



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-03-69-T

Date: 16 May 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 16 May 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR THE
ADMISSION OF WRITTEN EVIDENCE OF WITNESS
SLOBODAN LAZAREVIĆ PURSUANT TO RULE 92
TER WITH CONFIDENTIAL ANNEX**

The Office of the Prosecutor

Mr. Dermot Groome
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Counsel for the Accused

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

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’s Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92ter With Confidential Annex”, filed 18 June 2007 (“Prosecution Motion”).

Procedural History

2. In its present Motion the Prosecution requests, pursuant to Rule 73 and Rule 92ter of the Rules of Procedure and Evidence (“Rules”), that the Trial Chamber admit the written evidence and related exhibits of Slobodan Lazarević - the said written evidence consists of trial transcripts of Mr. Lazarević’s *viva voce* testimony delivered during the *Slobodan Milosević* trial.

3. The current Motion is one of a series of seven Motions filed between 21 May 2007 and 18 June 2007 in which the Prosecution requests that the written evidence and related exhibits of the witnesses named in each of the respective Motions, be admitted into evidence pursuant to Rules 73 and 92ter. The Prosecution’s “Motion for Admission of Written Evidence Pursuant to Rule 92ter with Confidential Annex A”, filed 21 May 2007, is the first Motion in the series (“First Prosecution Motion”). The remaining six, which include the current Motion, were filed on 18 June 2007.

4. Also included among the six filed on 18 June 2007, is the Prosecution’s “Motion for Admission of Written Evidence of Witness Petar Jonković Pursuant to Rule 92ter With Confidential Annexes A and B” (“Janković Motion”). The Janković Motion contains the core of the Prosecution’s submissions regarding the legal requirements governing the admission of written statements generally as well as their concomitant exhibits. For the purposes of the present Motion, the Prosecution refers the Trial Chamber to its submissions of law in the Janković Motion in order “to avoid unnecessary repetition with respect to the legal requirements under Rule 92ter”.¹

5. On 9 July 2007, the Defence for Mr. Franko Simatović (“Simatović Defence”) filed its “Defence Response to Prosecution Motions for Admission of Written Evidence Pursuant to Rule 92ter” (“Simatović Response”). On the same date the Defence for Mr. Jovica Stanišić (“Stanišić Defence”) filed its “Defence Response to Prosecution’s Motions Pursuant to Rule 92ter and Request Leave to Exceed Page Limit” (“Stanišić Response”).

¹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Prosecution’s Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92ter with Confidential Annex, 18 June 2007, para. 2.

6. On 16 July 2007 the Prosecution filed its collective Reply² to both Defence Responses.

Prosecution Motion

7. In its submissions the Prosecution emphasises the importance of the availability of cross-examination to the Defence as a factor in favour of the admission of written statements generally under Rule 92ter. The Prosecution, citing various Tribunal precedents, thus submits that a “transcript of evidence pivotal to the Prosecution may still be admitted provided the Defence is given the opportunity to cross-examine the witness.”³ With regard to the written statements in the present instance, the Prosecution therefore argues that their admission would in no way occasion any prejudice to the Defence given that the witness “will be present at trial, will attest to the evidence, and be available for cross-examination”.⁴ The Prosecution thus concludes that the respective Accused will be afforded the opportunity to confront the witness and test his evidence under cross-examination “[t]herefore the rights of the Accused will not be infringed”.⁵

8. With regard to the exhibits accompanying the aforementioned written statements, the Prosecution submits that the Tribunal’s jurisprudence reflects that such exhibits may be admitted into evidence where it is shown that they form an inseparable and indispensable part of the testimony contained in the relevant transcripts. The Prosecution further argues that even in cases concerned with applications made under Rule 92bis, even though Rule 92bis makes no express provision for the admission of exhibits, their admission is nonetheless justified in the interests of justice once they were argued during witness testimony. As such, the Prosecution concludes that “[l]ikewise, exhibits associated with 92ter evidence should also be admitted as long as there are necessary safeguards in place to ensure reliability.”⁶ In the present instance, the Prosecution submits that “the requirements under Rule 92ter are met”⁷ so that the exhibits relate to Mr. Lazarević’s written evidence should also be admitted under Rule 92ter.

² Prosecution’s Request for Leave to Reply and Reply to Defence Responses to Prosecution Motions Pursuant to Rule 92ter, 16 July 2007.

³ Motion for Admission of Written Evidence of Witness Petar Jankovic Pursuant to Rule 92ter with Confidential Annexes A and B, 18 June 2007, para. 5.

⁴ Prosecution’s Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92ter with Confidential Annex, 18 June 2007, para. 6.

⁵ *Ibid.* para. 6.

⁶ Motion for Admission of Written Evidence of Witness Petar Jankovic Pursuant to Rule 92ter with Confidential Annexes A and B, 18 June 2007, para. 10.

⁷ Prosecution’s Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92ter with Confidential Annex, 18 June 2007, para. 5.

Stanišić Defence Response

9. In its 9 July 2007 Response, the Stanišić Defence replies collectively to all of the Prosecution's aforementioned Rule 92ter Motions and requests leave to exceed the page limit.⁸ Due to the consolidated nature of this Response, the request for leave to exceed the page limit is hereby granted.

10. The Defence objects in its Response to the "unlimited use of such statements or transcripts under Rule 92ter"⁹, arguing that "the use of such material prevents the Trial Judge from having an opportunity to assess the credibility of the witness based on his or her oral evidence-in-chief".¹⁰ The Defence also requests the dismissal of the Prosecution's current Motion on the premise that the Prosecution failed to disclose the witness's written evidence which is the subject of the present Prosecution Motion.¹¹

11. With regard to the exhibits accompanying Lazarević's transcript, the Defence acknowledges the ruling in *Prosecutor v. Dragomir Milošević*¹² which provides that exhibits accompanying written statements or transcripts which form an inseparable part of the evidence can be admitted along with the relevant statements or transcripts. The Defence however counters that the express language of Rule 92ter itself provides no legal basis for any such submission.¹³ The Defence also alleges that the Prosecution has failed to establish the relevance of these exhibits in relation to the witness thereby warranting a rejection of the Prosecution's application to have them admitted under Rule 92ter.

12. In further challenging the admissibility of the said exhibits, the Defence notes that most of the prospective exhibits - which include *inter alia* maps, video stills, video footage and photographs - were not authored by the witness himself, as such, the Defence argues that they "have no direct bearing with the particular witness" and should therefore not be admitted through this witness.¹⁴ In concluding its submissions on this point, the Stanišić Defence asserts that the mere fact that the relevant exhibits might have been admitted into evidence in the previous *Slobodan Milošević* proceedings, should not guarantee their automatic admission into evidence for the purposes of the present proceedings. The Defence therefore argues that "the Prosecution cannot rely on those

⁸ Defence Response to Prosecution's Motions Pursuant to Rule 92ter and Request Leave to Exceed Page Limit, 9 July 2007.

⁹ *Ibid.* para. 7.

¹⁰ *Ibid.* para. 7.

¹¹ *Ibid.* para. 13.

¹² *Prosecutor v. D. Milošević*, IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92ter, 22 February 2007.

¹³ *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Defence Response to Prosecution's Motions Pursuant to Rule 92ter and Request Leave to Exceed Page Limit, 9 July 2007, paras. 19 and 20.

previous admissions”, submitting that the question as to whether they should be admitted in the instant case “should be adjudicated on its own merits”.¹⁵

Simatović Defence Response

13. In its 9 July 2007 Response to the Prosecution’s various Rule 92ter Motions, the Simatović Defence essentially submits that while the practical policy behind the creation of Rule 92ter was to promote trial expediency by reducing the time traditionally consumed in conducting examinations-in-chief, nevertheless the absence of a substantive examination-in-chief threatens to compromise the respective Accuseds’ right to a fair and public trial, as “each and every examination on chief allows a new testing of witnesses’ credibility, to which the accused also has the right.”¹⁶

14. Finally, the Simatović Defence asserts that Rule 92ter only expressly deals with the admission of written statements and trial transcripts and should not be otherwise amplified to include exhibits. The Defence therefore submits that seeking to justify a more expansive treatment of Rule 92ter on the basis that it serves the interests of justice, “is not a sufficient argument for a different interpretation of this Rule”.¹⁷

Prosecution Reply

15. In its 16 July 2007 Reply, the Prosecution requests leave to reply collectively to both Defence responses¹⁸, which leave is hereby granted. In its Reply the Prosecution submits that the Tribunal’s adoption of the Rule 92ter provision adequately balances the policy directive of expediting trials, with the safeguarding of an Accused’s right to a fair trial.¹⁹ The Prosecution therefore notes that in the present instance, consequent upon Rule 92ter’s requirement that the witness be made available to the Defence for cross-examination, the “fair trial rights of the Accused are in fact safeguarded”.²⁰ The Prosecution also answers the charge made in the Stanišić Response as to the Prosecution’s alleged failure to disclose the witness’s transcript evidence, by noting that the material had in fact been properly disclosed on 5 September 2005 prior to the filing of the present Motion, thereby removing any element of potential prejudice to the Defence.

¹⁴ *Ibid.* paras. 19 and 29.

¹⁵ *Ibid.* para. 32.

¹⁶ Defence Response to Prosecution Motions for Admission of Written Evidence Pursuant to Rule 92ter, 9 July 2007, para. 13.

¹⁷ *Ibid.* para. 16.

¹⁸ Prosecution’s Request for Leave to Reply to Defence Responses to Prosecution Motions Pursuant to Rule 92ter, 16 July 2007, para. 2.

¹⁹ *Ibid.* para. 3.

²⁰ *Ibid.* para 4.

16. Regarding the complaint by the Defence for both Accused that Rule 92ter does not *de facto* provide for the admission of exhibits, the Prosecution contends that while “[t]he Stanišić Response refers to the relevant jurisprudence, allowing for the admission of related exhibits along with written statements” it goes on “without further authority” to disagree with the established jurisprudence in requesting that the exhibits be excluded from admission under Rule 92ter.²¹ Having pointed to the deficit of any jurisprudential foundation to the Defence’s position favouring a restrictive interpretation of Rule 92ter, the Prosecution thereafter emphasises that the exhibits in question actually satisfy the criteria set down by the body of the Tribunal’s case law, which does in fact envisage the admission of exhibits under this Rule, concluding that the exhibits “form an integral part of the witness’s testimony and are relevant to the case as are the respective written statements”.²²

Applicable Law

17. Rule 92ter, was adopted on 13 September 2006 as part of the completion strategy of the Tribunal, to “increase the ability of the Trial Chambers to consider written statements and transcripts of witnesses in lieu of oral testimony where that evidence goes to the acts and conducts of an accused” and to enhance the efficiency in trial proceedings.²³ Rule 92ter provides:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a person in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following condition:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(iii) the witness attest that the written statements or transcripts accurately reflects that witness’ declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of acts and conduct of an accused as charged in the indictment.

18. As to the nature of the written evidence that may be admitted under Rule 92ter, the case law and practice of the Tribunal clearly indicates that there is “no limit to the scope of Rule 92ter to a specific means of documenting evidence and, in general, the requirement of a written statement

²¹ *Ibid.* para. 9.

²² *Ibid.* para. 12.

²³ Statement of ICTY President Judge Pocar to the U.N. General Assembly on 9 October 2006; *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion Pursuant To Rule 92 bis And on Prosecution’s Motion Pursuant to Rule 92ter, 30 March 2007, (“*Bošković Decision*”), para. 44.

should be considered as fulfilled when the witness's words are documented and preserved".²⁴ The admission of evidence under Rule 92ter is restricted only by the discretion of the Trial Chamber.²⁵

19. Whilst Rule 92ter does not expressly govern the admissibility of exhibits, the case law of the Tribunal has developed to allow for it where they accompany written statements or transcripts and form an inseparable part of the evidence.²⁶ It is important to note that each document referred to in the written statement of a witness may not automatically form an "inseparable and indispensable part" of the testimony of this witness. Without such document, the written statement would then become incomprehensible or would lose in probative value.

20. The admission of all evidence, whether written or oral, has to be tested for its relevance and probative value pursuant to Rule 89 (C). However, relevant and probative evidence may still be excluded if its admission is substantially outweighed by the need to ensure a fair trial in the interests of justice under Rule 89 (D).

Discussion

21. Slobodan Lazarević is a former JNA officer who was a member of the army's security organs (KOS). He is expected to testify, *inter alia*, regarding the relationship between the Accused Stanišić and the so-called Martić's police; the structure of the DB and the KOS and the role of the DB in the orchestrated uprising of the Croatian Serbs. The Trial Chamber consequently finds that Mr. Lazarević's evidence is relevant and of probative value to the present trial proceedings.

22. The Trial Chamber further finds, contrary to submissions by Counsel for both Accused, that the admission of the witness's written evidence does not stand to deprive the respective Accused of a fair trial. While the evidence contained in the written evidence does go in some part to the acts and conduct of the Accused Stanišić, Counsel for each of the Accused will nevertheless be afforded the facility of cross-examining the witness on his written statements – this is the distinctive characteristic built into Rule 92ter which makes it possible for written evidence relating to the acts and conduct of an accused to be admitted into evidence and which thereby distinguishes it from its far more restrictive Rule 92bis counterpart under which there is no built-in safeguard requiring witnesses to be present for cross-examination. In the present instance, Counsel for both Accused

²⁴ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Motion To Convert *Viva Voce* Witnesses to Rule 92ter Witnesses, 31 May 2007, ("Popović Decision"), p. 2.

²⁵ *Popović Decision*, p. 3; *Bošković Decision*, para. 39.

²⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92ter, 22 February 2007, ("D. Milošević Decision"), p. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis, 12 September 2007, para. 23; *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution's Motion Admission of Transcripts Pursuant to Rule 92bis (D), 23

will be able to clarify the details contained in Mr. Lazarević's evidence and test the validity of his transcript evidence under cross-examination.

23. Consequently, the Trial Chamber finds that the written evidence of Slobodan Lazaravić poses no prejudice to the respective Accused and may be admitted into evidence pursuant to Rule 92*ter*.


24. Finally, as regards the admissibility of the exhibits accompanying the witness's written evidence, the Trial Chamber finds that each of those exhibits satisfies the criteria very clearly stated in the jurisprudence emerging from the Tribunal, that is, they form an inseparable and indispensable part of the evidence of the witness.

25. The present exhibits having satisfied the foregoing criteria, the Trial Chamber therefore finds that they may be admitted into evidence pursuant to Rule 92*ter*.

Disposition

In light of the above, and pursuant to Rules 73, 89 and 92*ter* of the Rules, the Trial Chamber hereby **GRANTS** the Stanišić request for leave to exceed the page limit and the Prosecution's request for leave to reply and **GRANTS** the Prosecution Motion.

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



Judge Patrick Robinson
Presiding Judge

Dated this sixteenth day of May 2008.
At The Hague
The Netherlands

[Seal of the Tribunal]