

IT-03-69-T
D21294 - D21286
12 April 2010

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**UNITED
NATIONS**



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: 12 April 2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 12 April 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF EVIDENCE OF WITNESS C-057 PURSUANT TO RULE 92
*QUATER***

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 21 May 2007, the Prosecution filed a motion pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules"), seeking the admission of the evidence of Witness C-057 ("Witness").¹ On 19 March 2008, the Prosecution received notice that the Witness had died.²
2. On 8 April 2008, the Prosecution filed its "Motion to Admit the Evidence of Witness C-057 Pursuant to Rule 92 *quater*" ("Motion"), in which it indicated its intention to withdraw its Rule 92 *ter* Motion as it had, since then, been informed of the Witness's death.³ The Motion seeks the admission into evidence of the transcripts of the Witness's testimony from the case of *Prosecutor v. Slobodan Milošević* ("Milošević case"),⁴ his two witness statements⁵ and 16 related exhibits⁶ (together "Proffered Evidence").
3. On 22 April 2008, both the Stanišić Defence and the Simatović Defence responded to the Motion, requesting that the Chamber deny the Motion.⁷ The Simatović Defence further requested that the Witness be removed from the Prosecution's Rule 65 *ter* witness list.⁸

II. SUBMISSIONS

A. Prosecution

4. The Prosecution submits that the Witness is unavailable and, therefore, that the Proffered Evidence may be admitted pursuant to Rule 92 *quater*.⁹
5. The Prosecution submits that the Proffered Evidence is relevant and bears indicia of reliability.¹⁰ It states that, in the *Milošević* case, the Witness was subjected to cross-examination by

¹ Motion for Admission of Written Evidence Pursuant to Rule 92 *ter* (with Confidential Annex A), 21 May 2007 ("Rule 92 *ter* Motion"); see also Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004, p. 5, granting the Witness a pseudonym. The Prosecution has sought a variation of the protective measures since then. See Confidential Annex A to the Prosecution Submission on Status of Protective Measures with Annex, confidential, 24 November 2009, p. 28.

² Prosecution Motion to Admit the Evidence of Witness C-057 Pursuant to Rule 92 *quater* (with Confidential Annexes), 8 April 2008, para. 2.

³ Motion, para. 1; Confidential Annex 1 to the Motion.

⁴ Transcripts of 27 November 2003 and 2 December 2003.

⁵ Witness statements of 27 July 2003 and 25 November 2003. For the purposes of this decision, the use of the masculine by the Chamber does not identify the gender of the Witness.

⁶ The 16 related exhibits are identified in Annex 2 to the Motion.

⁷ Stanišić Defence Response to Prosecution Motion to Admit the Evidence of Witness C-057 Pursuant to Rule 92 *quater* with Confidential Annexes, 22 April 2008 ("Stanišić Response"); Simatović Defence Confidential Response on "Prosecution Motion to Admit the Evidence of Witness C-057 Pursuant to Rule 92 *quater* with Confidential Annexes", 22 April 2008 ("Simatović Response").

⁸ Simatović Response, para. 12.

⁹ Motion, para. 8.

one of the *amici curiae* and by Slobodan Milošević (“Milošević”).¹¹ The Prosecution argues that since Milošević was alleged to have been a member of the same joint criminal enterprise (“JCE”) as Jovica Stanišić and Franko Simatović (collectively, “Accused”), he “possessed a common interest in challenging the evidence” of the Witness.¹² The Prosecution further submits that the Proffered Evidence is corroborated by various other witnesses.¹³

6. Finally, the Prosecution submits that there is no overriding public interest in the Proffered Evidence being heard orally and can thus be submitted pursuant to Rule 92 *quater*. It holds that the “corroboration, nature and source of this evidence renders it inherently reliable and of probative value”.¹⁴

B. Stanišić Defence

7. The Stanišić Defence opposes the Motion.¹⁵ It does so on the grounds that admission of the Proffered Evidence would violate Stanišić’s rights to a fair trial,¹⁶ that the evidence goes to the acts and conduct of Stanišić, and that the Proffered Evidence is unreliable.¹⁷

8. The Stanišić Defence submits that evidence presented under Rule 92 *quater* cannot, by definition, be subject to cross-examination before the Chamber and that the Chamber should thus refer to the jurisprudence on the old Rule 92 *bis* (E).¹⁸ The Stanišić Defence argues that determining whether or not a witness should be required to appear for cross-examination is part of the obligation of the Chamber to ensure a fair trial under Articles 20 and 21 of the Statute of the Tribunal (“Statute”).¹⁹ The Stanišić Defence further argues that the Chamber should consider three issues: i) whether the evidence sought for admission goes to prove a critical element of the Prosecution’s case against the Accused; ii) whether the cross-examination of the Witness in other proceedings adequately dealt with the issues relevant to the Stanišić Defence; and iii) whether the evidence is proximate to the Accused.²⁰ The Stanišić Defence submits that evidence which is proximate to the

¹⁰ Motion, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Motion, para. 10.

¹⁴ Motion, para. 11.

¹⁵ Stanišić Response, para. 2.

¹⁶ Stanišić Response, paras 2, 10.

¹⁷ Stanišić Response, para. 2.

¹⁸ Stanišić Response, para. 11.

¹⁹ *Ibid.*

²⁰ Stanišić Response, paras 11-12.

Accused and pivotal to the Prosecution's case should not be admitted into evidence pursuant to Rule 92 *quater*.²¹

9. The Stanišić Defence submits that it is the Prosecution's theory that Stanišić bears responsibility for the acts and conducts of others".²² Therefore, it considers that the Proffered Evidence cannot be admitted pursuant to Rule 92 *quater* since it deals with the actions of Željko Ražnatović ("Arkan"), who was alleged to have been a member of the same JCE as the Accused.²³

10. In addition, the Stanišić Defence submits that the fact that a witness was found to be credible in prior proceedings before this Tribunal does not automatically lead to the conclusion "that the witness should be considered reliable in later proceedings".²⁴ It contends that the Proffered Evidence does not have sufficient indicia of reliability.²⁵ In this respect, first, it holds that C-057 was not "effectively" cross-examined by Milošević.²⁶ Second, it contends that Milošević's interests "were quite different" from those of the Accused.²⁷ It thus submits that the impossibility to cross-examine the Witness is prejudicial to Stanišić.²⁸

C. Simatović Defence

11. The Simatović Defence opposes the Motion and requests that the Chamber remove the Witness and the associated exhibits from the Rule 65 *ter* witness and exhibit lists.²⁹ It submits that the Witness, in the Prosecution's Rule 92 *ter* Motion, was proposed as a crime-base witness who was scheduled to be examined for two hours and cross-examined for four hours.³⁰ It submits that the fact that the Witness was initially going to be heard pursuant to Rule 92 *ter* as opposed to Rule 92 *bis* indicates that the Prosecution deemed it necessary for the Witness's evidence to be given orally.³¹

12. The Simatović Defence notes that the Proffered Evidence relates to the acts of Arkan's men who, according to the Indictment, were under the control of the Serbian State Security Service ("DB"). It therefore submits that, for Simatović's rights under to Article 21 of the Statute not to be

²¹ Stanišić Response, paras 12-13.

²² Stanišić Response, para. 16.

²³ Stanišić Response, paras 16-17, 21.

²⁴ Stanišić Response, para. 18.

²⁵ Stanišić Response, para. 19.

²⁶ Stanišić Response, para. 20.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Simatović Response, para. 12.

³⁰ Simatović Response, para. 7.

³¹ *Ibid.*

violated, the admission of the Proffered Evidence should be able to be subject to cross-examination in these proceedings.³²

13. The Simatović Defence challenges the Prosecution's submission that the Witness's evidence bears indicia of reliability because the Witness was cross-examined in the *Milošević* case.³³ It argues that the fact that both Milošević and Simatović were indicted as members of the same alleged JCE, does not necessarily imply that they share the same defence strategy and interests in the proceedings.³⁴

14. The Simatović Defence further questions the credibility of the Witness due to a possible "changed mental condition".³⁵ It holds that it is now impossible for the Simatović Defence to determine the mental condition of the Witness at the time of his testimony in the *Milošević* case, and when he gave the earlier statements to the Prosecution. As such, the admission of the Witness's evidence without the option of cross-examination would violate Article 21 of the Statute.³⁶

III. APPLICABLE LAW

15. The Chamber recalls the law governing the admission of evidence pursuant to Rule 92 *quater* as set out previously by this Chamber.³⁷

IV. DISCUSSION

A. Relevance

16. The Chamber finds that the Proffered Evidence is relevant to the case as it relates to the presence and acts of volunteers and of paramilitary units in the area around Erdut in the Serb Autonomous Region of Slavonia, Baranja, and Western Srem.³⁸

B. Unavailability

17. The Chamber finds that the Witness is deceased and thus "unavailable" pursuant to Rule 92 *quater* (A) (i) of the Rules.

³² Simatović Response, para. 8.

³³ Simatović Response, para. 9.

³⁴ *Ibid.*

³⁵ Simatović Response, para. 10.

³⁶ Simatović Response, paras 10-11.

³⁷ Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010 ("Witness B-179 Decision").

³⁸ See e.g. the events alleged in the Third Amended Indictment, paras 9, 22.

C. Reliability

18. The Chamber will now turn to the second requirement of Rule 92 *quater* (A). The Tribunal has identified the following criteria as being relevant to assess the reliability of evidence being requested for admission pursuant to Rule 92 *quater*: i) the circumstances in which the statement was made and recorded; ii) whether the statement has been subject to cross-examination; iii) whether the statement, in particular an unsworn statement which was never subject to cross-examination, relates to events about which there is other evidence; and iv) other factors, such as the absence of manifest or obvious inconsistencies in the statements.³⁹ These criteria will be dealt with below.

19. With regard to the transcripts, the Chamber notes that the Witness testified under oath before the Trial Chamber in the *Milošević* case.⁴⁰ The Witness initialled each page of the two statements he gave to the Prosecution and signed the accompanying acknowledgements that the statement was read back to him in his own language and was true to the best of his knowledge and recollection. This was also confirmed by an interpreter approved by the Registry.⁴¹

20. Both the Stanišić Defence and the Simatović Defence maintain that the cross-examination of the Witness in the *Milošević* case cannot be considered to have been of such quality that it would satisfy the criterion of “having been subjected to cross-examination”.⁴² Furthermore, both the Prosecution and the Defence in this case address the relevance of cross-examinations conducted by an accused (i.e. Milošević) who was alleged to be part of the same JCE and consequently shared a “common interest”.⁴³ The Chamber observes that the defence in each case will conduct the cross-examination of witnesses in a way that best fits the defence strategy of the relevant accused.⁴⁴ The Chamber considers that a possible common interest due to a shared membership of the alleged JCE is not relevant for the question as to whether or not cross-examination has taken place, because it is not the defence strategy on which the said cross-examination was based that merits assessment, but

³⁹ See Witness B-179 Decision; see further *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 10 October 2008. See further *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 7; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on the Admission of Statements of Seven Witnesses Pursuant to Rule 92 *quater*, 16 June 2008, para. 6.

⁴⁰ Hearing of 27 November 2009, Case No. IT-02-54-T, Transcript, pp. 29802-29803.

⁴¹ Witness statements of 27 July 2003 and 25 November 2003

⁴² Stanišić Response, para. 23; Simatović Response, para. 7

⁴³ Motion, para. 9.

⁴⁴ See e.g. *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 *bis* (D) – Foča Transcripts, Dissenting Opinion of Judge Patrick Robinson, 30 June 2003, paras 31-35.

the reliability of the evidence given by the witness.⁴⁵ Of relevance for the reliability of the Proffered Evidence is the question whether the witness has been tested through cross-examination in general. The Chamber furthermore recalls that the quality of prior cross-examination is a factor that may be considered when weighing the Proffered Evidence, if admitted.⁴⁶

21. Whilst not all witnesses named by the Prosecution as corroborating the Proffered Evidence⁴⁷ can be considered for this purpose,⁴⁸ the Chamber finds that it appears from the information presented to the Chamber that the evidence is corroborated by the evidence of other witnesses who have testified or are proposed to testify pursuant to Rule 92 *ter*.⁴⁹

22. Finally, the Chamber finds that the Witness's statements and testimony do not *prima facie* appear to contain manifest or obvious inconsistencies.

23. The Chamber is therefore satisfied that the Proffered Evidence has sufficient indicia to be considered reliable for the purpose of admission pursuant to Rule 92 *quater* of the Rules.

D. Acts and Conduct

24. The Proffered Evidence deals in part with acts of Arkan and of certain paramilitary units, e.g. Arkan's men, for which the Accused's responsibility is allegedly incurred. However, it does not deal, *per se*, with the acts and conduct of either Accused. The Chamber therefore finds, in line with its earlier observations in a previous decision and the Tribunal's jurisprudence,⁵⁰ that the Proffered Evidence does not go to the acts and conduct of the Accused as charged in the Indictment.

⁴⁵ In the *Popović et al.* case, the Trial Chamber admitted evidence of a witness pursuant to Rule 92 *quater* who was said to have been cross-examined in previous proceedings on behalf of an accused with "different interests" or who was "hostile" to the concerned accused in the *Popović et al.* case. The Trial Chamber, however, found that such claims could only be considered when assessing the weight to be assigned to the said testimonies. See *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* ("*Popović et al.* Decision"), 21 April 2008, para. 60.

⁴⁶ Witness B-179 Decision, para. 38; see also *Popović et al.* Decision, para. 51.

⁴⁷ Motion, para. 10.

⁴⁸ Witness C-1050 is removed by the Prosecution from its 65 *ter* Witness List by Submission of 5 June 2009; the evidence of Witness C-1051 is also submitted pursuant to Rule 92 *quater*; the evidence of witnesses JF-003, C-1194, and C1162 are submitted pursuant Rule 92 *bis*; see Prosecution Submission of Amended Consolidated Witness List and Request to Present Additional Witnesses within Allotted Time ("Prosecution's 5 June 2009 Witness List"), 5 June 2009.

⁴⁹ Witnesses C-1118, C-1129 and C-1215 have testified as Rule 92 *ter* witnesses on respectively 15 July 2009, 3 March 2010 and 5 March 2010; Witness C-1089 is submitted by the Prosecution as a Rule 92 *ter* witness; see Prosecution's 5 June 2009 Witness List; Prosecution Submission on 92*ter* and 92*bis* Witnesses, 13 November 2009, para. 14.

⁵⁰ Witness B-179 Decision, paras 29-31; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 9; *Prosecutor v. Slobodan Milošević*, Case

E. Associated exhibits

25. The associated exhibits have all been discussed by the Witness and without these exhibits the transcript would become incomprehensible. As such, the Chamber considers that they form an inseparable and indispensable part of the Witness's evidence and may therefore be admitted.

F. Conclusion

26. For all the above, the Chamber finds the Proffered Evidence to be of relevance and probative value within the meaning of Rule 89 of the Rules and finds that the conditions of Rule 92 *quater* are fulfilled and that the proffered evidence can be admitted.

V. DISPOSITION

27. For the foregoing reasons and pursuant to Rules 89 (C) and 92 *quater* of the Rules, the Chamber:

GRANTS the Motion;

ADMITS into evidence under seal:

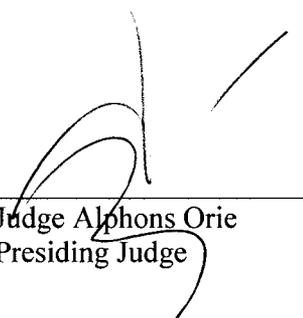
- (i) the un-redacted testimony of the Witness in the *Milošević* case dated 27 November 2003 (p. 29801-29836) and 2 December 2003 (p. 29837-29879);
- (ii) the Witness's statements dated 27 July 2003 and 25 November 2003;
- (iii) the associated exhibits with Rule 65 *ter* No. 4557, 4622, 3554, 2809, 2889, 4526, 4727, 4729, and 3556;
- (iv) the Death Certificate of the Witness (Confidential Annex 1 to the Motion);

ADMITS into evidence publicly the related exhibits with Rule 65 *ter* No. 4547, 4549, 0722, 3649, 4515, 3622, 0019;

No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22.

REQUESTS the Registrar to assign exhibit numbers to the admitted documents and inform the parties and the Chamber of the exhibit numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this twelfth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]