



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: 16 February 2007
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: 16 February 2007

PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 92 QUATER**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić 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 seized of a “Motion for Admission of Evidence Pursuant to Rule 92 *quater* with Annexes A and B”, filed by the Prosecution on 1 December 2006 (“Motion”), in which it seeks the admission in written form of the evidence pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”) of two deceased witnesses and hereby renders its decision thereon.

1. In its Motion, the Prosecution requests the Trial Chamber to admit (a) Halil Morina’s written statement dated 4–5 October 2001 (P2522) and his prior testimony in the *Milošević* case (P2523); and (b) Sadik Januzi’s two written statements, dated 20–21 October 2001 (P2524) and 23 April 1999 (P2525).¹ The Prosecution generally argues that the evidence of the two witnesses meets the requirement for admissibility under Rule 92 *quater*; in particular, the evidence by the two witnesses bears sufficient indicia of reliability for admission, and it does not relate to the acts and conduct of any of the Accused.²

2. On 13 December 2006, the Defence for all Accused filed a “Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Response”), in which the Accused oppose the Motion on the basis that the proposed evidence of the two witnesses lacks indicia of reliability and as such does not satisfy the requirements of Rule 92 *quater*. Thus, the Accused jointly request the Trial Chamber to dismiss the Motion.³

I. RELEVANT LEGAL AUTHORITY

3. Rule 92 *quater* governs the admissibility of evidence of unavailable persons and provides as follows:

**Rule 92 *quater*
Unavailable Persons**

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person’s unavailability as set out above; and

¹ Motion, para. 1.

² *Id.*, para. 2.

³ Response, paras. 2, 7, 27.

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

4. Thus, Rule 92 *quater* requires that two conditions be cumulatively satisfied, namely the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein.⁴ In addition, the Trial Chamber must ensure that the general requirements of admissibility of evidence as set out in Rule 89 are satisfied, namely that the proffered evidence is relevant and has probative value as provided in Rule 89(C).

5. The Trial Chamber observes that the Accused concede that Mr. Januzi and Mr. Morina are unavailable persons in accordance with Rule 92 *quater*.⁵ Parties are agreed that the evidence of the two deceased witnesses does not go to proof of acts and conduct of the Accused as charged in Indictment.⁶ Furthermore, the parties do not dispute the relevance of the evidence.⁷ Where it is conceded that the evidence is relevant, that evidence would normally have probative value if it appears authentic and capable of being accepted by the Trial Chamber. The issue in dispute between the parties is whether the evidence bears sufficient indicia of reliability for admission.

6. The Trial Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D) and thereby not unduly prejudicial.⁸

7. The Trial Chamber notes that evidence admitted pursuant to Rule 92 *quater* would previously have been subject to former Rule 92 *bis* (C). It is therefore appropriate for the Trial Chamber to draw upon Tribunal jurisprudence interpreting Rule 92 *bis* (C) to the extent that it still

⁴ *Prosecutor v. Prlić*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 27 October 2006 (“*Prlić* Decision”), para. 8.

⁵ Response, para. 5. As a proof of the death of the two witnesses, the Prosecution attaches statements of their sons; to prove Mr. Morina’s death, the Prosecution also attaches relevant medical documentation from the University Clinical Centre in Priština, Kosovo, including a hospital death certificate. Motion, Annexes A and B.

⁶ The Prosecution argues that the evidence of the two witnesses does not relate to the acts and conduct of the Accused as charged in the Indictment, but rather relates to the crime base. Motion, paras. 8, 11. In their Response, “[t]he Accused [] concede that the proposed evidence does not go to proof of the acts and conduct of the accused as this issue was previously decided by this Trial Chamber in the Decision on Prosecution’s Rule 92 *bis* Motion.” Response, para. 6 (citation omitted).

⁷ The evidence of Mr. Januzi and Mr. Morina is directly relevant to the crimes allegedly committed in the municipalities of Srbica/Skenderaj and Prizren, respectively, and thus constitute relevant crime-base evidence. See *further* Motion, paras. 6, 9.

⁸ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Rule 92 *bis* Motion, 4 July 2006 (“*Milutinović* Rule 92 *bis* Decision”), para. 5; *Prosecutor v. Milutinović*, Case No. IT-05-87-PT, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 September 2006, para. 4; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecutor’s Second Motion for the Admission into Evidence of Written Statement by Deceased Witness Bajram Šopi, Pursuant to Rule 92 *bis*(C), 18 April 2002 (“*Galić* Decision”), p. 3; *Prlić* Decision, para. 11.

applies to the new provision of the Rules, *e.g.*, the requirements for reliability. That jurisprudence identifies the following factors as relevant to the Trial Chamber's assessment of the reliability of the evidence tendered by the Prosecution pursuant to Rule 92 *quater*:⁹ (a) the circumstances in which the statement was made and recorded, in particular (i) whether the statement was given under oath; or (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and (d) other additional factors, such as the absence of manifest or obvious inconsistencies in the statements.

II. DISCUSSION

A. Circumstances in which the statements were made and recorded

8. The Trial Chamber notes that both Mr. Januzi and Mr. Morina signed each page of their written statements; they both signed an acknowledgement that their statements were true to the best of their knowledge and recollection. In each case, a Registry approved interpreter has certified that statements were read back to them in Albanian before they signed them.¹⁰ In each case the requirements of Rule 92 *bis* (B)(ii) were met. The transcript tendered is a record of Mr. Morina's testimony in the *Milošević* trial where he was examined, cross-examined, and re-examined, after having been sworn.¹¹ In the Trial Chamber's view, the particular circumstances in which these statements were made and recorded are strong indicators that they are an authentic record of the words of Mr. Januzi and Mr. Morina.

B. Other factors relied upon by the parties

a.) Mr. Januzi

9. The Defence argues that none of the proposed evidence contains a cross-examination of Mr. Januzi and submits that the Tribunal's case law has held that, if a statement touches upon "a live

⁹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 ("*Kordić & Čerkez* Appeals Decision"), para. 27; *Galić* Decision, pp. 3–4; *Milutinović* Rule 92 *bis* Decision, paras. 20–22; *Prlić* Decision, paras. 10, 15.

¹⁰ See Motion, paras. 7, 9. Cf. *Milutinović* Rule 92 *bis* Decision, para. 20.

¹¹ P2523, *Prosecutor v. Milošević*, Case No. IT-02-54-T, T. 870–957 (21–25 February 2002). See Motion, para. 10.

and important issue between the parties”, cross-examination should be granted.¹² However, the lack of opportunity to cross-examine a witness does not automatically preclude the admission into evidence of such witness’s written statement if the Trial Chamber is satisfied that the requirements for admission as prescribed under Rule 92 *quater* and Rule 89 are met.

10. The Trial Chamber also notes that the testimony of Mustafa Draga, Milazim Thaqi, and Liri Loshi about the events in Izbica/Izbicë in March 1999 is generally consistent with the statements made by Mr. Januzi. The inconsistencies that are present in the evidence given by the four witnesses, and indeed the internal inconsistencies in Mr. Januzi’s statements, go to weight. The Trial Chamber notes that the Defence had the opportunity to cross-examine the three witnesses and will be able to make submissions about the weight to be given to the evidence by the Trial Chamber in its final deliberations.

b.) Mr. Morina

11. The Trial Chamber notes that Mr. Morina was cross-examined in the *Milošević* trial and he responded to the challenges to the truthfulness and reliability of his evidence. As already noted, Mr. Morina took an oath when he testified in the *Milošević* trial, and he was cross-examined by the accused. Moreover, his statement and his testimony do not appear to be inconsistent. The fact that the evidence of Mr. Morina is not corroborative of other evidence goes to the weight to be attributed to his evidence.

C. Conclusion

12. Having had regard to all the arguments presented by the parties, the Trial Chamber is satisfied, from the circumstances in which the statements of Mr. Januzi and Mr. Morina were made and recorded, that they are reliable as required by the Rule 92 *quater*. The Trial Chamber has reached the same conclusion with respect to the transcript of Mr. Morina. The Trial Chamber has also been unable to find any basis on which it could be said that the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D).

III. DISPOSITION

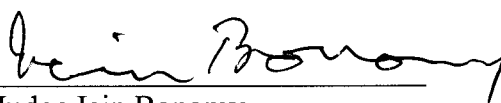
13. For all the foregoing reasons, the Trial Chamber concludes that the proffered evidence is admissible in accordance with Rule 92 *quater* and Rule 89. The Trial Chamber will have in mind the absence of the opportunity to cross-examine in the current trial when evaluating this evidence and deciding on the weight to be attributed to the statements and the transcript. In particular, the

¹² Response, paras. 11–13.

Trial Chamber will bear in mind the jurisprudence of the Tribunal, which has clearly stated that the admission of a written statement in lieu of oral testimony cannot support a conviction all by itself where the witness does not appear for cross-examination unless the written evidence is otherwise corroborated.¹³

14. Accordingly, pursuant to Rules 89 and 92 *quarter*, the Trial Chamber hereby **GRANTS** the Motion and **ORDERS** that the evidence of the two witnesses shall be admitted into evidence.

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



Judge Iain Bonomy
Presiding

Dated this sixteenth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ Such corroboration may include other witness testimony, documentary evidence, or video evidence. See *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Decision on the Prosecution's Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002; *Galić Appeals Decision*; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005; *Milutinović Rule 92 bis Decision*, para. 22; *Galić Decision*, p. 4.