



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: 14 April 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 14 April 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION GRANTING IN PART THE
PROSECUTION'S MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 *QUATER***

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. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

I. INTRODUCTION AND PROCEDURAL HISTORY

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 the “Prosecution’s motion for admission of evidence pursuant to Rule 92*quater*”, filed publicly with confidential annexes on 29 February 2008 (“Motion”),¹ and the “Prosecution’s amended notice and request regarding Rule 92 *bis*, 92 *ter*, and 92 *quater* evidence”, filed on 9 December 2008 (“Notice”), whereby the Prosecution seeks to admit into evidence the prior testimony and accompanying documents of the deceased witnesses Hasim Ferhatović, Predrag Radić and Milan Babić.²

2. The Defence of Mićo Stanišić (“Stanišić Defence”) responded on 28 April 2008 (“Stanišić Response”) and the Defence of Stojan Župljanin (“Župljanin Defence”) responded on 26 January 2009, both objecting to the admission into evidence of the prior testimony of the three witnesses (“Stanišić Response” and “Župljanin Response”, respectively).³ The Prosecution sought leave to reply and filed proposed replies on 5 May 2008, to the Stanišić Response (“Reply to Stanišić”), and on 2 February 2009, to the Župljanin Response (“Reply to Župljanin”).⁴

3. On 9 February 2009 the Župljanin Defence filed a “rejoinder” to the Reply to Župljanin.⁵ In view of the fact that the Rules of Procedure and Evidence (“Rules”) do not envisage rejoinders, and

¹ Annex A to the Motion contains a table listing the evidence of the witnesses sought to be admitted, Annex B contains summaries of each witness’s evidence, Annex C contains death certificates of the witnesses, and Annex D contains a DVD holding electronic copies of the transcripts and associated exhibits of the witnesses.

² Hasim Ferhatović testified in *Prosecutor v. Dragan Nikolić* (Case No. IT-94-2) on 11 November 1995 and 3 November 2003, Predrag Radić testified in *Prosecutor v. Radoslav Brđanin* (Case No. IT-99-36) on 3-7 November 2003 and in *Prosecutor v. Momčilo Krajišnik* (Case No. IT-00-39) on 26-28 October 2004, and Milan Babić testified in the *Krajišnik* case on 2-4 and 7 June 2004. The Motion also requests admission into evidence of the prior testimony of Miroslav Deronjić and associated exhibits. However, Miroslav Deronjić was removed from the Prosecution’s witness list in the Prosecution’s reduced list of witnesses, filed publicly with confidential annexes on 10 Sep 2009. Therefore, the Trial Chamber will not consider admission of the testimony of Miroslav Deronjić.

³ Defence’s response to Prosecution’s motion for admission of evidence pursuant to Rule 92 *quater*”, filed on 28 Apr 2008; Stojan Župljanin’s response to the Prosecution’s motion of 29 February 2008 for admission of evidence pursuant to Rule 92 *quater*”, filed confidentially on 26 Jan 2009. The Trial Chamber notes that the Stanišić Response was filed timely pursuant to the Decision regarding responses to Prosecution motions pursuant to Rules 92 *bis* and 92 *quater* and the Defence notice pursuant to Rule 94 *bis* of 10 Mar 2008 which granted an extension of time to file the response. The Trial Chamber also notes that on 30 January 2009, the Stanišić Defence filed Submission of Mićo Stanišić’s Defence regarding Stojan Župljanin’s response to the Prosecution’s motion of 29 February 2008 for admission of evidence pursuant to Rule 92*quater* in which it seeks to join the responses filed by the Župljanin Defence. For the reasons outlined in Decision on Prosecution’s motions for admission of evidence pursuant to Rule 92 *ter* (ST012 and ST019), filed confidentially on 29 Sep 2009 in paras 5-6, the Trial Chamber will not address this submission any further.

⁴ Prosecution’s motion for leave to reply and proposed reply to Defence’s response to Prosecution’s motion for admission of evidence pursuant to Rule 92*quater*, with annex, filed on 5 May 2008; Prosecution’s motion for leave to reply and proposed consolidated reply to Stojan Župljanin’s responses to the Prosecution’s Rule 92*bis* and 92*quater* motions, with confidential annex, filed on 2 Feb 2009.

⁵ Župljanin’s rejoinder to the Prosecution’s consolidated reply to Župljanin’s responses to the Prosecution’s Rule 92 *bis* and Rule 92 *quater* motions”, filed confidentially on 9 Feb 2009.

as the Trial Chamber did not order the Župljanin Defence to make further submissions, the rejoinder will not be considered.

II. SUBMISSIONS

1. Prosecution

4. The Prosecution submits that the transcripts of the prior testimony and the accompanying documents of Hasim Ferhatović, Predrag Radić and Milan Babić meet the requirements for admissibility under Rule 92 *quater* in that “[t]he witnesses are deceased and their testimony – which has been tested by cross-examination by defence counsel and/or examination by the Trial Chamber – bear sufficient indicia of reliability” and that the evidence “is both relevant and probative”.⁶

5. The Prosecution argues that “[n]one of the evidence makes any specific mention of [Mićo Stanišić] or of specific acts or conduct of [Mićo Stanišić] within the meaning of the *Galić* Decision”.⁷ While the Prosecution admits that the evidence of the witnesses discusses “the acts, statements and conduct of other members of the [joint criminal enterprise], it contends that, according to the jurisprudence, facts “‘related to the existence of a joint criminal enterprise and the conduct of its members other than the accused’ are not ‘acts and conduct of the accused’”.⁸ In the Prosecution’s submission this means that “Rule 92*quater*(B) is not implicated”.⁹

2. Stanišić Defence

6. The Stanišić Defence submits that the prior evidence of the witnesses does not meet the requirements of Rule 92 *quater* as it does not bear sufficient indicia of reliability, is not relevant and probative and as the Prosecution has not shown that the evidence is corroborated by other evidence.¹⁰

7. The Stanišić Defence argues that the fact that the Defence in the *Nikolić* case chose not to cross-examine Hasim Ferhatović indicates “that his testimony was not relevant for [that case]”.¹¹ In its view, there is, therefore, no “justifiable reason” for the Prosecution to rely on the testimony of

⁶ Motion, para. 12.

⁷ Motion, para. 13, referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-290-AR73.2, Decision on interlocutory appeal concerning Rule 92*bis*(C), 7 Jun 2002.

⁸ Motion, para. 13.

⁹ Motion, para. 13.

¹⁰ Stanišić Response, paras 2, 5, 8 and 20.

¹¹ Stanišić Response, para. 4.

this witness in this case.¹² The Defence also submits that Hasim Ferhatović “was not consistent in his testimony”, something which the Defence contends makes his evidence unreliable.¹³

8. The Stanišić Defence states that certain documents that were offered by the Prosecution as evidence during Predrag Radić’s testimony are not part of the Prosecution’s Rule 65 *ter* list in the present case.¹⁴ It also submits that “Mr. Radić’s testimony contains allegations regarding the act and conduct of the Accused that are central to the Prosecution’s case”.¹⁵

9. The Stanišić Defence argues that “Mr. Babić’s testimony is not credible” because he “testified pursuant to a plea agreement with the Prosecution”.¹⁶

3. Župljanin Defence

10. The Župljanin Defence submits that as the evidence of Hasim Ferhatović “has not been adequately tested [...] the prejudicial effect of this evidence outweighs its probative value and it should therefore be excluded”.¹⁷

11. The Župljanin Defence submits that “the Krajišnik defence had only read approximately 20% of the materials in that case”.¹⁸ On this basis, the Defence argues that the evidence of Predrag Radić and Milan Babić was not “properly tested” and that it will “be impossible for the Trial Chamber to assess what weight should be given to evidence that has not been properly tested in the first instance”.¹⁹ In the Defence’s view, “it is not reasonably practicable to separate any admissible portions of the proposed Rule 92 *quater* material from the inadmissible portions” and that, therefore, “the entirety of the proposed Rule 92 *quater* material should be excluded”.²⁰

12. The Župljanin Defence submits that the evidence of Predrag Radić concerns “the acts and conduct of Mr. Župljanin in detail”, citing examples that the evidence goes to 1) “what criminal activity the police could have prevented”, 2) “the alleged replacement of police officials who sought to minimise the evictions or expulsions of non-Serbs, and under whose authority such actions were conducted”, 3) “the chain of command in the police and the relationship between Mr. Stanišić and Mr. Župljanin”, 4) “the formation of the crisis staff and Mr. Župljanin’s role in it”, 5) “the

¹² Stanišić Response, para. 4.

¹³ Stanišić Response, para. 4.

¹⁴ Stanišić Response, para. 9.

¹⁵ Stanišić Response, para. 16.

¹⁶ Stanišić Response, paras 18-19.

¹⁷ Župljanin Response, para. 7.

¹⁸ Župljanin Response, para. 4.

¹⁹ Župljanin Response, para. 4.

²⁰ Župljanin Response, para. 9.

implementation of ARK Crisis Staff decisions” and 6) “the control (or lack thereof) by the ARK Crisis Staff of Prijedor municipality”.²¹

13. The Župljanin Defence objects to the evidence of Milan Babić, referencing by analogy Tribunal jurisprudence which holds that a requirement for judicial notice under Rule 94(B) is that the fact must not be based on an agreement between the parties to the original proceedings. It submits that the fact that Milan Babić “reached [an agreement] with the Office of the Prosecutor – and presumably received [a] more lenient sentence as a result – undermines the admissibility of [his] evidence through Rule 92 *quater*” and that “this Trial Chamber cannot properly assess what weight should be attributed to the evidence of Milan Babić”.²²

4. Prosecution replies

14. The Prosecution submits that it need not present all corroborative evidence for the admission into evidence of a witness statement under Rule 92 *quater*; rather, it need “only provide sufficient evidence to allow the Trial Chamber to assess the reliability of the statement”.²³

15. The Prosecution takes issue with the Stanišić Defence argument that the testimony of Hasim Ferhatović is irrelevant because the Defence in the *Nikolić* case chose not to cross-examine him and states that it has explained the relevance of the evidence.²⁴ In the Prosecution’s view, this argument “invites conjecture on a defence counsel’s tactical decision whether to cross-examine a witness”.²⁵ It submits that whether a proposed Rule 92*quater* witness was subject to cross-examination is only one among several factors to consider “when determining whether the witness’ testimony is sufficiently reliable”.²⁶ It argues that this can be taken into account by the Trial Chamber when it is ultimately deciding what probative value to give the evidence.²⁷

16. The Prosecution argues that testimony is not rendered unreliable “merely because a witness fails to recall every detail of an event, particularly when the event occurred several years before his

²¹ Župljanin Response, para. 8 (citations omitted).

²² Župljanin Response, para. 5 citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution motion for judicial notice of adjudicated facts, 26 Sep 2006, pp 4-11.

²³ Reply to Stanišić, para. 5, where the Prosecution also states that “the statements of other witnesses need not be identical to the proposed Rule 92*quater* witness’s statement to be corroborative so long as they are generally consistent with each other”.

²⁴ Reply to Stanišić, para. 3.

²⁵ Reply to Stanišić, para. 3.

²⁶ Reply to Župljanin, para. 9.

²⁷ Reply to Župljanin, para. 9.

or her testimony”.²⁸ It submits that even if this “constituted an inconsistency [...] this would go to the weight attributed to the evidence rather than its admissibility”.²⁹

17. The Prosecution submits that the argument that all documents offered through a Rule 92 *quater* witness’s testimony must be on the Prosecution’s Rule 65 *ter* exhibit list “is misguided”.³⁰ It argues that the documents “are offered through Radić’s testimony because they are inseparable and indispensable parts of [the] testimony”.³¹ The Prosecution submits that “[t]heir admission under Rule 92*quater*, therefore, is solely to aid the Trial Chamber in fully understanding and evaluating this witness’s evidence”.³²

18. In respect of Predrag Radić’s testimony, the Prosecution submits that to the extent that it “may pertain to acts or conduct of Župljanin, the Trial Chamber should exercise its discretion to admit Radić’s testimony because it is corroborated by other evidence and is internally consistent, and therefore, is sufficiently reliable”.³³ In the Prosecution’s view, the Župljanin Defence has provided “no basis for [its] assertion that any portion of Radić’s evidence the Trial Chamber deems inadmissible under Rule 92*quater* cannot be excised from the admissible portions of this witness’ evidence”.³⁴

19. In respect of Milan Babić’s testimony, the Prosecution submits that the jurisprudence “does not exclude from judicial notice the *viva voce* testimony of a witness who is obligated to testify pursuant to a plea agreement, but rather excludes facts stipulated by the parties and therefore accepted as established by the Trial Chamber”.³⁵ It submits that according to the jurisprudence “the existence of a plea agreement is a factor to be considered when assessing the weight to be assigned to the witness’s Rule 92*quater* testimony”.³⁶ In any case, the Prosecution argues, the testimony of

²⁸ Reply to Stanišić, para. 4.

²⁹ Reply to Stanišić, para. 4.

³⁰ Reply to Stanišić, para. 8.

³¹ Reply to Stanišić, para. 8.

³² Reply to Stanišić, para. 8.

³³ Reply to Župljanin, para. 10. By way of example, the Prosecution states that “Radić’s evidence relating to SJB Banja Luka Chief Vladimir Tutuš’ dismissal for attempting to minimize evictions and expulsions of non-Serbs can be corroborated by Tutuš himself who is a *viva voce* witness on the Prosecution’s Rule 65*ter* witness list”, *id* fn 27. The Prosecution also submits that Radić’s testimony will be further corroborated by the testimony of Christian Nielsen, Dorothea Hanson and Nurset Sivač as well as documents included on the Prosecution’s Rule 65 *ter* exhibit list, *ibid*.

³⁴ Reply to Župljanin, para. 10.

³⁵ Reply to Župljanin, para. 8.

³⁶ Reply to Stanišić, para. 13, referring to *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s confidential motion for admission of written evidence pursuant to Rule 92 *quater*, filed on 21 Apr 2008, para. 60, whereby the Trial Chamber rejected the argument that the evidence of Miroslav Deronjić was admissible because he testified pursuant to a plea agreement.

Milan Babić neither derives from his plea agreement nor from his own case, but rather from his “contested and fully adjudicated testimony in an unrelated case against another accused”.³⁷

III. APPLICABLE LAW AND DISCUSSION

20. Pursuant to Rule 92 *quater*, a Trial Chamber may admit into evidence a written statement or transcript of a person who has subsequently died, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber is satisfied of the person’s unavailability and finds, from the circumstances in which the statement was made and recorded, that it is reliable.

21. Based on the death certificates which the Prosecution has submitted for each witness in Annex C to the Motion, the Trial Chamber is satisfied that the witnesses are unavailable within the meaning of Rule 92 *quater*.

22. Rule 92 *quater* is 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. It is recalled that pursuant to Rule 92 *quater*(B) the fact that the evidence sought admitted may go to proof of acts of the accused may be a factor against the admission of the evidence.³⁸

23. The Trial Chamber considers that corroboration does not constitute a requirement for admissibility under Rule 92 *quater* but that it is a factor to be taken into consideration when assessing the reliability of evidence.³⁹ The Trial Chamber also considers that the level of consistency within a witness’ evidence is a factor that goes to the weight of the evidence, not its admissibility. It is recalled that “issues related to the substance of prior cross-examination or the alleged interests of counsel are matters that go to the Trial Chamber’s assessment of the weight to be accorded to that evidence rather than its admissibility”.⁴⁰ The Trial Chamber also recalls that “evidence of witnesses who might have motives or incentives to implicate the accused is not *per se* unreliable [but that] a Chamber, when weighing the probative value of such evidence, is bound to carefully consider the totality of the circumstances in which it was tendered”.⁴¹

24. The testimony of Hasim Ferhatović was given under solemn declaration before the Tribunal. While the witness testified on 11 November 1995 at a hearing held pursuant to Rule 61 and while

³⁷ Reply to Župljanin, para. 8 .

³⁸ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92*bis*(C), 7 Jun 2002, paras 10-11.

³⁹ *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 Apr 2008, para. 62.

⁴⁰ *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 Aug 2008, paras 51, 60-61.

⁴¹ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 Mar 2009, para. 146.

counsel for the Defence of Dragan Nikolić elected not to cross-examine the witness during the sentencing hearing on 3 November 2003 in the *Nikolić* case, the Trial Chamber considers that Hasim Ferhatović's evidence contains a consistent account of events despite having been given eight years apart. For these reasons, the Trial Chamber is satisfied that the prior testimony of this witness is sufficiently reliable to be admitted into evidence.

25. The testimony of Predrag Radić was given under solemn declaration before this Tribunal and was subject to cross-examination. For these reasons, the Trial Chamber is satisfied that the evidence is sufficiently reliable to be admitted into evidence.

26. Milan Babić testified in *Krajišnik* following a plea agreement, under solemn declaration and was subject to cross-examination. The Trial Chamber considers that the fact that the witness testified pursuant to a plea agreement does not render his testimony inadmissible, but is rather a factor which it will consider in weighing his evidence in light of the trial record as a whole.

27. The Trial Chamber recalls that when admitting into evidence pursuant to Rule 92 *quater* the prior testimony of a witness it will also admit the accompanying documents that form an inextricable and indispensable part of the witness's evidence and that will assist the Trial Chamber's understanding of the evidence. The Trial Chamber notes that several of the transcripts of the witnesses' prior testimony and several documents accompanying the prior testimony are not on the Prosecution's Rule 65 *ter* exhibit list.⁴² However, the transcripts of the prior evidence of Hasim Ferhatović, Predrag Radić and Milan Babić, together with the accompanying documents, were provided to the Defence in the Motion. In the Trial Chamber's opinion, therefore, the Defence has had adequate time to prepare and will not suffer undue prejudice were the Trial Chamber to admit into evidence this material, which it considers to be relevant and probative within the meaning of Rule 89(C) and which forms an "inextricable and indispensable part" of the prior testimony of the witnesses. The Trial Chamber will *proprio motu* amend the Prosecution's exhibit list and add the material contained in Annex A that is not on the exhibit list, subject to the below considerations.

28. It is noted in this respect that the Prosecution seeks to introduce into evidence Milan Babić's plea agreement and factual statement, which contains "facts [that] are true and correct and not

⁴² Motion, Annex A. The Trial Chamber recalls the very clear language of Rule 65 *ter*(E)(iii), which requires the Prosecution to file "the list of exhibits [it] intends to offer" and holds that, as a necessary consequence, any material that the Prosecution seeks to have admitted into evidence must appear on its exhibit list. See also Order on revised guidelines on the admission and presentation of evidence, 2 Oct 2009, para. 6. The Trial Chamber notes that Rule 65 *ter* (G)(ii) requires the Defence to do the same in respect of the exhibit it intends to offer in its case.

disputed by Milan Babić”.⁴³ The Trial Chamber considers – noting that these documents are not on the Prosecution’s exhibit list – that, although these documents were admitted into evidence during Milan Babić’s testimony in the *Krajišnik* case, they were not the focus of the parties’ questions to him. They do not, therefore, form an inextricable and indispensable part of the testimony.

29. The Trial Chamber concludes that the prior testimony and associated exhibits of Hasim Ferhatović, Predrag Radić and Milan Babić, with the exception of Milan Babić’s plea agreement and factual statement, are relevant and probative. They may, therefore, be admitted into evidence.⁴⁴ The weight to be given to the evidence is a matter for the Trial Chamber to determine within the context of all the evidence on the trial record, having regard to the fact that there is no possibility to cross-examine the witnesses and recalling that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts.⁴⁵

⁴³ *Prosecutor v. Milan Babić*, Case No. IT-03-72-I, Amendment to the joint motion for consideration of plea agreement between Milan Babić and the Office of the Prosecutor pursuant to Rule 62 *ter*, filed confidentially on 22 Jan 2004, para. 6. See Motion Annex A, p. 1, and Annex D.

⁴⁴ See also Motion, Confidential Annex B, paras 4, 10-11 and 14.

⁴⁵ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the motion of the Prosecution for the admissibility of evidence, 19 Jan 1998, para. 20.

IV. DISPOSITION

30. Pursuant to Rule 54, Rule 89(C) and Rule 92 *quater*, the Trial Chamber:

GRANTS the Prosecution leave to reply to the Stanišić Response and the Župljanin Response;

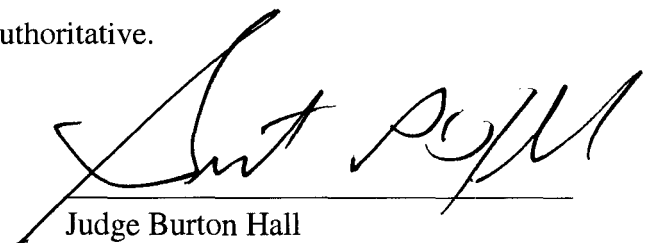
GRANTS the Motion and the Notice **IN PART**;

AMENDS the Prosecution's Rule 65 *ter* exhibit list, adding the transcripts of the prior testimony of Hasim Ferhatović, Predrag Radić and Milan Babić with accompanying documents, as listed in Annex A to the Motion, which are not currently on the Prosecution's exhibit list, except Milan Babić's plea agreement and factual statement;

ADMITS INTO EVIDENCE the prior testimony and accompanying documents of Hasim Ferhatović, Predrag Radić and Milan Babić, except Milan Babić's plea agreement and factual statement; and

ORDERS the Registrar to assign exhibit numbers to the evidence admitted by this decision.

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



Judge Burton Hall
Presiding

Dated this fourteenth day of April 2010

At The Hague

The Netherlands

[Seal of the Tribunal]