



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: 8 December 2006
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FRANÇAIS

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: 8 December 2006

THE PROSECUTOR

vs.

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

**DECISION ON THE PROSECUTION MOTIONS FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 *bis* OF THE RULES**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Daryl Mundis

Defence Counsel:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and M. Peter Murphy for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Čorić
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 Criminal Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seized of the “Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) (*Ribičić*)” and the “Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) (*Pajić*)” filed by the Office of the Prosecutor (“the Prosecution”) on 17 October 2006 (“*Ribičić* Motion” and “*Pajić* Motion” respectively). In the *Ribičić* Motion, the Prosecution requests the Chamber to admit as evidence, pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence (“the Rules”), the testimonial transcript and the exhibits tendered as evidence during the testimony of *Ciril Ribičić* on 15 and 16 February 2000 in the case *The Prosecutor vs. Dario Kordić and Mario Čerkez* (“*Kordić* case”).¹ In the *Pajić* Motion, the Prosecutor requests the Chamber to admit as evidence pursuant to Rule 92 *bis* of the Rules the testimonial transcript and the exhibits tendered as evidence during the testimony of *Zoran Pajić* between 30 June and 3 July 1997 in the case *The Prosecutor vs. Tihomir Blaškić* (“*Blaškić* case”).²

II. BACKGROUND OF THE PROCEEDINGS

2. On 31 October 2006, counsel for the six Accused (“the Defence”) filed a “Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) (*Ribičić*)” (“the *Ribičić* Response”) and a “Joint Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) (*Pajić*)” (“*Pajić* Response”). In the *Ribičić* Response and the *Pajić* Response (“Responses”) the Defence opposes the admission of the testimony of Mr. *Ribičić* and Mr. *Pajić* and the exhibits tendered through them. In the alternative, the Defence requests that it be given the opportunity to cross-examine witnesses *Ribičić* and *Pajić* (“Witnesses”) should the Chamber decide to admit their testimony (“Testimonies”).

3. On 7 November 2006, the Prosecution filed its confidential “Motion for Leave to File Consolidated Reply to Joint Defence Responses to Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *bis* (A) (*Pajić*) and (*Ribičić*) and Proposed Reply” (“Motion for Leave to File a Reply”).

¹ IT-95-14/2-T (“*Kordić* case”).

² IT-95-14-T (“*Blaškić* case”).

III. ARGUMENTS OF THE PARTIES

4. In the *Ribičić* Motion and the *Pajić* Motion (“Motions”), the Prosecution requests that the Chamber, pursuant to Rule 92 *bis* (A) of the Rules admit the Testimonies and all the relevant evidence. In support of its Motions, the Prosecution observes that the Testimonies plainly meet all the requirements of Rule 92 *bis* (A) of the Rules insofar as it does not go to proof of the acts and conduct of the Accused and are not presented to that end.³ It also observes that under the recent case law of the Tribunal, the notion of “acts and conduct of an accused” are plainly limited to the personal acts and conduct of the accused and do not include going to the existence and operation of a joint criminal enterprise or the conduct of other persons.⁴ The Prosecution submits that the Testimonies are relevant both to the *Kordić* case and to the *Blaškić* case on the one hand and to this case on the other. As such, the Prosecution argues that the subjects dealt with in the Testimonies concern the establishment and evolution of the governmental and political order established in the framework of the HZ (HR) H-Z, the workings of its bodies, structures and processes and their relationship to the Republic of Bosnia and Herzegovina and the creation and role of the HVO.⁵ In this respect, it also notes that the Testimonies corroborate the statements of witness William Tomljanovich who was heard in this case on 4, 5 and 6 September 2006.⁶

5. The Prosecution also submits that the Testimonies were previously accepted as Rule 92 *bis* evidence in the case *The Prosecutor vs. Naletilić et Martinović*.⁷ In addition, the Prosecution argues that the *Witnesses* were cross-examined by counsel representing the Accused *Naletilić* and *Martinović*, counsel with identical interests to the Accused here (“Accused”).⁸ The Prosecution further argues that the purpose of accepting the transcript evidence and exhibits of witnesses who have appeared before the Tribunal in lieu of their oral testimony is to promote the efficiency of Tribunal proceedings and to avoid the use and expenditure of resources.⁹

6. The Prosecution concludes by stating that the above-mentioned arguments support the admission of the Testimonies. Moreover, it considers that there is no need for the Witnesses to

³ *Ribičić* Motion, para. 3 and *Pajić* Motion, para 3.

⁴ *Ibid.*

⁵ *Ribičić* Motion, para. 5 and *Pajić* Motion, para 5.

⁶ *Ribičić* Motion, para. 3 and *Pajić* Motion, para 3.

⁷ *Ribičić* Motion, para. 11 and *Pajić* Motion, para. 11.

⁸ *Ribičić* Motion, para. 9 and *Pajić* Motion, para. 9.

⁹ *Ribičić* Motion, para. 12 and *Pajić* Motion, para. 12.

appear for cross-examination in this case.¹⁰ Accordingly, the Prosecution requests that the Chamber admit the Testimonies without the Witnesses being called to appear for cross-examination.¹¹

7. In its Responses, the Defence objects to the admission of the Testimonies and first underlines that the Witnesses are expert witnesses. It recalls that their Testimonies corroborate the evidence given by William Tomljanovich who was called in this case as an expert witness.¹² According to the Defence, the admission of the Testimonies is governed both by Rule 92 *bis* and Rule 94 *bis* of the Rules. Accordingly, it argues that the evidence of a witness who testified in another case before the Tribunal as an expert witness can be admitted under Rule 92 *bis* of the Rules only if the witness is required to attend for cross-examination. It submits that Rule 92 *bis* of the Rules must be interpreted in the light of Rule 94 *bis* of the Rules which, in the opinion of the Defence, means that a Trial Chamber's discretionary power under Rule 92 *bis* (C) of the Rules is limited.¹³

8. Furthermore, the Defence submits that the Testimony of witness *Ribičić* includes an expert report and that the case law of the Tribunal opposes the admission of such reports unless the opposing party has had the opportunity to cross-examine the witness.¹⁴

9. Furthermore, according to the Defence, the Testimonies go to the very heart of the charges brought against the Accused insofar as they concern questions such as the governmental and political order of the HZ (HR) H-B as well as the Croat-Muslim conflict in 1992 and 1993.¹⁵ It also submits that the evidence of the Witnesses goes beyond the scope of William Tomljanovich's testimony insofar as it offers expert and legal opinion which Mr Tomljanovich himself acknowledged that he does not have.¹⁶ The Defence also submits that the Testimony of witness *Ribičić* goes further than that of William Tomljanovich in that witness *Ribičić* suggests that the HZ H-B was established as a sovereign state. According to the Defence, this assertion has obvious implications for the central issues in the present case.¹⁷

10. In addition, the Defence considers that the Testimonies deal with the acts and conduct of the Accused by indicating that the Accused had official responsibility within the HZ (HR)

¹⁰ *Ribičić* Motion para 12 and *Pajić* Motion para 12.

¹¹ *Ribičić* Motion, para. 12 and *Pajić* Motion, para 12.

¹² Responses paras. 2 and 3.

¹³ Responses, paras. 3 to 5.

¹⁴ *Ribičić* Response, paras. 6 and 7.

¹⁵ Responses, paras. 2 and 9.

¹⁶ Responses, paras. 2 and 10.

¹⁷ *Ribičić* Motion, para. 11.

H-B and participated in the taking of fundamental decisions which goes to proof of their participation in the joint criminal enterprise as alleged by the Prosecution.¹⁸

11. The Defence emphasises that the issues at stake in the *Kordić* case and the *Blaškić* and *Naletelić* cases were different from those in this case.¹⁹

12. Finally, the Defence submits that at the time the Witnesses were heard, certain materials like the presidential transcripts were not available or had become available only recently. Accordingly, it submits that the opinion of the expert witness might be revised after a review of the said materials, which would argue in favour of a fresh cross-examination.²⁰

13. In view of the preceding arguments, the Defence requests that the Chamber not admit the Testimonies under Rule 92 *bis* of the Rules and, in the alternative, should the Chamber decide to admit them, that the Witnesses be required to attend for cross-examination.²¹

IV. DISCUSSION

14. The Chamber would first recall that Replies are not accepted unless so required by circumstances.²² In the case in point, the Prosecution has failed to justify how the circumstances here are sufficiently important for the Chamber to grant its Motion for Leave to File a Reply. The Chamber must therefore deny that motion.

15. Moreover, the Chamber observes that Rule 92 *bis* of the Rules was amended at the extraordinary plenary session of the Tribunal on 13 September 2006. On that occasion, new Rule 92 *ter* was also adopted. The amended version of Rule 92 *bis* and new Rule 92 *ter* of the Rules entered into force on 22 September 2006.

16. The Chamber will first recall the conditions for which Rules 92 *bis* and 94 *bis* of the Rules apply in the light of the Tribunal's case law. Further to these conditions, it will then analyse the admissibility of the Testimonies and will decide whether the witnesses should be required to appear for cross-examination.

¹⁸ *Ribičić* Response, para. 2 and 13 and *Pajić* Response para. 2 and 11.

¹⁹ *Ribičić* Response, para. 2 and 14 *Pajić* Response paras. 2, 12, 13 and 14.

²⁰ *Ribičić* Response, paras. 2, 17 and 18 and *Pajić* Response, paras. 2, 15 and 16.

²¹ *Ribičić* Response, para. 19 and *Pajić* Response, para. 17.

²² Revised version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, para. 9, sub-para. P.

A. Applicable law

17. The case law of the Tribunal is not consistent in respect of the application of Rules 92 *bis* and 94 *bis* to the evidence of expert witnesses.²³ In the case *The Prosecutor vs. Galić*, the Appeals Chamber did however identify a general principle when it indicated that:

“Š...Ć Rule 94 *bis* contains nothing which is inconsistent with the application of Rule 92 *bis* to an expert witness. Indeed, Rule 92 *bis* expressly contemplates that witnesses giving evidence relating to the relevant historical, political or military background of a case (which is usually the subject of expert evidence) will be subject to its provisions. There is nothing in either Rule which would debar the written statement of an expert witness, or the transcript of the expert’s evidence in proceedings before the Tribunal, being accepted in lieu of his oral testimony where the interests of justice would allow that course in order to save time, with the rights of the other party to cross-examine the expert being determined in accordance with Rule 92 *bis*.”²⁴

18. In the case *The Prosecutor vs. Popović*, the Trial Chamber was seized a motion for the admission, pursuant to old Rule 92 *bis* (D) of the Rules, of the transcript of the evidence of an expert who had appeared in other proceedings before the Tribunal. The motion asked that the expert report be admitted as an integral part of the transcript since the report had been admitted during oral testimony.²⁵

19. By majority decision, the *Popović* Chamber found that the admissibility of transcripts is governed solely by Rule 92 *bis* (D).²⁶ This notwithstanding, the Chamber considered that in respect of the transcript of expert testimony, it could no longer exercise its discretionary power under Rule 92 *bis* in order to decide whether it was appropriate to call an expert to appear for cross-examination.²⁷ It found that Rule 94 *bis* confers on the accused the right to ask that any

²³ The case law dealing with this question precedes that date and, for this reason, any reference to Rule 92 *bis* in this context refers to old Rule 92 *bis*.

²⁴ *The Prosecutor vs. Stanislav Galić*, Case no. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 *bis* (C), 7 June 2002, para. 40 (“*Galić* Decision”).

²⁵ *The Prosecutor vs. Vujadin Popović et al.*, Case no. IT-05-88-T, *Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in lieu of viva voce Testimony pursuant to Rule 92 bis*, 12 September 2006, para. 42 (“*Popović* Decision”).

²⁶ *Ibid.*, para. 43.

²⁷ *Ibid.*, para. 52.

expert witness appear for cross-examination.²⁸ As the accused had not accepted the testimony proposed by the Prosecution, the Defence had the right to cross-examine the witness.²⁹

20. Conversely, the *Popović* Chamber held that the admissibility of expert reports was governed by Rule 94 *bis* of the Rules, even when the admission of those reports was requested as an integral part of the transcript of oral testimony given pursuant to Rule 92 *bis* (D).³⁰ Accordingly, the *Popović* Chamber held that under Rule 94 *bis* (C) of the Rules, only if an accused has accepted an expert report can it be tendered as evidence without cross-examination of the expert by the Defence.³¹

21. In this case, the Chamber was seized of two motions for the admission of testimonial transcripts of two experts who appeared in two cases before the Tribunal as well as the exhibits admitted through them. Among the evidence admitted through one of the expert witnesses is his expert report. The Chamber will first rule on the issue of whether the admission of transcripts of expert testimony is governed by Rule 92 *bis* or Rule 94 *bis* of the Rules.

22. Having examined Rule 92 *bis* of the Rules, the Chamber considers that the findings set out in the above-mentioned *Galić* case law apply also to the new version of Rule 92 *bis*. Accordingly, the Appeals Chamber in the *Galić* case identified the principle that none of the provisions of Rules 92 *bis* or 94 *bis* of the Rules debar the admission of transcripts of expert testimony in lieu of oral testimony under Rule 92 *bis* of the Rules. In like manner, the current version of Rule 92 *bis* (A) plainly indicates that this rule governs the admission of transcripts of evidence given in another case before the Tribunal in lieu of oral testimony. Nothing in the current version of Rules 92 *bis* or 94 *bis* would indicate that the transcripts of expert testimony are excluded from the scope of application of Rule 92 *bis*. The Chamber thus finds that Rule 92 *bis* (A) also governs the admissions of transcripts of the testimony of experts.

23. The Chamber must then examine the relevant rule of the Rules governing the admission of expert reports filed as an integral part of a transcript of expert testimony whose admission is being requested under Rule 92 *bis*. In this respect, the Chamber does not subscribe to the findings of the *Popović* Chamber according to which only the transcript of an expert testimony, without the accompanying report, can be admitted, as the report remains

²⁸ *Ibid.*, para. 51.

²⁹ *Ibid.*, para. 52.

³⁰ *Ibid.*, paras. 53 and 54.

³¹ *Ibid.*, para 53.

governed by the provisions of Rule 94 *bis*. On the contrary, the Chamber considers that the evidence of an expert witness has an intrinsic link with the report which he has drafted. In fact, the expert report will by necessity have been the subject of debate during the examination-in-chief and the cross-examination of the expert witness within the scope of the case in which the expert appeared. For this reason, the admissibility of the transcript of an expert witness' testimony along with the expert report must be reviewed together in respect of the provisions of Rule 92 *bis* only.³²

24. Having established that Rule 92 *bis* (A) is applicable to the case at hand, the Chamber will now determine whether the Testimonies are admissible under the terms of that same rule. In this respect, the Tribunal's case law has clearly set out that Rule 92 *bis* (A) excludes the admissions of written evidence which goes to the acts and conduct of the accused as alleged in the indictment.³³ The statements or transcripts of testimony which deal with a joint criminal enterprise relating to the accused, may be admitted so long as they "do not go to any proof of any act or conduct of the accused on which the prosecution relies to establish that (a) he participated in that joint criminal enterprise or (b) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes".³⁴

25. Accordingly, should the Trial Chamber find that the written statement or testimonial transcript contains references to the acts and conduct of the accused, it must deny the motion or, depending on the circumstances, redact the parts of the transcript or the written statement dealing with the acts and conduct of the accused.

26. Finally, the Chamber must consider the question of whether it retains its discretionary power under Rule 92 *bis* of the Rules in order to decide whether it is appropriate to call an expert witness to appear for cross-examination or whether that discretionary power is nullified by Rule 94 *bis* of the Rules.

27. In this respect, the Chamber would recall the *Galić* case law according to which a Trial Chamber may decide whether there is reason to call the expert witness for cross-examination pursuant to Rule 92 *bis* of the Rules.³⁵ The *Galić* case law thus establishes that a Trial Chamber has real discretionary power under Rule 92 *bis* of the Rules in order to decide

³² See also *Popović* Decision, "Separate Opinion of Judge Kimberly Prost", paras. 3 to 5.

³³ *Galić* Decision, para. 9. See also, *The Prosecutor vs. 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. 22.

³⁴ *Galić* Decision para. 10. See also, *The Prosecutor vs. 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 ("*Prlić Decision*").

whether or not to authorise the cross-examination of an expert witness. Concomitantly, the Chamber notes that Rule 94 *bis* of the Rules seeks to guarantee the interest of the opposing party in challenging the evidence tendered into the record by granting to it the right to cross-examine an expert witness. This being the case, the Chamber considers that it should not be automatic. In fact, as Judge Prost has recalled, any testimony tendered under Rule 92 *bis* of the Rules will have been the subject of cross-examination as part of the case in which it was given.³⁶ For this reason, the Chamber must take its decision on a case by case basis in respect of whether such cross-examination guarantees the rights of the opposing party or whether there is reason to recall the expert witness.

B. Examination of the merits

28. The Chamber must determine whether the Testimonies go to the acts and conduct of the Accused.

29. The Chamber has reviewed the Testimonies in the light of the arguments of the Parties and the above-mentioned case law in order to ensure that no mention is made of the acts and conduct of one of the six Accused. Contrary to the arguments of the Prosecution, the Chamber finds that the Testimonies go to the very heart of the acts and conduct of the Accused as alleged in the Amended Indictment (“Indictment”), in particular paragraph 17 thereof. In that paragraph, the Prosecution alleges *inter alia* that Accused participated in a joint criminal enterprise through their positions and powers by directing or establishing, organising or supporting the governmental and political structures of Herceg-Bosna and the HVO HZ H-B and by organising a system of detention facilities in Herceg-Bosna where Bosnian Muslims were detained.³⁷

30. Indeed, as the Prosecution indicates in its written filings, the Testimonies corroborate the statements of Mr Tomljanovich on questions such as:

- The positions and responsibilities of the Accused in the structure of the HZ (HR) H-B;
- The organisation and attributions of the HVO;

³⁵ *Galić* Decision, para. 40.

³⁶ Separate Opinion of Judge Prost, para. 5.

³⁷ Indictment paras. 17.a and 17.2.

- The “Croatisation” of the territory de la HZ (HR) H-B;
- The armed forces of the HZ H-B, military discipline and mobilisation;
- The treatment of captured persons and prisoners of war and the places of detention.³⁸

31. The Chamber is of the opinion that the Testimonies could thus be such as to prove the participation of the Accused in the joint criminal enterprise alleged in the Indictment.

32. In the case at hand, the Chamber cannot therefore apply Rule 92 *bis* of the Rules and must deny the admission of the Testimonies and the evidence relating thereto.

33. The Chamber reminds the Prosecution that it can present evidence which goes to proof of the acts and conduct of the Accused by using Rule 92 *ter* of the Rules. This having been said, the Chamber would point out that the both Testimonies proposed in this case corroborate the same elements in the testimony of Mr William Tomljanovich. Mindful of the need to advance the proceedings efficiently and as expeditiously as possible, the Chamber considers that the presentation of only one of Testimonies under Rule 92 *ter* would suffice to support the testimony of M Tomljanovich and that proceeding in this manner would allow the Defence to cross-examine the witness in accordance with its request.

V. DISPOSITION

FOR THE FOREGOING REASONS

PURSUANT TO Rule 92 *bis* (A) of the Rules,

DENIES the Motion for Leave to File a Reply,

DENIES the Motions **AND**

INVITES the Prosecution to present either of the Testimonies under Rule 92 *ter* of the Rules.

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

³⁸ *Ribičić* Motion para. 4 and *Pajić* Motion para 4.

Jean-Claude Antonetti
Presiding Judge Trial Chamber III

Done this eighth day of December 2006
At The Hague
The Netherlands

[Seal of the Tribunal]