



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-T
Date: 8 September 2006
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 8 September 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

DECISION ON EVIDENCE TENDERED THROUGH FUAT HAXHIBEQIRI

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Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS 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 pending objection by Accused Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić (collectively, “Accused”) to the admission of part of the statement of Mr. Fuat Haxhibeqiri (“witness”), and hereby renders its decision thereon.

I. PROCEDURAL HISTORY

1. On 7 August 2006, the Office of the Prosecutor (“Prosecution”) called Mr. Fuat Haxhibeqiri to testify.¹ The Prosecution had initially proposed that the witness’ testimony be admitted without cross-examination, in the form of a statement under Rule 92 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).² In a decision in the pre-trial stage of the proceedings, this Trial Chamber ruled that “the proffered evidence ... is appropriate for admission” under this provision of the Rules, but ordered that “the Accused shall have an opportunity to cross-examine each witness whose written material is admitted into evidence”.³

2. At the very beginning of his testimony, counsel for Accused Milutinović objected to the admission of pages six to nine of exhibit P2235, the witness’ Rule 92 *bis* statement, on the same grounds as earlier objections to documents tendered through two other witnesses, Sandra Mitchell and Frederick Abrahams.⁴ This portion of the statement contained a summary of allegations recorded by the witness and others in his organisation – the Council for the Defence of Human Rights and Freedoms – described by the witness in his statement as being “from my investigation,” and his “findings” as a result of interviewing witnesses. The Accused objected to the admission of this summary on the basis that such hearsay was not admissible in the form in which it was presented.⁵ Given the terms of that objection, and the discussion that took place at the end of Mr. Haxhibeqiri’s testimony, the Trial Chamber confirms that it considers the objection to be one that is

¹ *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T (“*Milutinović et al.*”), Transcript, T. 1060 (7 August 2006).

² See *Milutinović et al.*, Prosecution’s Submissions pursuant to Rule 65ter(E), Annex A, 10 May 2006, p. 55; *Milutinović et al.*, Notice of Filing of Revised 65 *ter* Witness List, Annex A, 6 July 2006, p. 1; *Milutinović et al.*, Prosecution’s Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* and Confidential Annexes A, B and C, 26 May 2006.

³ *Milutinović et al.*, Decision on Prosecution’s Rule 92 *bis* Motion, 4 July 2006, para. 23.

⁴ *Milutinović et al.*, Transcript, T. 1062 (7 August 2006).

⁵ See generally *Milutinović et al.*, Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams, 1 September 2006 (“Decision on OSCE/HRW Evidence”), para. 4 n. 12 (listing Defence submissions arguing against admission of documents tendered through these two witnesses).

shared by all Accused.⁶ The Chamber reserved its decision on the Accused's objections until after the witness' testimony had concluded.⁷

3. The Chamber notes that certain contentions within the page range challenged by the Accused are clearly based on the witness' own experiences and observations, not allegations that are recounted to him by others,⁸ so the Accused's objections are inapplicable to those assertions. The remainder of this Decision will therefore focus on those portions of the statement which are evidently the subject of the Accused's objections ("challenged excerpt").

II. APPLICABLE LAW

4. The parties' arguments, which have all been considered by the Trial Chamber, are set out in the transcripts and submissions cited in Part I of this Decision. The Chamber will neither reproduce nor summarise these arguments, but will instead refer to them, where applicable, in the course of its discussion of the law and facts relevant to its determination of the motions before it.

5. The Chamber recalls its discussion of the applicable law in its recent decision on Defence objections to evidence tendered through two other Prosecution witnesses,⁹ and in particular, its conclusion that

[t]he admission of summaries and reports created by non-parties is not affected by the rule against admitting summaries prepared by parties of statements given by potential witnesses, so such materials may be admitted pursuant to Rule 89(C). These documents, however, are hearsay in nature, and thus would have to possess the necessary indicia of reliability in order to be admissible.¹⁰

6. The admission of all evidence brought before the Tribunal is subject to the general requirements of relevance and probative value found in Rule 89(C). Rule 92 *bis* (E), the *lex specialis*, permits the Chamber to admit written evidence in lieu of oral testimony either in whole or in part. Therefore, the Chamber's task is to decide whether any parts of Mr. Haxhibeqiri's Rule 92 *bis* statement fail to satisfy the admissibility requirements of Rule 89(C) and should accordingly be refused admission.

⁶ *Milutinović et al.*, Transcript, T. 1302 (9 August 2006) (Judge Bonomy stating that "[t]he position was made clear at the outset in relation to this particular objection and your position is already noted and I regard every counsel as having taken the same position in this case."); *see also ibid.* T. 1300 (defence counsel summarising the objection).

⁷ *Milutinović et al.*, Transcript, T. 1063, 1083, 1087 (7 August 2006).

⁸ *See, e.g., Milutinović et al.*, Ex. P2235 ("Rule 92 *bis* Statement"), p. 6 ("The following day 26th March I saw six houses burning in the BLOKU I RI neighbourhood where I was hiding."); *ibid.* ("On 2nd April at 10.00am two police in a blue vehicle came to the house ... where I was sheltering. ... I was hiding in the house but I saw and heard them."); *ibid.* p. 7 ("From my house I could see on a daily basis ...").

⁹ *See* Decision on OSCE/HRW Evidence, *supra* note 5, paras. 6–16.

¹⁰ *Ibid.*, para. 16.

III. DISCUSSION

7. As was the case with the reports tendered through Ms. Mitchell and Mr. Abrahams, it is clear that the statements taken by the witness, in the course of investigations into allegations of criminal conduct during the indictment period, were not prepared for the purposes of litigation before the Tribunal, as that term is employed in the jurisprudence on the admission of hearsay evidence.¹¹ Neither Mr. Haxhibeqiri's organisation – the Council for the Defence of Human Rights and Freedoms (CHHRF) – nor the International Crisis Group (ICG), under whose auspices the statements were taken,¹² has ever been a party to proceedings before the Tribunal. At the time they spoke to Mr. Haxhibeqiri and his fellow interviewers, the declarants were therefore not potential witnesses within this Chamber's interpretation of Rules 89 and 92 *bis*.¹³ Furthermore, while it is clear that the information thus collected was intended to be provided to the Prosecution,¹⁴ nothing in either the witness' testimony or his Rule 92 *bis* statement indicates that the purpose for which these forms were completed was their direct admission into evidence as proof of the truth of the allegations contained therein.

8. For these reasons, the Trial Chamber concludes that the challenged excerpt of his statement is potentially admissible pursuant to Rules 89(C), provided that sufficient indicia of reliability are either evident in the statement itself,¹⁵ or have been demonstrated during the testimony of the witness.

9. When considering the indicia of reliability for this type of document, the Appeals Chamber has held that a Trial Chamber

must consider whether the summary is "first-hand" hearsay (that is, whether the persons who made the statements summarised personally saw or heard the events recorded in their statements), and whether the absence of the opportunity to cross-examine those persons affects the reliability of their statements. Contrary to the submission of the prosecution, the opportunity to cross-examine the person who summarised those statements does not overcome the absence of the opportunity to cross-examine the persons who made them.¹⁶

10. For reasons similar to those expressed with regard to the challenged reports tendered through Ms. Mitchell and Mr. Abrahams,¹⁷ the Trial Chamber does not consider that the reliability

¹¹ *Ibid.* paras. 17–19.

¹² See *Milutinović et al.*, Transcript, T. 1168 (8 August 2006), T. 1234–1235 (9 August 2006).

¹³ See Decision on OSCE/HRW Evidence, *supra* note 5, para. 11.

¹⁴ See, e.g., *Milutinović et al.*, Transcript, T. 1240 (9 August 2006) (the witness stating that the first question asked of the interviewees was "are you ready to testify to [t]he Hague Tribunal?").

¹⁵ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 22.

¹⁶ *Ibid.* (relying on *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15).

¹⁷ See Decision on OSCE/HRW Evidence, *supra* note 5, paras. 21–24.

of the information on which the challenged excerpt of Mr. Haxhibeqiri's statement is based has been established. The statement asserts that "[i]n my position within the CHHRF, I have interviewed more than one thousand people from the town",¹⁸ and it is on these approximately 1,000 interviews that the hearsay assertions within the challenged excerpt are based.¹⁹ With particular regard to the part of the statement on page six of the English version, discussing the alleged killing of six named people, it is impossible for the Chamber to determine from the evidence given whether the witness' knowledge of these killings has also been obtained through these interviews. Moreover, during the witness' testimony, it became clear that he did not personally interview 1,000 people; rather, as he stated on direct examination, "We were a team of ten people. So it means that about 100 I interviewed myself, but at the end I looked over all the interviews."²⁰ Neither the statement itself nor Mr. Haxhibeqiri's live testimony distinguishes between allegations that were reported directly to him, or those which were recorded by other members of CHHRF while working for the ICG. Neither the challenged excerpt, the rest of the Rule 92 *bis* statement, nor the live testimony of the witness contains sufficient detail to enable the Chamber to ascertain definitively whether a particular assertion is first-hand hearsay, or more removed hearsay.

11. Moreover, unlike the statements and testimony of Ms. Mitchell and Mr. Abrahams,²¹ very little information of the steps taken by either CHHRF or ICG to ensure the accuracy of the recording process was presented to the Trial Chamber. Indeed, from the evidence the Chamber has already heard, there are positive indications that the information collected from at least one declarant was not recorded accurately. Another witness called by the Prosecution, Ms. Merita Deda, testified that she gave a statement reporting crimes to the ICG.²² Although it is unclear whether Mr. Haxhibeqiri was Ms. Deda's interviewer,²³ it is more certain that one of the members of the investigative teams the witness describes in his testimony was in fact the person who

¹⁸ Rule 92 *bis* Statement, *supra* note 8, p. 7.

¹⁹ See *Milutinović et al.*, Transcript, T. 1118 (8 August 2006).

²⁰ *Ibid.* T. 1110 (8 August 2006). See also *ibid.* T. 1235 (9 August 2006):

JUDGE BONOMOY: ... You took 100 interviews. I understand that. How many did you read?

THE WITNESS: [Interpretation] All of them.

JUDGE BONOMOY: How many is that? Roughly.

THE WITNESS: [Interpretation] Roughly 1.000.

²¹ Compare Decision on OSCE/HRW Evidence, *supra* note 5, paras. 21–23 and accompanying notes.

²² *Milutinović et al.*, Transcript, T. 1405–1406 (10 August 2006).

²³ Compare *ibid.* T. 1263 (9 August 2006) ("Q. Do you recall interviewing a person by the name of Merita Deda? A. Yes.") with T. 1265 (9 August 2006):

A. I can't remember. I met Merita at the hotel because I had forgotten who she was, and I don't think I have interviewed Merita.

Q. Did you speak with her or not? Do you remember?

A. I have to see who filled in her form. That's how I would know if I spoke with her or not.

interviewed her for ICG.²⁴ According to the information collected on the ICG form, Ms. Deda alleged that “[m]asked Serb police with painted faces”, among others, forced her and other villagers to leave their houses. In her Rule 92 *bis* statement and her live testimony, however, Ms. Deda asserts that the army came to force villagers to leave.²⁵ Indeed, the last paragraph of her statement explicitly states that “[t]he Police did not take part to [*sic*] the military operations that I have described in my statement.”²⁶ During cross-examination, Ms. Deda affirmed that the alleged perpetrators of the forced expulsion she describes were members of the VJ—soldiers, not policemen.²⁷

12. The six Accused in this case are alleged to have different roles and responsibilities during the indictment period,²⁸ especially with regard to the *de jure* and *de facto* command and control structure in place at the time. The identity or institutional affiliation of the alleged physical perpetrators is therefore a live issue, and accurate recording of victim or witness allegations in this regard is important. Given the information currently available to the Trial Chamber, there are reasons to doubt the accuracy of the process by which the allegations summarised in Mr. Haxhibeqiri’s statement were collected and recorded, and insufficient affirmative indicia of its reliability.

13. For these reasons, and pursuant to Rules 54, 89 and 92 *bis* of the Rules, the Trial Chamber hereby **DECIDES** as follows:

(1) The following excerpts of exhibit P2235 are denied admission:

- (a) In the English version, the paragraphs on page 6 that begin with “At that time I learned...” and end with “Go to Albania or we will kill you all.”; and
- (b) In the English version, from the paragraph on page 7 that begins “My findings are as follows...” to the penultimate sentence on page 9, which ends “sole aim of ethnic cleansing”.

²⁴ See *ibid.* T. 1117 (8 August 2006) (Mr. Haxhibeqiri testifying that all but one of the interviewees were from the municipality of Đakovica/Gjakovë); *ibid.* T. 1244–1245 (8 August 2006) (Mr. Haxhibeqiri testifying that none of the completed forms were signed by the interviewees); *Milutinović et al.*, Ex. P2233 (“Deda Rule 92 *bis* Statement”), p. 2 (Ms. Deda affirming that she has spent almost her entire life in this municipality); *Milutinović et al.*, Transcript, T. 1405–1406 (10 August 2006) (Ms. Deda testifying that she gave a statement to ICG, but was never contacted after or asked to sign a copy of the completed form).

²⁵ See *ibid.* T. 1399, 1400 (10 August 2006); Deda Rule 92 *bis* Statement, *supra* note 24, pp. 2–3.

²⁶ Deda Rule 92 *bis* Statement, *supra* note 24, p. 6.

²⁷ *Milutinović et al.*, Transcript, T. 1412 (10 August 2006).

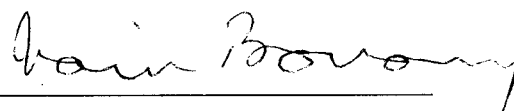
²⁸ See *Milutinović et al.*, Redacted Third Amended Joinder Indictment, 12 June 2006 (“Operative Indictment”), paras. 8–13, 15, 34–59, 65–69.

(2) The Chamber shall not take into account oral evidence given by the witness that amounts to a repetition of information obtained by him through the investigations of the CHHRF, rather than being from his personal knowledge.

(3) Within seven days, the Prosecution shall prepare and submit to the Registry a version of the statement that is redacted in compliance with paragraph 13(1) above. The redacted version of the statement is to be provided in all the languages in which the original unredacted version was written or translated.

(4) The Registry shall assign a new exhibit number to the redacted statement, which will be admitted in accordance with this Decision.

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



Judge Iain Bonomy
Presiding

Dated this eighth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]