

4-05-87/1-T
D 3735 - D 8731
13 August 2009

3735
48.

**UNITED
NATIONS**



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-05-87/1-T
Date: 13 August 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking

Decision: 13 August 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF EVIDENCE OF WITNESS MILAN ĐAKOVIĆ PURSUANT
TO RULE 92 TER**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. This Trial Chamber (“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 the “Prosecution’s Motion for the Admission of Evidence of Witness Milan Đaković Pursuant to Rule 92 *ter*” (“Motion”) filed by the Office of the Prosecutor (“Prosecution”) on 22 July 2009, whereby the Prosecution seeks leave to call Milan Đaković pursuant to Rule 92*ter* of the Rules of Procedure and Evidence (“Rules”). On 5 August 2009, the Defence filed “Vlastimir Đorđević’s Response to Prosecution’s Motion for the Admission of Evidence of Witness Milan Đaković Pursuant to Rule 92*ter*” (“Response”). On 12 August 2009, the Prosecution requested leave to file the reply as set forth in the filing (“Reply”).

I. SUBMISSIONS

2. In the Motion, the Prosecution indicates its intention to tender Milan Đaković’s testimony in the case of *Prosecutor v. Milutinović et al*, which it submits is relevant and has probative value.¹ In particular, it points to testimonial evidence that Milan Đaković personally attended meetings of the Joint Command in 1998, and will give evidence with respect to a notebook that he kept which recorded the events and attendance of the Joint Command meetings from 22 July 1998 to 30 October 1998.² It also contends that Milan Đaković will assist the Chamber in understanding the coordination between the MUP and the VJ at the time relevant to the Indictment.³ It envisages a brief oral examination of Milan Đaković in court “in order to highlight, supplement and clarify certain portions of his written evidence”.⁴ It contends that the admission of the proposed evidence in the mode of Rule 92*ter* “will further the interests of an expeditious trial without infringing upon the rights of the Accused”.⁵ It further submits that the proposed evidence has already been made available to the Defence, as has a statement given by Milan Đaković to the Prosecution (on 11 December 2007) and the notebook of Milan Đaković and its handwritten additions on 21 May 2008.

3. The Defence opposes the Motion. It submits that given the significance of the anticipated evidence of Milan Đaković, he should be called *viva voce*, rather than pursuant to Rule 92*ter*.⁶ In its view, the significance of the proposed evidence is analogous to the situation dealt with by the Chamber in regard to Witnesses Ljubinko Cvetić and Aleksandar Vasiljević, who were both ordered by the Chamber to be called as live witnesses, rather than pursuant to Rule 92*ter*.⁷ In

¹ Motion, para 6.

² Motion, para 6.

³ Motion, para 6.

⁴ Motion, para 9.

⁵ Motion, para 8.

⁶ Response, para 1.

⁷ Response, paras 1 and 6.

particular, it argues that “live direct testimony will focus his [Milan Đaković’s] evidence on only the allegations against this Accused, Mr. Đorđević.”⁸ It submits that since the entirety of Milan Đaković’s testimony in the *Milutinović et al.* case relates not only to the actions of the Accused, but also, and primarily, with the conduct of those tried in that case, this “irrelevant” testimony will not necessarily save time in direct examination, and may prejudice the Accused, since it deals with the conduct of people other than the Accused.⁹ In limiting the examination in chief to “the critical information relevant to the basis of their case against Vlastimir Đorđević” by calling Milan Đaković as a live witness, the Defence contends that the cross-examination will also be more efficient and focused.¹⁰

4. In its Reply, the Prosecution submits that the Defence’s contention that much of the *Milutinović et al.* testimony is irrelevant and prejudicial since it deals with the involvement of the accused in that case is unsound since the membership, nature and operation of the Joint Command “are all relevant and highly probative of Mr. Đorđević’s criminal responsibility as charged in the Indictment”.¹¹

II. THE LAW

5. Rule 92ter of the Rules was adopted on 13 September 2006 in order to “increase the ability of the Trial Chambers to consider written statements and transcripts of witnesses in lieu of oral testimony where that evidence goes to the acts and conducts of an accused” and to enhance the efficiency of trial proceedings.¹² Rule 92ter provides:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined.

⁸ Response, introductory para.

⁹ Response, para 5.

¹⁰ Response, para 7.

¹¹ Reply, paras 5-6.

¹² Statement of ICTY President Judge Pocar to the U.N. General Assembly on 9 October 2006; *Prosecutor v. Ljube Boškoški and Johan Tarčulovski*, Case No. IT-04-82-PT, “Decision on Prosecution’s First Revised Motion Pursuant to Rule 92 bis and on Prosecution’s Motion Pursuant to Rule 92 ter”, 30 March 2007, para 44; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, “Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 ter”, 9 July 2008 (“*Lukić and Lukić Decision*”), para 13.

- (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

6. The evidence sought to be admitted pursuant to Rule 92*ter*, whether a written statement or a transcript of oral testimony, must fulfill the general requirements of admissibility.¹³ That is, the proposed evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.¹⁴

III. DISCUSSION

7. The Trial Chamber notes at the outset that the general relevance and probative value of the expected evidence of Milan Đaković is not contested. Indeed, the Chamber recalls its finding that “the proposed evidence [of Milan Đaković] is relevant to the Accused’s alleged responsibility pursuant to Article 7(1) and 7(3) of the Statute”, and that it has at this stage “no reason to doubt the probative value of his proposed evidence”.¹⁵ Neither are any of the other criteria required for the admission of evidence pursuant to Rule 92*ter* in regard to Milan Đaković’s testimony in *Prosecutor v. Milutinović et al.* at issue. Rather, the matter to be decided is whether Rule 92*ter* is the appropriate mode of evidence for this particular witness.

8. Milan Đaković’s position at the time relevant to the Indictment and the general description of his proposed evidence has been outlined in the Chamber’s previous decision and need not be recalled here.¹⁶ It may be emphasised, however, that Milan Đaković is in the unique position of being able to testify as to his personal attendance and knowledge of and involvement in the Joint Command, attended to by the Accused Vlastimir Đorđević and other members of the joint criminal enterprise alleged in the Indictment, which is relevant to the Accused’s liability under Article 7(1) and (3) of the Statute. Although the transcript is certainly relevant, it is taken up in large part by the discussion of the acts and conduct of some of the accused in the *Milutinović et al.* case during the Joint Command meetings, whereas the Accused Vlastimir Đorđević is only mentioned once in the transcript as having been an attendee of these meetings.¹⁷ The Chamber therefore agrees with the Defence that the testimony of this witness in that case may have not been sufficiently focused on the alleged involvement of the Accused in the acts to which the proposed evidence relates and that an examination in chief can be of assistance in clarifying matters regarding that involvement. In

¹³ *Lukić and Lukić* Decision, para 20; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter*”, 2 September 2008, para 13.

¹⁴ Rule 89 (C) and (D) of the Rules.

¹⁵ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, “Decision on Prosecution’s Motion to Add Milan Đaković to the Rule 65*ter* Witness List”, 21 May 2009, para 8.

¹⁶ *Ibid.*

¹⁷ 65*ter* 05344, p 26386.

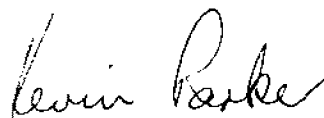
other words, the Chamber considers that the examination-in-chief of Milan Đaković could be of assistance in directing his evidence to matters of direct relevance to the alleged criminal responsibility of the Accused. The Chamber finds that, in the circumstances, even if it were accepted that court time could be saved by applying Rule 92*ter* to the proposed evidence of Milan Đaković, the above considerations militate strongly against granting the Motion in respect of this witness. It is the view of this Chamber that the interests of justice would be best served if Milan Đaković provides his evidence *viva voce*.

IV. DISPOSITION

9. For these reasons, and pursuant to Rules 89 and 92*ter* of the Rules, the Chamber grants leave to the Prosecution to file the Reply and holds that Milan Đaković shall be heard in the ordinary way with an examination-in-chief and that the Motion shall be denied with respect to his proposed evidence.

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

Dated this thirteenth day of August 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]