



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-03-67-T

Date: 13 May 2009

Original: English

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Acting Registrar: Mr. John Hocking

Decision of: 13 May 2009

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF
EVIDENCE OF MUJO DŽAFIĆ PURSUANT TO RULE 92 QUATER OF
THE RULES OF PROCEDURE AND EVIDENCE**

Office of the Prosecutor

Mr. Daryl Mundis
Ms. Christine Dahl

The Accused

Mr. Vojislav Šešelj

I. INTRODUCTION

1. Trial Chamber III (“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 Prosecution motion filed on 16 February 2009 (“Motion”)¹ and the *Corrigendum* to the Motion filed on 8 April 2009 (“*Corrigendum*”),² which request the admission into evidence of the written statement of Mujo Džafić dated 11 and 14 June 2004 (“Džafić Statement”), along with two associated documents, pursuant to Rule 92*quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).³

II. BACKGROUND

2. The Trial Chamber recalls that in its decision dated 7 January 2008 (“7 January 2008 Decision”), it denied the Prosecution’s consolidated motion to admit a number of witness statements, including the Džafić Statement, pursuant to Rule 92*ter* of the Rules,⁴ finding that “it is in the interest of justice that the witnesses, the authors of the statements [including Mujo Džafić], testify *viva voce* due to their fundamental importance and in view of a better understanding of the case presented before the Chamber.”⁵ The Trial Chamber also denied the Prosecution motion to admit documents accompanying the witness statements, including those accompanying the Džafić Statement, on the basis that the Prosecution “had not shown the relevance of exhibits related to the statements and transcripts for which it requests admission nor the link to the witness to which they relate.”⁶

3. In the Motion, the Prosecution now seeks the admission of the Džafić Statement,⁷ along with two accompanying documents, pursuant to Rule 92*quater* of the Rules.⁸ It argues that the 7 January 2008 Decision was founded on the premise that Mujo Džafić would be available to testify

¹ Prosecution’s Motion for Admission of Evidence of Witness Mujo Džafić Pursuant to Rule 92*quater*, public with confidential annexes, 16 February 2009 (“Motion”).

² *Corrigendum* to Prosecution’s Motion for Admission of Evidence of Witness Mujo Džafić Pursuant to Rule 92*quater*, confidential, 8 April 2009 (“*Corrigendum*”). The *Corrigendum* includes English translations for the Džafić Statement and its associated documents, which were erroneously omitted from the Motion.

³ Motion, para. 1.

⁴ Decision on the Prosecution’s Consolidated Motion Pursuant to Rules 89(F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence, confidential, English translation dated 14 January 2008 with original in French dated 7 January 2008 (“7 January 2008 Decision”), paras 42, 59.

⁵ 7 January 2008 Decision, para. 40.

⁶ 7 January 2008 Decision, para. 55; *see also id.* para. 57.

⁷ The Trial Chamber notes, however, that it is unclear whether the Motion seeks the admission of the entirety of the Džafić Statement or just some of its paragraphs into evidence. *Compare* Motion para. 19 (requesting that the Trial Chamber admit the Džafić Statement into evidence) *with* Motion para. 2 (indicating that confidential annex B identifies paragraphs and specific pages of the Džafić Statement, namely paragraphs 1-7, 9-18, 20-29 and 31-32 and page 8, that the Motion seeks to admit into evidence).

viva voce and that, given his death, renewed consideration should be given as to whether the Džafić Statement and its accompanying documents should be admitted.⁹

4. The Prosecution contends that Mujo Džafić is “unavailable” pursuant to Rule 92*quater* of the Rules and argues that the circumstances surrounding the Džafić Statement establish that the information it contains is reliable.¹⁰ The Prosecution argues that the Džafić Statement is internally consistent and is corroborated by other evidence.¹¹ The Prosecution adds that the Džafić Statement provides relevant evidence relating to crimes committed in the area of Greater Sarajevo and to paragraphs 6, 10, 15, 16, 24, 31 and 34(B) of the Third Amended Indictment.¹² Specifically, the Džafić Statement indicates that Mujo Džafić was kept prisoner in Ilijaš and forced to work for a Chetnik unit under the command of Vasilije Vidović, whose crimes Mujo Džafić observed.¹³ The Džafić Statement also provides information regarding the Accused’s visits to the Ilijaš area and his meetings with Vasilije Vidović.¹⁴ The Džafić Statement states that, at least on two occasions, the Accused met with Vasilije Vidović in Ilijaš and brought his volunteers cigarettes and money.¹⁵

5. Further, the Prosecution requests the admission of two documents accompanying the Džafić Statement — Mujo Džafić’s JNA booklet and Republika Srpska Identification Card — as they form “an inseparable and indispensable part of that statement.”¹⁶

6. The Trial Chamber further notes that the Džafić Statement complements and refers to a statement provided by Mujo Džafić to the Republic of Bosnia and Herzegovina’s Agency for Investigating and Documenting on 22 May 1996 (“22 May 1996 Statement”), which is included with the documents attached to the *Corrigendum*, but that neither the Motion nor the *Corrigendum* request the admission of the 22 May 1996 Statement into evidence.

7. During the hearing of 26 March 2009, the Trial Chamber sought the Accused’s position regarding a number of motions filed by the Prosecution seeking the admission of evidence pursuant to Rule 92*quater* of the Rules, including the present Motion. In response, the Accused reiterated his

⁸ Motion, paras 1, 19.

⁹ Motion, para. 3.

¹⁰ Motion, paras 4, 11-13.

¹¹ Motion, para. 11. The Trial Chamber notes that the Prosecution attaches as confidential annex B to the Motion a chart that details the relevance of the information provided in the Džafić Statement as well as whether that information is corroborated by other evidence.

¹² Motion, para. 14.

¹³ Motion, paras 15-16

¹⁴ Motion, para. 15.

¹⁵ Motion, para. 15; *see* Džafić Statement attached to the *Corrigendum*, p. 42933-42934.

¹⁶ Motion, paras 2, 18, 19. English translations of these two documents are attached to the *Corrigendum*.

general objection to the admission of statements into evidence pursuant to Rule 92*quater* of the Rules, including his opposition to its retroactive application.¹⁷

III. APPLICABLE LAW

8. The Trial Chamber recalls that it

has an inherent power to reconsider its own decisions. It can receive a request for reconsideration if the moving party satisfies the Chamber of the existence of a clear error or reasoning in the impugned decision or of particular circumstances, new facts or new arguments, justifying its reconsideration in order to avoid injustice.¹⁸

9. Rule 92*quater* (A) of the Rules governs the admissibility of evidence of unavailable persons and provides:

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.

10. 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* of the Rules: (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.¹⁹

¹⁷ Hearing of 26 March 2009, T. 14451-14455 (closed session).

¹⁸ Decision on Vojislav Šešelj's Motion for Reconsideration of the Decision of 30 August 2007 on Adopting Protective Measures, original in French dated 11 January 2008, para. 9.

¹⁹ *Prosecutor v. Vujadin 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, confidential, 18 August 2008, para. 30; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion on Behalf of Drago Nikolić Seeking admission of Evidence Pursuant to Rule 92*quater*, confidential, 18 November 2008, para. 32.

11. Further, pursuant to Rule 92*quater* (B) of the Rules, if a statement goes to the 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.

12. The Trial Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 of the Rules are satisfied, namely that the proffered evidence is relevant, has probative value and that such probative value would not be substantially outweighed by the need to ensure a fair trial.

IV. DISCUSSION

A. Preliminary Matters

13. The Trial Chamber considers that Mujo Džafić's death is a new fact that justifies renewed consideration of the question of whether to admit his Statement into evidence.²⁰

14. Further, regarding the Accused's general objection against the application of Rule 92*quater* of the Rules, the Trial Chamber considers that the Accused fails to show the existence of any prejudice.²¹

B. Admission of Evidence provided by Mujo Džafić under Rule 92*quater* of the Rules

15. The Trial Chamber notes that the Prosecution attaches Mujo Džafić's death certificate, burial permit and obituary in confidential annex A to the Motion. The Motion thus falls squarely within the ambit of Rule 92*quater* (A) of the Rules.

16. As regards its reliability, the Trial Chamber notes that, while the Džafić Statement was not subject to cross-examination, it does contain the following *indicia* supporting admissibility: (i) the Džafić Statement was signed by Mujo Džafić with an accompanying acknowledgement that the statement is true to the best of his knowledge and recollection;²² (ii) the Džafić Statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal;²³ (iii) the Džafić Statement was subsequently certified pursuant to Rule 92*bis* on 30 October 2004 by a representative of the Registrar with the assistance of a certified interpreter;²⁴ (iv) as part of the

²⁰ The Trial Chamber notes, however, that the 7 January 2008 Decision rejected the Prosecution's motion to admit the Džafić Statement pursuant to Rule 92*ter* of the Rules, while the present Motion is predicated on Rule 92*quater* of the Rules.

²¹ See also 7 January 2008 Decision, para. 37.

²² See Džafić Statement attached to the *Corrigendum*, p. 42937-42927.

²³ See Džafić Statement attached to the *Corrigendum*, p. 42927.

²⁴ See Rule 92*bis* attestation attached to the *Corrigendum*, p. 42940.

Rule 92*bis* certification procedure, Mujo Džafić was provided with his Statement in his own language, informed of his liability for the accuracy and truthfulness of its content and undersigned the related Attestation without making any corrections to the said Statement;²⁵ (v) portions of the Džafić Statement, including those that go to the acts and conduct of the Accused, are corroborated by other evidence proffered by the Prosecution;²⁶ and (vi) the Džafić Statement does not display any obvious inconsistencies.

17. The Trial Chamber further notes that the Džafić Statement contains evidence that goes to the proof of the acts and conduct of the Accused as charged in the Third Amended Indictment and/or is fundamental to the Prosecution's case, namely as regards the Accused's visits to Ilijaš and his meetings with Vasilije Vidović.²⁷ While these factors may weigh against admissibility, they are not determinative of the issue under Rule 92*quater* of the Rules.²⁸ The Trial Chamber considers that the Džafić Statement is sufficiently reliable that it may be admitted into evidence.

18. The Trial Chamber recalls that, in conjunction with the admission of the Džafić Statement, the Prosecution also seeks the admission into evidence of Mujo Džafić's JNA booklet and Republika Srpska Identification Card, which are annexed to his Statement ("Annexed Documents").²⁹ The Trial Chamber considers that the Annexed Documents form an inseparable and indispensable part of the Džafić Statement³⁰ and that their admission in conjunction with that of the Džafić Statement would permit a better assessment of the weight to be given to the information contained therein.

19. Moreover, the Trial Chamber considers that the Džafić Statement and the Annexed Documents meet the general requirement set out by Rule 89 of the Rules as they are relevant to the present case, have probative value and that such probative value is not substantially outweighed by the need to ensure a fair trial. Though the Motion is unclear as to whether the Prosecution seeks the admission of the entirety of the Džafić Statement or just certain of its paragraphs,³¹ the Trial

²⁵ See Rule 92*bis* attestation attached to the *Corrigendum*, p. 42928.

²⁶ See e.g., Hearing of 4 June 2008, T. 7842-7843 (describing relationship between the Accused and Vasilije Vidović and indicating that the latter appeared to be a regular escort and bodyguard of the former); P218 "Serbian Chetnik Movement Order no. 425" (proclaiming Vasilije Vidović a Serbian Chetnik Vojvoda).

²⁷ See Džafić Statement paras 20-22 attached to the *Corrigendum*.

²⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92*quater* of the Rules (Hasa Rizvić), 14 January 2008, para. 22.

²⁹ English translations of the Annexed Documents are attached to the *Corrigendum*, p. 42926 and 42925.

³⁰ See *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, p. 4.

³¹ Compare Motion para. 19 (requesting that the Trial Chamber admit the Džafić Statement into evidence) with Motion para. 2 (indicating that confidential annex B identifies the paragraphs and specific pages of the Džafić Statement — paragraphs 1-7, 9-18, 20-29 and 31-32 and page 8 — that the Motion seeks to admit into evidence). The Trial Chamber notes that neither the Motion nor the *Corrigendum* includes any indication of why certain paragraphs, namely paragraphs 8, 19, 30 and 33, should not be admitted into evidence.

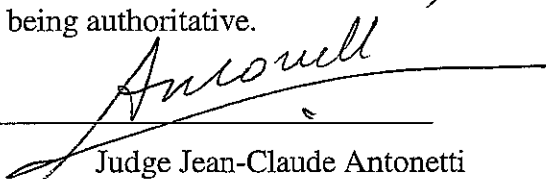
Chamber considers that the admission of the entirety of the Džafić Statement would permit a more comprehensive assessment of the evidence it contains. Thus, the Trial Chamber considers that the Džafić Statement, along with its Annexed Documents, should be admitted into evidence.

20. However, the Trial Chamber recalls that, according to the jurisprudence of the Tribunal, it may not base a conviction solely or to a decisive extent on evidence that has not been subject to examination by both parties.³² The Trial Chamber further recalls the fundamental distinction between the admissibility of documentary evidence and the weight that will be given to it in light of the entire record.³³ At this stage of the proceedings, the Trial Chamber had not made a final evaluation of the relevance, reliability or probative value of the evidence. This will only be carried out at the end of the trial in light of all the evidence, both Prosecution and Defence, that has been tendered into the record,³⁴ and until that stage, the Trial Chamber reserves the possibility of removing certain exhibits from the record.

V. DISPOSITION

21. Accordingly, the Trial Chamber, pursuant to Rules 89 and 92*quater* of the Rules, **GRANTS** the Motion and **ORDERS** the Registry to assign exhibit numbers to the Džafić Statement³⁵ and the Annexed Documents.³⁶

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



Judge Jean-Claude Antonetti
Presiding

Dated this 13th day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasa Rizvić), 14 January 2008, para. 22.

³³ Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial, 15 November 2007, para. 2.

³⁴ *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision to Admit Documentary Evidence Presented by the Prosecution, confidential, 5 October 2007, p. 7.

³⁵ The Džafić Statement bears BCS ERN 0363-1574 to 0363-1586. An English translation of this document is attached to the *Corrigendum*.

³⁶ Mujo Džafić's JNA booklet bears BCS ERN 0363-1589 to 0363-1595 and his Republika Srpska Identification Card bears BCS ERN 0363-1587 to 0363-1588. English translations of these documents are attached to the *Corrigendum*.