



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-04-74-T
Date: 14 January 2008
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FRENCH

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti
Judge Árpád Prandler
Judge Stefan Trechsel
Judge Antoine Kesia-Mbe Mindua, Reserve Judge

Registrar: Mr Hans Holthuis

Decision of: 14 January 2008

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

Public

**Decision on the Prosecution Motion for Admission of a Written Statement
Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvić)**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

I. INTRODUCTION

1. Trial Chamber III (“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 the *Prosecution motion for admission of evidence pursuant to Rules 92 Bis (A) and 92 Quater (Hasan Rizvić)*, filed partially confidentially by the Office of the Prosecutor (“Prosecution”) on 10 December 2007 (“Motion”), in which the Prosecution requests the Chamber to admit, pursuant to Rules 92 *bis* (A) and 92 *quater* of the Rules of Procedure and Evidence (“Rules”), the written statement of Hasan Rizvić given to the Prosecution on 11 March 1999 (“Statement”),¹ to which five annexes are attached, annex 5 being confidential.

II. PROCEDURAL BACKGROUND

2. On 12 July 2007, the Chamber issued the confidential Decision on the Prosecution Motion to Admit Testimonies pursuant to Rule 92 *bis* of the Rules (Jablanica) (“Jablanica Decision”) in which it rejected the Prosecution motion for admission of the Statement pursuant to Rule 92 *bis* of the Rules and requested that the witness appear before the Chamber pursuant to Rule 92 *ter* of the Rules.²

3. On 19 December 2007, the Prosecution filed the *Prosecution submission of death certificate (Hasan Rizvić)*.

4. Counsel for the six accused in this case (“Defence”) filed a joint response to the Motion on 7 January 2008, in which the Defence objects to the admission of the Statement.³

III. ARGUMENTS OF THE PARTIES

5. In its Motion, the Prosecution invites the Chamber, in accordance with Rule 92 *bis* (A) and Rule 92 *quater* of the Rules, to admit the Statement. In support of its Motion, the Prosecution submits (1) that the Statement is relevant and provides important, probative evidence about the allegations set out in the Indictment amended on 16 November 2005 (“Indictment”) relating to the municipality of Jablanica;⁴ (2) that it corroborates the testimony

¹ Motion, paras. 1 and 7.

² Jablanica Decision, paras. 20 and 32.

³ *Joint Defence response to Prosecution motion for admission of evidence pursuant to Rules 92 Bis (A) and 92 Quater (Hasan Rizvić)*, (“Response”).

⁴ Motion, para. 23.

of witnesses Ismet Poljarević, Nihad Kovać, BZ, BJ and CA;⁵ (3) that the Statement deals with the effect of the crimes on the victims;⁶ (4) that the Statement does not go to proof of the acts or conduct of one of the Accused;⁷ (5) that the witness is deceased.⁸

6. In the Response, the Defence submits that the Prosecution did not take into account the Jablanica Decision in which the Chamber observed that the Statement goes to the acts and conduct of the Accused.⁹ It also submits that the Prosecution provided an incorrect interpretation of the Tribunal's case law in respect of the definition of the acts and conduct of the accused under Rule 92 *bis* of the Rules.¹⁰ Lastly, it states that in the light of the Jablanica Decision, admitting the Statement without cross-examination would prejudice the Defence.¹¹

IV. DISCUSSION

7. The Chamber first recalls (A) the conditions of applicability of Rule 92 *quater* of the Rules¹² and (B) then decide, in view of these conditions, whether it is or is not appropriate to admit the Statement.

A. Applicable Law

8. Rule 92 *quater* of the Rules states that:

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.

⁵ Motion, paras. 24 and 25.

⁶ Motion, para. 28.

⁷ Motion, paras. 26, 27 and 31.

⁸ Motion, paras. 8 and 30.

⁹ Response, paras. 3-5.

¹⁰ Response, para. 6.

¹¹ Response, para. 8.

¹² Decision on Prosecution Motion for admission of transcript of testimony pursuant to Rules 92 *bis* and *quater* of the Rules (Milada Orman), issued confidentially on 13 December 2007; Decision on Prosecution Motion for admission of transcript of testimony pursuant to Rules 92 *bis* and *quater* of the Rules, public redacted version, 27 October 2006.

9. The Chamber first recalls once again that Rule 92 *quater* of the Rules establishes a system for admission of evidence which is autonomous and distinct from Rule 92 *bis* of the Rules. Accordingly, the admission of the written statement or transcript of a statement of a person unavailable for the reasons indicated in Rule 92 *quater* is determined only in respect of the conditions set out in Rule 92 *quater* and not those set out in Rule 92 *bis*. The Prosecution's references to Rule 92 *bis* in paragraphs 1, 27, 28 and 32 of the Motion are thus incorrect.

10. The Chamber must examine first whether it is satisfied that the author of the statement or testimony is unavailable for the reasons indicated in Rule 92 *quater* (A) of the Rules.

11. Second, the Chamber must consider whether the evidence in the written statement or transcript of testimony is, in view of the circumstances in which it was given, reliable.¹³ To this end, the Chamber will *inter alia* take into account the following indicia of reliability: the fact that the statement was given under oath, that it was the subject of cross-examination or that it is corroborated by some other evidence.¹⁴

12. Third, the Chamber will decide under its discretionary power in this matter whether or not to admit the written statement or transcript of the testimony at issue. In its examination, the Chamber will take several factors into account. First, as provided for in Rule 89 (C) of the Rules, "a Chamber may admit any evidence which it deems to have probative value". Accordingly, the Chamber will examine whether the written statement or transcript of testimony has a certain relevance and a certain probative value. The Chamber notes however that reliability will not be re-examined at this stage insofar as it did so previously in the context of Rule 92 *quater* (A) (ii) of the Rules.

13. Lastly, the Chamber will consider whether the written statement or the transcript of testimony at issue contains a reference to the acts and conduct of the accused charged in the Indictment. Moreover, the Chamber will again review whether the written statement or transcript of testimony at issue goes to proof of crucial inculpatory evidence.¹⁵ The Chamber

¹³ According to the case law of the Tribunal, "reliability [...] depends upon whether the evidence, if accepted, proves the fact to which it is directed.": *The Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo*, Case no. IT-96-21-A *bis*, 8 April 2003, para. 57 quoting *The Prosecutor v. Kunarac et al*, Case no. IT-96-23-T & 96-23/1-T, Decision on the Motion for Acquittal, 3 July 2000, para. 7.

¹⁴ *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case no. IT-95-14/2-AR73.5, Decision on Appeal regarding Statement of a Deceased Witness, 21 July 2000, para. 27.

¹⁵ *The Prosecutor v. Sikirica et al*, Case no. affaire no. IT-95-8-T, Decision on Prosecution Motion for admission of transcripts pursuant to Rule 92 *bis* of the Rules 23 May 2001, paras. 4 and 35. See also *The Prosecutor v. Slobodan Milošević*, Case no. IT-02-54-T, Decision on Prosecution's Request to have written statements admitted under Rule 92 *bis*, 21 March 2002, para. 7.

holds that this latter factor, like the circumstance that testimony goes to proof of the acts or conduct of an accused, is a factor which may support its not being admitted..

B. Examination of the merits

14. Since the Chamber is satisfied that because he has died Hasan Rizvić is unavailable within the meaning of Rule 92 *quater* of the Rules, it will focus its examination on the indicia of the Statement's reliability and on the other factors which might support or, on the contrary, go against its admission as set out above.

15. The Chamber first considers that the Statement is relevant to this case insofar as it relates in particular to paragraphs 76, 77, 79, 82 and 86 of the Indictment.

16. The Chamber then observes that the Statement largely corroborates the testimony of witnesses Ismet Poljavrević, Nihad Kovać and BZ as regards the HVO attack on Sovići on 17 April 1993. It also corroborates the testimony of witnesses Ismet Poljavrević and Nihad Kovać in respect of the detention of Muslims by the HVO at the Sovići school, the mistreatment and the poor detention conditions. The Chamber notes that the Statement corroborates the testimony of witnesses CB and BJ in respect of the visit of a delegation comprising members of the Spanish UNPROFOR battalion, the ABiH and the HVO, including the Accused Petković, to Sovići in early May 1993. Lastly, the Statement is cumulative in respect of what was said by Witnesses BJ, CA and CB about the destruction of the Muslim houses in Sovići and Doljani. Moreover, the Statement is cumulative in respect of many facts admitted by the Trial Chamber in the case *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, of which the Chamber has taken judicial notice.¹⁶

17. The Chamber also notes that the Statement was taken in the presence of a Presiding Officer appointed by the Registrar of the Tribunal, and that the written declarations of the Registrar of the Tribunal are appended to the Statement.

18. In view of the above, the Chamber is satisfied that the Statement presents indicia of reliability.

¹⁶ Decision on Prosecution motions of 14 and 23 June 2006 for judicial notice of adjudicated facts, 7 September 2006.

19. As the Chamber has already observed in the Jablanica Decision, the Statement goes to the acts and conduct of the Accused Petković and Pušić¹⁷. It should be noted that in the Motion, the Prosecution makes no reference to the Chamber's findings. Indeed, it held that:

Furthermore, the Chamber finds that a part of the testimony of Hasan Rizvić goes to the acts and conduct of the Accused Milivoj Petković and Berislav Pušić, in particular during their visit to Sovići. Consequently, the Chamber cannot admit the testimony of Hasan Rizvić without cross-examination or redaction of the parts in question.¹⁸

20. In addition, it found that witness Hasan Rizvić was to appear to inform the Chamber about the role of the two Accused during that visit:

In this respect, it is not sufficient to redact the statement of any reference to the acts or conduct of the Accused, because the Chamber wishes to have this witness, who was the head of the Doljani crisis cell, appear in court and provide information on the roles of the accused Petković and Pusić in the Muslim Croat delegation on a visit to Sovići and Doljani around 4 May 1993.¹⁹

Accordingly, the Chamber rejected the motion for admission filed pursuant to Rule 92 *bis* of the Rules.

21. The Chamber notes that the Statement contains information which is not corroborated by other witnesses who appeared before it. Accordingly, witness Hasan Rizvić describes in detail the visit by the Muslim Croat delegation to the Sovići school around 4 May 1993 and mentions the presence of the Accused Pušić in Sovići and Doljani in that delegation.

22. However, unlike Rule 92 *bis*, Rule 92 *quater* of the Rules allows a Trial Chamber to admit a written statement even if it goes to the acts and conduct of an accused. This is a factor which might argue against its admission, but admission is not excluded. It should also be recalled that the case law of the Tribunal according to which a Chamber cannot base a conviction solely or to a decisive extent on evidence which has not been subject to examination by both parties.²⁰

23. In conclusion, the Chamber considers that the Statement is admissible under Rule 92 *quater* and Rule 89 (C) of the Rules. It will take into account that no cross-examination was

¹⁷ Jablanica Decision, paras. 20 and 32.

¹⁸ Jablanica Decision, para. 20 (citations omitted).

¹⁹ Jablanica Decision, para. 32.

²⁰ *The Prosecutor v. Martić*, Case no. IT-95-11-AR73.2, *Decision on appeal against the Trial Chamber's decision on the evidence of witness Milan Babić*, 14 September 2006, para. 20; *The Prosecutor v. Prlić et al*, IT-04-74-AR73.6, *Decision on the appeals against the decision to admit the trial transcript of the examination of Jadranko Prlić*, 23 November 2007, para. 53.

conducted when assessing the probative value to be given to the statement and will require corroborating information before assigning to it decisive weight.

24. The Chamber notes that the Prosecution asked only for the admission of the Statement. However, instead of providing all the information relating to the Statement under a single reference number, the Prosecution provided the followed documents: exhibit P 09868, the “92 *bis* package” containing the written declaration of the Registry pursuant to Rule 92 *bis* (B), the BCS version of the Statement, the BCS version of the corrections the witness made to the Statement and a statement given to the local authorities in 1993; exhibit P 10358, which is the English version of the Statement; exhibit P 10361, which is the English version of the corrections to the Statement, and exhibit P 10359, which is the English version of the statement given to the local authorities in 1993.

25. The Chamber decides to admit exhibits P 09868, P 10358 and P 10361 but points out that neither the BCS nor the English version of the statement given to the local authorities in 993 is admitted insofar as the Prosecution did not ask for their admission.

V. DISPOSITION

FOR THESE REASONS,

PURSUANT TO Rules 89 (C) and 92 *quater* of the Rules,

GRANTS the Motion and admits the Statement of Hasan Rizvić under reference numbers P 09868, P 10358 and P 10361, while underscoring that neither the BCS nor the English version of the statement given to the local authorities in 1993 is admitted,

RECALLS that the admission of exhibit P 10359 was not requested **AND**

REQUESTS that the Prosecution and the Court Officer download into the e-court system exhibits P 10358 and P 10361.

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

/signed/

Jean-Claude Antonetti

President of the Chamber

Done this fourteenth day of January 2008

At The Hague

The Netherlands

(Seal of the Tribunal)