



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: 5 March 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: 5 March 2007

PROSECUTOR

v.

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

**DECISION ON SECOND 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 seised of a “Second Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, filed by the Prosecution on 7 February 2007 (“Motion”), in which it seeks the admission in written form of evidence pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”) of a deceased witness and hereby renders its decision thereon.

I. BACKGROUND

1. In its Motion, the Prosecution requests the Trial Chamber to admit Ibrahim Rugova’s written statement, dated 1 and 3 November 2001 (P2613), and his prior transcript from the *Milošević* case (P2612).¹ The Prosecution argues that Ibrahim Rugova’s evidence meets the requirements for admissibility under Rule 92 *quater*; Ibrahim Rugova’s evidence is relevant and of probative value, and it is corroborated by other witnesses who testified in these proceedings; and the Defence have had the opportunity to cross-examine other witnesses in relation to the information provided in Ibrahim Rugova’s evidence and have therefore been able to test the reliability of the proposed evidence.²
2. On 19 February 2007, the Defence for all Accused filed a “Joint Defence Response to Second Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Response”), in which the Accused oppose the Motion on the basis that the Motion disregards the three express reasons underpinning the “Decision on Prosecution’s Rule 92 *bis* Motion”, issued on 4 July 2006 (“First Decision”), and the provisions of Rule 92 *quater*. In the Defence’s view, the Prosecution offers no reasons for the Trial Chamber to depart from the ruling contained in its First Decision and that the reasoning of the Trial Chamber under Rule *bis* (C) in the First Decision is germane to Rule 92 *quater*.³ The Defence further argues that “[a]ny probative value of this evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D) and granting the [] Motion would therefore be unduly prejudicial to the Accused”.⁴ For these reasons, the Defence urges the Trial Chamber to deny the Motion.⁵
3. The Trial Chamber notes that the Prosecution has previously requested the Trial Chamber to admit Ibrahim Rugova’s written statement and his prior testimony in the *Milošević* case in its

¹ Motion, para. 1.

² *Id.*, para. 3.

³ Response, paras. 4–7.

⁴ Response, para. 7.

⁵ *Id.*, p. 5.

“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”, filed on 26 May 2006 (“First Motion”).⁶ Pursuant to Rule 92 *bis*, the Trial Chamber denied the admission of Ibrahim Rugova’s evidence on the basis, *inter alia*, that his evidence “concerns the acts and conduct of any Accused”.⁷ Rule 92 *bis* was modified on 12 September 2006 and the amended provisions governing admission of evidence of unavailable persons became part of new Rule 92 *quarter*, which now provides for the admission of statements or transcripts of a deceased relating to acts and conduct of an accused. The Trial Chamber will thereby consider the Motion in light of new circumstances created by the amendment of former Rule 92 *bis*.

4. In its Motion, the Prosecution also requests leave to file submissions in excess of the word limit under the Practice Direction on the Length of Briefs and Motions given the importance of the issue dealt with in its Motion.⁸ The Trial Chamber notes that according to The Practice Direction on the Length of Briefs and Motions, a Motion shall not exceed ten pages or 3,000 words, whichever is greater, and that the Motion exceeds the limit by 756 words.⁹ The Trial Chamber also notes that a party seeking authorisation to exceed this limit must do so in advance and “provide an explanation of the exceptional circumstances that necessitate this oversized filing.”¹⁰ The Trial Chamber grants the Prosecution request, considering the need to deal with the matter expeditiously given that the Prosecution forecasts that the presentation of its case will be concluded shortly. The Trial Chamber reiterates the importance of adhering to word limits, as well as to the procedure prescribed in the Practice Direction on the Length of Briefs and Motions.

⁶ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, 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. On 15 June 2006, the Accused filed Joint Defence Response to the Prosecution’s Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, in which they requested the Trial Chamber to deny the Prosecution’s request for admission of Ibrahim Rugova’s evidence. On 22 June 2006, the Prosecution filed a Prosecution Application for Leave to Reply and Reply to Joint Defence Response to the Prosecution’s Motion for Admission of Written Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* with Confidential Annex.

⁷ First Decision, paras. 21, 23.

⁸ Motion, para. 4.

⁹ *Id.*, p. 10.

¹⁰ Practice Direction on the Length of Briefs and Motions, 16 September 2005, Section (C) 5 of IT/184 Rev. 2, paras. 5, 7.

II. RELEVANT LEGAL AUTHORITY

5. 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

(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.

6. Thus, Rule 92 *quater* requires that two conditions be satisfied, namely the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein.¹¹ 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). 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.¹²

III. DISCUSSION

7. In the First Decision, the Trial Chamber concluded that Ibrahim Rugova was an unavailable person.¹³ Furthermore, the Trial Chamber ruled that there were satisfactory indicia of the material's reliability since Ibrahim Rugova affirmed that his statement was true to the best of his knowledge, and the transcript of Ibrahim Rugova's testimony in *Milošević* was recorded after he was sworn, examined, cross-examined, and re-examined.¹⁴ Now that the prior statement and

¹¹ *Prosecutor v. Prlić et al.*, 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.

¹² *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 et al.*, 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.

¹³ First Decision, para. 20.

¹⁴ *Id.*, para. 20.

testimony of a deceased may be admitted even where it relates to acts or conduct of an accused, it follows that the evidence proffered is admissible. The question for the Trial Chamber is whether to exercise its discretion to admit it.

8. The Trial Chamber notes that, in its First Motion, the Prosecution did not seek the admission of portions of Ibrahim Rugova's evidence on the ground that they concern the acts and conduct of the Accused. Moreover, the Trial Chamber identified some additional portions of Ibrahim Rugova's evidence as relating to the acts and conduct of the Accused and thereby inadmissible in accordance with Rule 92 *bis*. In its First Decision, the Trial Chamber also noted that "[i]t would not be reasonably practicable for the Trial Chamber to edit the statement and transcript of Dr. Rugova in advance of the trial in a way that would ensure that the evidence is confined to relevant matters in issue between the parties", especially since much of the remaining evidence would have been historical background.¹⁵ However, in the present Motion, the Prosecution seeks the admission of the comprehensive evidence of Ibrahim Rugova, namely his entire statement and the transcript from the *Milošević* case, including previously inadmissible evidence relating to acts and conduct of the Accused. The Trial Chamber notes that, in light of these changes and the nature of the formerly inadmissible evidence, consideration of the whole of the evidence proffered would help set the most significant parts thereof in context. The Defence, in opposing the Motion, have placed no reliance upon Rule 6(D),¹⁶ and the Chamber has been unable to identify any way in which admitting the evidence will unduly prejudice the rights of the Accused.

9. The Trial Chamber is satisfied that the evidence of Ibrahim Rugova is generally relevant to the Indictment and is of probative value. It relates to events in which he was involved as a senior politician.¹⁷ It also relates to events about which there is evidence from two other witnesses, Adnan Merovci and Veton Surroi, who have already testified.¹⁸ The Trial Chamber considers that the evidence of the two witnesses, especially Adnan Merovci's evidence, clarifies the context into which the evidence of Ibrahim Rugova fits. Furthermore, his testimony is generally consistent with the evidence of Adnan Merovci and Veton Surroi. The Trial Chamber also notes that the Defence

¹⁵ First Decision, para. 21 (footnote omitted).

¹⁶ Rule 6(D) provides as follows: "An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case."

¹⁷ Adnan Merovci testified that Ibrahim Rugova was "a very stable, democratic, non-radical politician, [a person] who would be able to lead the Kosovars and deal with matters democratically and peacefully." T. 8491 (16 January 2007). He also stated that "Mr. Rugova's definition was always in favour of a peaceful way." T. 8494 (16 January 2007). Moreover, "[s]ince in 1989 Mr. Rugova was elected president of the LDK and in [19]92 he was elected president of Kosova by the election organised at that time by the Albanians." T. 8423 (16 January 2007).

¹⁸ Adnan Merovci testified on 16 and 17 January 2006; Veton Surroi testified on 10 October 2006.

had the opportunity to cross-examine both Adnan Merovci and Veton Surroi and will be able to make submissions about the weight to be given to the evidence by the Trial Chamber in its final deliberations. The Trial Chamber has also been unable to find any basis upon 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).

10. Having had regard to all the arguments presented by the parties, the Trial Chamber is satisfied that the evidence should be admitted. The fact that further cross-examination is not possible goes appropriately in this case to the weight of the evidence.

IV. DISPOSITION

11. For all the foregoing reasons, the Trial Chamber decides to admit the proffered evidence of Ibrahim Rugova. 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 upon the weight to be attributed to the statements and the transcript. In particular, the 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.¹⁹

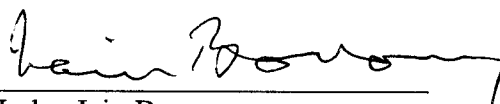
12. Accordingly, pursuant to Rules 54, 89, and 92 *quater*, the Trial Chamber hereby **GRANTS** the Motion and hereby **ORDERS** as follows:

- (1) The Prosecution is granted leave to exceed the word limit in its Motion; and

¹⁹ 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.

(2) The written statement of Ibrahim Rugova (P2513) and his prior transcript from the *Milošević* case (P2512) shall be admitted into evidence.

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



Judge Iain Bonomy
Presiding

Dated this fifth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]