



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-05-88-T

Date: 19 February 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Acting Registrar: Mr. John Hocking

Decision of: 19 February 2009

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**REDACTED VERSION OF “DECISION ON MOTION ON BEHALF OF
DRAGO NIKOLIĆ SEEKING ADMISSION OF EVIDENCE PURSUANT
TO RULE 92 QUATER”, FILED CONFIDENTIALLY ON 18 DECEMBER
2008**

Office of the Prosecutor

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Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
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Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
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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 the confidential “Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*”, filed on 22 October 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 15 July 2005, an interview conducted by Investigators from the Office of the Prosecutor with Mrs. Nada Stojanović (“Stojanović”) on 1 July 2002 was disclosed to the Defence by the Prosecution (“Stojanović Interview”).¹ In its Pre-Trial Brief filed on 28 April 2006, the Prosecution listed Stojanović as a witness.² Stojanović passed away on 15 July 2006, during the course of the *Popović et al.* trial. On 3 August 2007, Mrs. Stojanović was withdrawn from the Prosecution’s List of Witnesses.³

2. On 28 September 2008, near the end of the presentation of its case, Nikolić informed the Prosecution, as well as all other parties and the Trial Chamber Senior Legal Officer, of his intention to file a Rule 92 *quater* Motion.⁴ On 29 September 2008 and 2 October 2008, Nikolić mentioned in court his intention to file the present Motion.⁵

3. On 22 October 2008, Nikolić filed the Motion. On 31 October 2008, Beara filed his confidential “Ljubiša Beara’s Response to the Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*” (“Beara Response”).

4. On 6 November 2008, the Prosecution filed its confidential “Prosecution Response to Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*” (“Prosecution Response”).

5. On 6 November 2008, Nikolić filed his confidential “Defence Motion Seeking Leave to Reply and Reply to Ljubiša Beara’s Response to the Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*” (“Reply”).

¹ Motion, para. 5.

² Prosecution’s Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter*(E)(v), confidential, 28 April 2006. Mrs. Nada Stojanović was listed in Confidential Annex A as Witness 133. A summary of her testimony is included in Confidential Annex B.

³ Prosecution’s Motion to Remove Twenty-Four Witnesses From and Add Seven Witnesses to its 65 *ter* Witness List with Confidential Appendices, 6 August 2007.

⁴ Motion, paras. 9–10.

⁵ See T. 26384 (29 September 2008), T. 26633 (2 October 2008).

II. SUBMISSIONS OF THE PARTIES

A. Motion

6. In his Motion, Nikolić requests the Trial Chamber to admit in evidence the Stojanović Interview.⁶ Nikolić also seeks to admit the death certificate of Mrs. Nada Stojanović (“Stojanović death certificate”).⁷ Nikolić also seeks leave to exceed the word-limit for motions because the Motion comprises both a request to modify the Defence Rule 65 *ter* Lists of Witnesses and Exhibits as well as a request for admission in evidence of the Stojanović Interview and the Stojanović death certificate pursuant to Rule 92 *quater*.⁸

7. Nikolić argues that the Stojanović Interview meets the requirements for admissibility under Rule 92 *quater* because Stojanović is unavailable⁹ and the Stojanović Interview is reliable,¹⁰ relevant and has probative value.¹¹

8. Nikolić argues that the Stojanović Interview is reliable because:

- a. the Stojanović Interview was conducted by an investigator of the Office of the Prosecution;¹²
- b. the Stojanović Interview was recorded;¹³
- c. a duly qualified interpreter was present throughout the entire interview and Stojanović did not express any dissatisfaction or complaint regarding the work of the interpreter;¹⁴
- d. from the beginning of the interview, Stojanović was informed that she was considered a suspect regarding crimes committed in July 1995, and was informed of her rights as a suspect, including the right to be represented by counsel;¹⁵
- e. although Stojanović was not subject to cross-examination, the nature of the interview and investigation method used by the Prosecution’s investigator allowed him to obtain, test, challenge and probe the information provided by Stojanović;¹⁶

⁶ See Confidential Annex A of the Motion.

⁷ Motion, para. 1.

⁸ *Ibid.*, para. 4.

⁹ *Ibid.*, para. 20. Confidential Annex B of the Motion is a copy of Stojanović’s death certificate.

¹⁰ *Ibid.*, paras. 23–30.

¹¹ *Ibid.*, paras. 31–44.

¹² *Ibid.*, para. 24.

¹³ *Ibid.*, para. 25.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 26.

- f. the fact that Stojanović was included in the Prosecution's List of Witnesses shows that at a minimum, the Prosecution considered the information provided to be reliable;¹⁷ and
- g. [redacted].¹⁸

9. Nikolić argues that the Stojanović Interview is relevant and has probative value. Stojanović was questioned regarding the prisoners detained at Orahovac School on 13 and 14 July 1995 and who would have been subsequently executed.¹⁹ The events which took place in Orahovac on 13 and 14 July 1995 are the object of specific allegations in the Indictment against the Accused.²⁰ Nikolić therefore argues that the Stojanović Interview is both relevant and has probative value because the information provided by Stojanović assists in understanding how the events unfolded in the Zvornik Brigade, as well as in Orahovac, during those two days.²¹ [redacted].²²

10. Nikolić argues that the Stojanović Interview is not unduly prejudicial under Rule 89(D) and the probative value of the Stojanović Interview far exceeds any resulting prejudice to the co-Accused or the Prosecution because:

- a. the co-Accused have been on notice of the possibility that Stojanović would testify in this case as early as 18 April 2006;²³
- b. from 18 April 2006 until the witness was withdrawn, the co-Accused had ample opportunity to analyse and prepare for Stojanović's testimony or admission into evidence of the Stojanović Interview;²⁴
- c. the co-Accused and Prosecution have been on notice since at least 28 September 2008 of the intention of Nikolić to seek admission of the Stojanović Interview;²⁵ and
- d. [redacted].²⁶

¹⁶ *Ibid.*, para. 27.

¹⁷ *Ibid.*, para. 28.

¹⁸ [redacted]

¹⁹ *Ibid.*, para. 32.

²⁰ *Ibid.*, para. 33; Indictment (4 August 2006), para. 30.6.

²¹ *Ibid.*, para. 34.

²² [redacted]

²³ *Ibid.*, para. 40.

²⁴ *Ibid.*, para. 41.

²⁵ *Ibid.*, para. 42.

²⁶ [redacted]

11. Nikolić notes that Rule 92 *quater* specifically provides that if the evidence goes to proof of acts and conduct of the Accused, this may be a factor against the admission of such evidence, or part of it, but notes that this part of the Rule does not find application here because the Stojanović Interview does not go to proof of the acts or conduct of the Accused.²⁷

12. Because the Stojanović Interview and Stojanović's death certificate were not included in Nikolić's original Rule 65 *ter* List of Witnesses and Exhibits, Nikolić also seeks leave pursuant to Rule 73 *bis* to amend its Rule 65 *ter* Lists of Witnesses and Exhibits to add these materials.²⁸ In support of its request, Nikolić argues that the Stojanović Interview has *prima facie* relevance and probative value²⁹ and that the co-Accused would suffer no prejudice because the Stojanović Interview was disclosed on 15 July 2005, and the co-Accused were put on notice of the possibility that Stojanović would testify since 28 April 2006.³⁰ Moreover, Nikolić submits that the admission of the Stojanović Interview should not affect the case for the Defence of any of the co-Accused in such a way as to require a co-Accused to modify an earlier tactical decision, and that Nikolić would have no objections to the presentation of defence evidence in rejoinder pursuant to Rule 85(A)(iv) for co-Accused that have already presented their case.³¹

13. Nikolić further submits that the inclusion of the death certificate of Stojanović would cause no prejudice to the co-Accused and the issue of time to prepare does not come into play because the only purpose of the document is to show the unavailability of Stojanović.³²

14. In sum, Nikolić submits that it is in the interest of justice to allow Nikolić to modify his Rule 65 *ter* Lists of Witnesses and Exhibits.³³

B. Beara Response

15. In his response, Beara urges the Trial Chamber to deny the Motion.³⁴ Beara also seeks leave to exceed the word-limit for motions as his response requires a discussion of Rule 92 *quater* and case law.³⁵

²⁷ *Ibid.*, paras. 18–19.

²⁸ *Ibid.*, para. 3.

²⁹ *Ibid.*, paras. 31–38, 48.

³⁰ *Ibid.*, para. 49.

³¹ *Ibid.*, paras. 50–51.

³² *Ibid.*, para. 54.

³³ *Ibid.*, para. 55.

³⁴ Beara Response, paras. 2, 4, 32.

³⁵ *Ibid.*, para. 5.

16. Beara concedes that Stojanović is an unavailable person in accordance with Rule 92 *quater*.³⁶ He argues, however, that the Stojanović Interview is not reliable and as such does not meet the requirements of Rule 92 *quater*.³⁷ Beara argues that the Stojanović Interview is unreliable for the purpose of Rule 92 *quater* for several reasons relating to the way it was made and recorded:

- a. the interview was not given under oath;³⁸
- b. Stojanović did not sign the transcript of the interview and there is no indication that she had time to review the transcript or was even shown a copy of it;³⁹
- c. although Nikolić states that the interpreter was duly qualified and approved by the Registry, Beara requests that verification of the interpreter's qualifications be submitted to the Trial Chamber;⁴⁰
- d. the interview is "indiscernible" at points and Stojanović frequently states "I don't know" in response to questions;⁴¹
- e. the interview was not subject to cross-examination;⁴² rather, Stojanović was interviewed by an investigator for the Office of the Prosecutor who pressured Stojanović and treated her as a suspect, "thereby creating a one-sided nature to this interview";⁴³ and
- f. the interview is largely uncorroborated with respect to the information that Beara was at Orahovac on 14 July 1995.⁴⁴

17. Beara submits that the Stojanović Interview concerns the acts and conduct of, among others, Beara since the Stojanović Interview places Beara at Orahovac school on the morning of 14 July and therefore supports paragraph 30.6 of the Indictment.⁴⁵ In addition, Beara submits that the Stojanović Interview is central to the Prosecution's case against Beara.⁴⁶

³⁶ *Ibid.*, para. 8.

³⁷ *Ibid.*, paras. 9, 19–24.

³⁸ *Ibid.*, paras. 14, 21

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para. 14.

⁴¹ *Ibid.*, para. 21.

⁴² Beara submits that the questioning of Stojanović by the investigator does not qualify as cross-examination, "as the investigator's questions about the Accused Beara were very broad and not on point with respect to the issues in the Accused Beara's Defence case". *Ibid.*, para. 22.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. 23.

⁴⁵ *Ibid.*, para. 20; Indictment (4 August 2006), para. 30.6.

⁴⁶ *Ibid.*, para. 20.

18. Beara further argues that the admission of the Stojanović Interview undermines the fairness of the proceedings because the Stojanović Interview does not have any probative value⁴⁷ and is unduly prejudicial.⁴⁸ Beara submits that the Stojanović Interview is unreliable and as such it should be considered irrelevant.⁴⁹ Because of its unreliability, Beara argues that the Stojanović Interview does not have probative value and therefore violates Rule 89(C).⁵⁰ Beara argues that the Stojanović Interview violates Rule 89(D) and is unduly prejudicial because the Stojanović Interview concerns the acts and conduct of Beara and has been shown to be unreliable.⁵¹

19. Beara opposes Nikolić's request to amend his Rule 65 *ter* List of Witnesses and Exhibits on the grounds that Nikolić's delay in listing Stojanović as a Rule 92 *quater* witness in those lists has caused Beara prejudice.⁵² Beara asserts that once Stojanović was withdrawn from the Prosecution's List of Witnesses, Beara should not have been expected to anticipate that he might possibly have to challenge her testimony in the future, especially considering that Beara has already presented his defence case to the Trial Chamber and his case was completed weeks before the filing of the Motion.⁵³ Beara further reiterates his argument that any probative value of the evidence is substantially outweighed by the prejudicial effects to Beara.⁵⁴

C. Prosecution Response

20. The Prosecution does not object to the admission of the Stojanović Interview.⁵⁵ However, it requests that when reaching its decision on the Motion, the Trial Chamber take into account the arguments raised in its response which address two erroneous statements in the Motion.⁵⁶

21. First, the Prosecution submits that because Stojanović stated that she saw Beara at the Orahovac school on 14 July 1995, the Stojanović Interview falls squarely within the definition of evidence going to proof of the acts and conduct of an Accused, contrary to what was stated in the Motion.⁵⁷

22. Second, contrary to the Motion's claim regarding the reliability of Stojanović, the Prosecution states that the fact that she initially appeared on the Prosecution's Rule 65 *ter* List of

⁴⁷ *Ibid.*, para. 25.

⁴⁸ *Ibid.*, para. 26.

⁴⁹ *Ibid.*, para. 25.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para. 26.

⁵² *Ibid.*, para. 29.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, paras. 30-31.

⁵⁵ *Ibid.*

⁵⁶ Prosecution Response, paras. 1, 6.

Witnesses is not indicative of the reliability of her statements made during her interview.⁵⁸ In fact, the Prosecution submits that Stojanović fell squarely into the category of witnesses concerning whom the Prosecution provided the following caveat in its Rule 65 *ter* Witness Summaries:

Due to the knowledge and possible involvement in Srebrenica crimes of many of the VRS and MUP members, as well as of the Bosnian Serb civilians, their testimony may become less credible in certain areas.⁵⁹

23. Finally, the Prosecution states that its position concerning Stojanović is that she was present at the Grbavci School in Orahovac on 14 July 1995, and was directly involved with the Bosnian Muslim men held there.⁶⁰

D. Reply

24. Nikolić seeks leave to file a Reply to Beara's Response,⁶¹ and requests the Trial Chamber to admit the Stojanović Interview in evidence, less that part of it which deals with the acts and conduct of Beara.⁶²

25. In response to the arguments raised in the Beara's Response, Nikolić stresses that, from the circumstances in which Stojanović Interview was conducted and recorded, the interview is sufficiently reliable.⁶³ In particular, Nikolić submits that:

- a. the interview was recorded;⁶⁴
- b. Ms. Stojanović was given an opportunity to add and/or clarify what she said during the interview;⁶⁵ and
- c. in the absence of evidence to the contrary or complaints from the interviewee, the interpreter's qualifications can be considered as having been established, in light of the fact that she was working for the Office of the Prosecutor.⁶⁶

⁵⁷ *Ibid.*, para. 2.

⁵⁸ *Ibid.*, para. 3.

⁵⁹ *Ibid.*, para. 4.

⁶⁰ *Ibid.*, para. 5. The Prosecution mentions several witnesses (Lazar Ristić, Stevo Kostić, Milorad Birčaković, PW-110, and Mevludin Orić) whose testimonies provide corroborating evidence that Stojanović was present in Orahovac. *Ibid.*

⁶¹ Nikolić does not seek leave to reply to the Prosecution Response. Reply, para. 2.

⁶² *Ibid.*, para. 32.

⁶³ Reply, para. 15.

⁶⁴ *Ibid.*, para. 13.

⁶⁵ *Ibid.*, para. 14.

⁶⁶ *Ibid.*

26. Nikolić concurs that limited portions of the Stojanović Interview go to proof of the acts and conduct of the Accused Beara.⁶⁷ Accordingly, these portions should not be admitted, “unless the Trial Chamber is fully satisfied of their reliability”.⁶⁸ Nikolić submits that these specific portions are not sufficiently reliable to warrant their admissibility.⁶⁹

27. Nikolić further argues that Stojanović Interview, considered as a whole, does have probative value, [redacted].⁷⁰ However, “with a view to preventing any undue prejudice to the Accused Beara”, Nikolić submits that the portions of the interview relating specifically to the acts and conduct of Beara should not be admitted in evidence.⁷¹

28. Finally, Nikolić reiterates that the co-Accused were clearly put on notice of the possibility that Stojanović would be called as evidence in the present case, and that he would not oppose any request to the presentation of defence evidence in rejoinder pursuant to Rule 85(A)(iv).⁷² Especially if the interview is admitted without the portions dealing with the acts and conduct of Beara, it is submitted that the sought amendment of the Rule 65 *ter* List of Witnesses and Exhibits “appropriately strikes a balance between the right of the Accused to make full answer and defence with the rights of the co-Accused to have adequate time and facilities to prepare a defence and to be tried without undue delay.”⁷³

III. APPLICABLE LAW

A. Rule 92 quater

29. Rule 92 *quater* governs the admissibility of evidence of unavailable persons and provides:

(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.

⁶⁷ *Ibid.*, para. 17.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, paras. 18–19.

⁷⁰ *Ibid.*, para. 21.

⁷¹ *Ibid.*, para. 23.

⁷² *Ibid.*, para. 27–30.

⁷³ *Ibid.*, para. 31.

30. Thus, Rule 92 *quater* requires that two conditions be cumulatively satisfied, the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein.⁷⁴

31. The Trial Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 are satisfied and 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.⁷⁵

32. Trial Chambers have identified, and the Appeals Chamber has upheld, the following factors as relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (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; (iii) 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 never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.⁷⁶

33. The Trial Chamber also notes that Rule 92 *quater*(B) specifically provides that, if the evidence goes to proof of acts and conduct of the Accused, that may be a factor against the admission of such evidence, or part of it. The Trial Chamber considers that this provision is inflected with concern for ensuring a fair trial and the reliability of the evidence. This provision counsels cautious scrutiny with respect to evidence going to proof of acts and conduct of the Accused but also contemplates the admission of statements by deceased persons containing such evidence.⁷⁷

⁷⁴ See Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008 (“Decision of 21 April 2008”), para. 29, referring to *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 October 2006 Decision”), para. 8; *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 et al. Decision”), para. 4; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 9 July 2007 (“Delić Decision”), p. 4.

⁷⁵ Decision of 21 April 2008, para. 30, referring, *inter alia*, to *Milutinović et al.* Decision, paras. 4, 6.

⁷⁶ Decision of 21 April 2008, para. 31; *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 (“Appeals Chamber Decision of 18 August 2008”), para. 30.

⁷⁷ Decision of 21 April 2008, para. 32; Appeals Chamber Decision of 18 August 2008, paras. 52–53.

B. Amendments of Rule 65 ter Lists of Witnesses and Exhibits

34. Rule 73 *ter* (D) provides that: “[a]fter commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called”.

IV. DISCUSSION

35. As a preliminary matter, the Trial Chamber notes that the “Practice Direction on the Length of Briefs and Motions” provides that motions, responses and replies shall not exceed 3,000 words. 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.”⁷⁸ The Motion and Beara Response exceed the prescribed limit. The Trial Chamber grants the parties’ requests to exceed the word limit because the present submissions deal with an important issue. The Trial Chamber reiterates to the parties, however, 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”.

A. Amendments of Rule 65 ter Lists of Witnesses and Exhibits

36. In exercising its discretion under Rule 73 *ter* (D), the Trial Chamber should balance the accused’s right to present the available evidence during its defence case with the right of the Prosecution and the co-accused to have adequate time and facilities to prepare their case. In striking a balance, the Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the witness list and/or exhibit list has been shown.⁷⁹

37. The Trial Chamber notes that Nikolić could have and should have filed the Motion earlier. However, with regard to any prejudice caused by the delay in listing Stojanović as a Rule 92 *quater* witness, the Trial Chamber considers that the Stojanović Interview was disclosed on 15 July 2005, and the co-Accused were put on notice of the possibility that Stojanović would testify since 28 April 2006. Although the witness was withdrawn from the Prosecution’s List of Witness on 3 August 2007, the Trial Chamber is satisfied that the co-Accused had known about the possibility of introduction of the Stojanović Interview for considerable time and therefore received adequate notice. The Trial Chamber notes that the co-Accused who still have to present their case will have the opportunity to challenge the evidence during their defence case by calling other evidence. The

⁷⁸ Practice Direction on the Length of Briefs and Motions, 16 September 2005, Section (C) 5 of IT/184 Rev. 2, paras. 5, 7.

⁷⁹ See, e.g., *ibid.*, para. 36 (discussing Rule 73 *bis* (F)).

Trial Chamber also notes the opportunity for Beara, who completed the presentation of his evidence on 11 September 2008 to make an application to call additional evidence, if considered necessary, in order to specifically challenge the evidence offered in Stojanović Interview.

38. Further, as additional criteria the Trial Chamber has taken into account that the Stojanović Interview is relevant and of probative value to issues raised in this case, particularly alleged events which took place in Orahovac on 13 and 14 July 1995, which are the object of specific allegations in the Indictment, [redacted].

39. The Trial Chamber is also satisfied that the inclusion of the death certificate of Stojanović would cause no prejudice to the co-Accused as the only purpose of the document is to show the unavailability of Stojanović.

B. Rule 92 quater

40. The Trial Chamber is satisfied that Stojanović is an unavailable person within the meaning of Rule 92 *quater*.

41. The Trial Chamber first notes that the various factors of reliability will be considered collectively when determining the ultimate reliability of the Stojanović Interview. As previously held by this Trial Chamber, the absence of one or more of these factors does not automatically lead to the exclusion of this evidence as it may be compensated for by the existence of other factors, and where such evidence is admitted, the absence of one or more indicia of reliability will be taken into consideration when attributing the ultimate weight to that evidence.⁸⁰

42. The Stojanović Interview includes evidence that goes to proof of the acts and conduct of the Accused in the present case, namely Beara. In accord with Rule 92 *quater* (B), the Trial Chamber considers this factor as weighing against admission. The ultimate determination about whether to admit the evidence despite this factor will be made based on an assessment of all the factors as a whole.

43. Stojanović, who worked in the Military Police unit in Zvornik as a nurse during July 1995, was interviewed on 1 July 2002 in Banja Luka. As mentioned above, the Stojanović Interview focused mostly on events which took place shortly after the fall of Srebrenica in July 1995, including alleged events which occurred in Orahovac on 13 and 14 July 1995, [redacted].

⁸⁰ Decision of 21 April 2008, para. 41. See also *Delić* Decision, p. 5; *Milutinović* Decision, paras. 8–12.

44. The Trial Chamber notes that the reliability of this witness has to be assessed, as suggested by the Prosecution, taking into account her position, role and knowledge at the time the alleged crimes took place and her possible involvement in those events. Stojanović provided her evidence during an interview conducted by representatives from the Office of the Prosecutor after having been informed of her status as a suspect and being informed of her rights as such.

45. The Trial Chamber further notes that the interview was tape-recorded and Stojanović was informed that an official record was being created which could be used as evidence in court. She was also given the opportunity to add and/or clarify what she said during the interview and raised no complaints or dissatisfaction about the work of the interpreter or the interview process.

46. Beara argues that Stojanović Interview was not subjected to cross-examination and that Stojanović was pressured by the investigator and the interview was “one-sided”. Though Stojanović’s evidence was provided during an interview with OTP representatives and not subjected to any cross-examination, the Trial Chamber stresses that cross-examination is simply a factor to take into consideration as to the reliability of the evidence and not a requirement for admissibility under Rule 92 *quater*. Therefore, the lack of cross-examination does not automatically preclude the admission of the evidence if the Trial Chamber is satisfied that the requirements for admission as prescribed under Rule 92 *quater* and Rule 89 are met. It further considers that whether the questioning of Stojanović fully and effectively probed the witness’s account is a question that goes to the weight to be attributed to the evidence rather than to its admissibility. Further, the Trial Chamber takes into account, as a factor relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*, that the Stojanović Interview, even if is an unsworn statement never subject to cross-examination, it relates to events about which there is other evidence.

47. With regard to Beara’s claim that the Stojanović Interview lacks corroboration, particularly with respect to the information that Beara was at Orahovac on 14 July, the majority of the Trial Chamber again reiterates that corroboration is a factor to take into consideration as to the reliability of the evidence rather than a requirement for admissibility under Rule 92 *quater*. Therefore, the lack of corroboration, on the whole of the statement or a portion thereof, does not automatically preclude the admission of the evidence if the Trial Chamber is satisfied that the requirements under Rule 92 *quater* and Rule 89 are met. In this instance, the majority of the Trial Chamber acknowledges that not every part of the Stojanović Interview is corroborated. However, there is corroborating evidence that there were prisoners held at the school in Orahovac,⁸¹ [redacted].⁸² This corroborating evidence

⁸¹ See, e.g., PW-169, T. 17328–17335 (1 November 2007); Mevludin Orić, T. 933–955 (29 August 2006).

was subjected to challenges by way of cross-examination. The majority of the Trial Chamber has considered all these points when making its assessment of the degree of corroboration for the testimony of this witness.

48. Having considered these factors, the majority of the Trial Chamber is therefore satisfied that the evidence contained in the Stojanović Interview bears sufficient indicia of reliability for the purpose of its admissibility pursuant to Rule 92 *quater*.

49. The Stojanović Interview contains a section which pertains to proof of the acts and conduct of Beara. As noted previously, while this factor may weigh against admissibility it is not determinative of the issue under Rule 92 *quater*. In this particular case, the reference to the Accused Beara is one part of the statement of this witness, whose interview is a lengthy one that covered her recollections of the events of the day in detail. In these particular circumstances and given all of the factors outlined above in relation to reliability the majority of the Trial Chamber is satisfied that this statement can be admitted pursuant to Rule 92 *quater*, albeit a part of it relates to proof of the acts and conduct of an accused.

50. In reaching this conclusion, the majority of the Trial Chamber has considered the Nikolić Reply, in which it is submitted that the Trial Chamber should not admit the references to the acts and conduct of the accused Beara, unless fully satisfied of their reliability. In Nikolić's submission, this portion of the statement is not reliable. The majority of the Trial Chamber finds that there is no basis to distinguish any particular portion of the statement in terms of the finding of reliability. In assessing admissibility, the majority of the Trial Chamber has considered the statement in totality to determine whether the reliability criteria have been met. Similarly, in subsequently assessing the weight to be accorded to the statement as a whole or in relation to any part thereof, it is equally imperative that the whole statement is before the Trial Chamber. All of the responses of the witness are relevant in assessing *inter alia*, her recollection, descriptive powers and credibility. This is the case even if different weight or no weight is ultimately accorded to any part of her statement. For this reason, the Trial Chamber, by majority, finds that it is important to admit the Stojanović Interview in its entirety in order to fully assess the interview and the weight to be given to it.

51. The Stojanović Interview also meets the requirements set out by Rule 89 as it is relevant to the present case and has probative value and its admission does not affect the fairness of the proceedings.

⁸² [redacted]

C. Conclusions

52. For the foregoing reasons, the Trial Chamber concludes that the proffered evidence is admissible under Rule 92 *quater* and Rule 89.

V. DISPOSITION

53. For these reasons, pursuant to Rules 89, 92 *quater*, and 73 *ter* (D), the Trial Chamber hereby **DECIDES** as follows:

- a. To grant leave to Nikolić and Beara to exceed the word-limit in their Motion and Response, respectively;
- b. To grant leave to Nikolić to file the Reply;
- c. To admit the document tendered;
- d. By majority, to admit, in whole, the Stojanović Interview (Judge Kwon dissenting); and
- e. To grant leave to Nikolić to amend his Rule 65 *ter* Lists of Witnesses and Exhibits accordingly.

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



Carmel Agius
Presiding

Dated this nineteenth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

VI. PARTIALLY DISSENTING OPINION OF JUDGE KWON

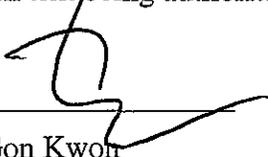
54. I agree with the opinion of the majority that the Stojanović Interview should be admitted, however I do not agree that the document should be accepted into evidence in its entirety.

55. Nikolić initially tendered the complete Stojanović Interview, however in response to submissions from Beara,⁸³ Nikolić stated “as envisaged by Rule 92 *quarter* (B), and with a view to preventing any undue prejudice to the Accused Beara, the Defence respectfully submits that those parts of the Stojanović Interview which relate specifically to the acts and conduct of the Accused Beara should *not* be admitted in evidence”.⁸⁴ I take this to mean that Nikolić withdrew that part of the Motion which requests admission of the parts of the Stojanović Interview going to the acts and conduct of Beara.

56. In short, those parts of the Stojanović Interview which go to the acts and conduct of Beara have not been tendered. I therefore consider that it is not possible for the Trial Chamber to admit the parts of the Stojanović Interview going to the acts and conduct of Beara. Furthermore, I note that to admit the Stojanović Interview in this way has no impact upon the overall context of the document.

57. For these reasons, I would grant Nikolić’s motion to admit the Stojanović Interview, omitting those parts which go to the acts and conduct of Beara.

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



O-Gon Kwon
Judge

Dated this nineteenth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

⁸³ See Beara Response, para. 20.

⁸⁴ Reply, para. 23 (footnotes omitted, emphasis original).