



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-08-91-T
Date: 3 April 2012
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 3 April 2012

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION GRANTING ŽUPLJANIN MOTION TO
REOPEN DEFENCE CASE**

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Dragan Krgović and Mr. Aleksandar Aleksić for Stojan Župljanin

I. INTRODUCTION

1. Trial Chamber II (“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 seised of a “Župljanin [sic] motion to reopen Defence case”, filed on 27 March 2012 (“Motion”), in which the Defence for Stojan Župljanin (“Defence”) seeks to reopen its case in order to have admitted into evidence one witness statement pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal.

II. SUBMISSIONS

2. The Defence submits that, following the closure of its case on 8 December 2011, the Prosecution disclosed to it on 20 February 2012, pursuant to Rule 68, an interview conducted by the Prosecution with Srdjo Srdić, former President of the Red Cross in Prijedor (“Interview”).¹ The Defence argues that the Interview qualifies as fresh evidence justifying the reopening of its case and that the Interview is of high probative value because it was conducted by the Prosecution.² The Defence adds that the admission of the Interview into evidence will not prejudice the Prosecution nor will it cause any substantial delay to the proceedings.³ According to the Defence, the Interview shows the central role of the Prijedor Crisis Staff during the Indictment period, that the Crisis Staff acted independently of any overarching authority,⁴ and that individuals left Prijedor without any coercion rather than pursuant to the policy of the Serbian leadership.⁵ The Defence seeks the admission into evidence of the Interview pursuant to Rule 92 *quater* since the witness is deceased,⁶ submitting that the Interview is reliable for the purposes of that Rule because it is a full transcript of a recorded interview with the Prosecution.⁷

3. The Prosecution does not oppose the request to reopen the Defence’s case for the limited purpose of admitting the Interview into evidence pursuant to Rule 92 *quater*.⁸ The Prosecution states that the Interview is relevant, probative to, and consistent with other already-admitted evidence related to the widespread destruction of non-Serb property in Prijedor and elsewhere, the use of the three primary detention facilities in Prijedor as a means to “ethnically cleanse” the municipality, and the authority of the police over those detention facilities.⁹ However, the

¹ Motion, paras 1, 15. The Interview is attached as Annex A to the Motion.

² Motion, paras 8, 17.

³ Motion, paras 8, 17.

⁴ Motion, paras 9, 12-14, 16.

⁵ Motion, paras 12, 15.

⁶ Motion, paras 7, 10; Annex B to the Motion “Death certificate of Srdjo Srdić”.

⁷ Motion, para. 11.

⁸ Prosecution’s response to Župljanin Motion to reopen Defence case, 29 March 2012 (“Response”), paras 2, 10.

⁹ Response para. 4.

Prosecution submits that the Interview is not pertinent to the issues raised by Župljanin in the Motion.¹⁰ It submits, for example, that Srdić stated that he was never present at the meetings of the Prijedor Crisis Staff, that he was unaware of how it functioned, and that he never had read any of its decisions.¹¹ The Prosecution adds that Srdić's statement—that it was not the policy of the Bosnian Serb leadership to remove the non-Serb population from Prijedor—is self-serving because he was a member of the Republika Srpska Assembly at the time.¹²

4. Mićo Stanišić informed the Trial Chamber that he did not intend to file a response to the Motion.¹³

III. APPLICABLE LAW

5. The Defence may seek to introduce fresh evidence by reopening its case. The Appeals Chamber has held that the “primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case-in-chief of the party making the application”.¹⁴ Additionally, the burden of demonstrating that reasonable diligence could not have led to the discovery of the evidence at an earlier stage “rests squarely” on the moving party.¹⁵

6. Even where a failure to discover evidence cannot be attributed to the moving party's lack of reasonable diligence and the subsequently-discovered evidence therefore qualifies as fresh and admissible, a Chamber must exercise its discretion and determine whether the evidence should be admitted.¹⁶ The Appeals Chamber has noted that this discretion should be exercised “by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings” and that these factors fall under the general discretion reflected in Rule 89(D).¹⁷

¹⁰ Response, paras 4-7.

¹¹ Response, para. 5.

¹² Response, para. 9.

¹³ Email from Lead Counsel to the Trial Chamber, 2 April 2012.

¹⁴ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići Appeal Judgement*”), para. 283. See also *Prosecutor v. Ante Gotovina et al.*, IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač interlocutory appeals against Trial Chamber's decision to reopen the Prosecution case, 1 July 2010, para. 23.

¹⁵ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Prosecution's alternative request to reopen the Prosecution's case, 19 August 1998 (“*Čelebići Decision*”), para. 26; see also *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's motion to admit evidence in rebuttal and incorporated motion to admit evidence under Rule 92 bis in its case on rebuttal and to re-open its case for a limited purpose, 13 September 2004 (“*Blagojević Decision*”), para. 9.

¹⁶ *Čelebići Appeal Judgement*, para. 283.

¹⁷ *Ibid.* With respect to this weighing exercise, the Tribunal's jurisprudence establishes that “it is only in exceptional circumstances where the justice of the case so demands” that a Chamber should exercise its discretion to reopen a case. *Čelebići Decision*, para. 27 (quoted with approval in *Čelebići Appeal Judgement*, para. 288). In such a determination, the following factors are relevant: (1) the advanced stage of the trial; (2) the delay likely to be caused by a reopening of the case and the suitability of an adjournment in the overall context of the trial; (3) the effect of bringing evidence

Pursuant to Rule 89(D), a Chamber may exclude relevant evidence where its probative value is substantially outweighed by the need to ensure a fair trial.

7. The law on Rule 92 *quater* was set out in the Trial Chamber's decision of 14 April 2010 and need not be repeated here in detail.¹⁸ In order to admit evidence pursuant to Rule 92 *quater*, the Trial Chamber must be satisfied that the person who gave the evidence is unavailable and that the proposed evidence is reliable.¹⁹ Relevant to the Trial Chamber's assessment of reliability are the circumstances in which the proposed evidence was made and recorded, whether the proposed evidence has been subjected to cross-examination, whether the proposed evidence relates to events about which other evidence exists, and other factors such as the absence of manifest or obvious inconsistencies in the proposed evidence.²⁰ Rule 92 *quater* is also to be read in conjunction with Rule 89(C), which authorises the Trial Chamber to admit any relevant evidence which it deems to have probative value.²¹

IV. DISCUSSION

8. Since the Interview was disclosed to the Defence only on 20 February 2012, the Trial Chamber is satisfied that the Defence could not have identified and presented the Interview during its case-in-chief. This is not disputed by the Prosecution. The Trial Chamber is therefore satisfied that the Interview constitutes fresh evidence.

9. Although this trial is at an advanced stage, a partial reopening of the Defence's case for the limited purpose of admitting the Interview into evidence will not result in undue delay to the proceedings for either Župljanin or his co-accused Stanišić. Nor will the admission of the Interview

against one accused on the fairness of the trial of another accused in a multi-defendant case; and (4) the probative value of the evidence to be presented. See, e.g., *Blagojević* Decision, paras 10-11; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on application for a limited re-opening of the Bosnia and Kosovo components of the Prosecution case with confidential annex, 13 December 2005, para. 13 ("*Milošević* Decision"); *Čelebići* Appeal Judgement, paras 280 (referencing *Čelebići* Decision, para. 27), 290. With regard to the first factor, following the *Čelebići* Trial Chamber's lead, subsequent decisions on motions to reopen have paraphrased or clarified "the advanced stage of the trial" as meaning "the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request". See *Milošević* Decision, para. 13.

¹⁸ Confidential Decision granting in part the Prosecution's motion for admission of evidence pursuant to Rule 92 *quater*, 14 April 2010 ("14 April 2010 Decision"; reclassified as confidential pursuant to Chamber Decision of 25 February 2011, RP D11245-D11241). See also Confidential Decision granting Defence motions for admission of evidence of witnesses MS012, ST233 and SZ024 pursuant to Rule 92 *quater*, 17 June 2011.

¹⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution motion for admission of evidence pursuant to Rule 92 *quater*, 21 April 2008 ("*Popović* Decision"), para. 29. This view was confirmed by the Appeals Chamber in *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's interlocutory appeals against Trial Chamber's decision of 21 April 2008 admitting 92*quater* evidence", 18 August 2008, para. 31. See also *Prosecutor v. Milutinović et al.* Case No. IT-05-87-T, Decision on Prosecution motion for admission of evidence pursuant to Rule 92 *quater*", 16 February 2007 ("*Milutinović* Decision"), para. 4.

²⁰ *Milutinović* Decision, para. 7. See also *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the admission of statements of seven witnesses pursuant to Rule 92 *quater*", 16 June 2008, para. 6; *Popović* Decision, para. 31.

²¹ 14 April 2010 Decision, para. 22.

adversely impact upon the fairness of the trial in respect of Stanišić. The Trial Chamber finds that the Interview is relevant to the proceedings and that it possesses sufficient probative value for admission into evidence because it is a transcript of a recorded interview conducted by the Prosecution with Srdjo Srdić.²²

10. The Trial Chamber is satisfied, on the basis of the death certificate attached as Annex B to the Motion, that Srdjo Srdić is deceased.

11. Even though the Prosecution does not oppose the admission of the Interview into evidence, the Defence and the Prosecution disagree regarding to which issues in the trial the Interview is relevant. This is a matter that need not be decided in the present Decision, but rather one that will be considered by the Trial Chamber when it analyses the Interview in light of the totality of the evidence in this case. Although the Prosecution has pointed to what it views to be a contradiction in the Interview, it does not argue there are manifest or obvious inconsistencies therein and does not oppose its admission into evidence.²³

12. Considering that the requirements of Rule 92 *quater* have been fulfilled and bearing in mind that the Prosecution does not object to the admission of the Interview into evidence, the Trial Chamber will admit the Interview into evidence.

V. DISPOSITION

13. For the foregoing reasons and pursuant to Rules 85, 89(C), and 92 *quater*, the Trial Chamber hereby:

GRANTS the Motion;

ALLOWS the Defence to partially reopen its case for the limited purpose of admitting the Interview into evidence;

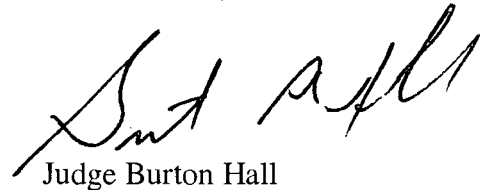
ADMITS the Interview, attached as Annex A to the Motion, into evidence; and

²² See Annex A to the Motion.

²³ Motion, para. 9.

ORDERS the Registrar to assign an exhibit number to the Interview and inform the Trial Chamber and parties accordingly.

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



Judge Burton Hall
Presiding

Dated this third day of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]