



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 September
2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 September 2009

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION
OF EVIDENCE OF WITNESSES UNAVAILABLE PURSUANT
TO RULE 92 *QUATER***

Office of the Prosecutor

Mr Dermot Groome
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Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
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Counsel for Franko Simatović

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Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 21 May 2007, the Prosecution filed a motion requesting the admission into evidence of statements and associated documents of Witnesses C-1051, C-1072, C-1202,¹ C-1075, and C-1183 pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").²
2. On 29 May 2007, the Simatović Defence requested that the deadline for filing its response to the Motion be postponed until 15 September 2007.³ The Chamber partly granted this request on 1 June 2007 and extended the time-limit for responses to the Motion by both the Simatović and Stanišić defence teams until 9 July 2007.⁴
3. On 9 July 2007, the Simatović Defence responded to the Motion, opposing it.⁵ The Stanišić Defence did not respond to the Motion. On 16 July 2007, the Prosecution requested leave to reply to the Simatović Response and replied.⁶
4. On 22 February 2008, the Prosecution filed a motion to withdraw its application to tender into evidence the statements and associated documents of 17 witnesses, including Witnesses C-1075 and C-1183, which was granted on 18 March 2008.⁷

II. SUBMISSIONS OF THE PARTIES

5. The Prosecution submits that Witnesses C-1051, C-1072, and C-1202 ("the Witnesses") are deceased.⁸ Their death certificates are submitted as associated documents in Annex B to the Prosecution's Motion. The Prosecution therefore seeks the admission of the following exhibits pursuant to Rule 92 *quater*:

¹ For the purpose of the present decision, pseudonym C-1202 refers to Witness number 89 on the Prosecution Amended Consolidated Witness List (filed 8 June 2009 and dated 5 June 2009, hereinafter "Prosecution Witness List"). The Chamber notes that this pseudonym has been also assigned mistakenly to witness number 86 on the Prosecution Amended Consolidated Witness List.

² Prosecution's Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 21 May 2007 ("Motion"), paras 1, 22.

³ Simatović Defence Motion to Postpone Deadline for Filing Response on Prosecution Motions for Admission of Written Evidence Pursuant to Rule 92 *bis*, 92 *ter* and 92 *quater*, 29 May 2007, paras 11-12.

⁴ Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 1 June 2007, para. 7.

⁵ Simatović Defence Response to Prosecution's Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 9 July 2007 ("Response"), paras 10-11.

⁶ Prosecution Leave to Reply and Consolidated Reply to Simatović's Responses to the Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 16 July 2007 ("Reply").

⁷ Prosecution Motion to Withdraw 17 Pending Applications for Admission of Evidence in Written Form Under 92 *bis* and 92 *quater*, 22 February 2008, paras 3, 7, Annex A; Decision on Prosecution Motion to Withdraw 17 Pending Applications for Admission of Evidence in Written Form Under Rules 92 *bis* and 92 *quater* of the Rules, 18 March 2008, p. 3.

⁸ Motion, para. 6.

- A statement of Witness C-1051 dated 13 and 17 December 1998 (“C-1051 Statement”), Witness C-1072 dated 19 and 20 March 2002 (“C-1072 Statement”), and Witness C-1202 dated 6 and 7 October 2000 (“C-1202 Statement”), (collectively “Witness Statements”);
- The death certificates of Witness C-1051 dated 8 March 2000 (“C-1051 Death Certificate”), Witness C-1072 dated 19 June 2003 (“C-1072 Death Certificate”), and Witness C-1202 dated 20 October 2004 (“C-1202 Death Certificate”), (collectively with the Witness Statements “Proffered Evidence”).⁹

6. The Prosecution contends that the evidence of the Witnesses bears numerous indicia of reliability and corroborates the evidence of other witnesses.¹⁰ It also submits that the evidence is relevant, as it concerns events at crime bases mentioned in the Indictment, and that it has probative value.¹¹

7. The Simatović Defence does not challenge that the Witnesses are unavailable.¹² However, it emphasises the right to cross-examine any witness whose evidence concerns acts or conduct of Franko Simatović.¹³ It argues in this respect that evidence describing acts of those, alleged subordinates of Simatović, at least indirectly goes to proof of the acts and conduct of Simatović and should therefore not be admitted without the Simatović Defence having been given an opportunity to cross-examine the witness.¹⁴ It argues that the evidence proffered through Witness C-1051, which pertains to Arkan, an alleged subordinate of Simatović, at least indirectly goes to acts and conduct of Simatović.¹⁵

8. Additionally, the Simatović Defence argues that the crucial matter is whether the evidence concerns a critical and live issue between the parties as opposed to a peripheral or marginally important issue.¹⁶ It considers the former to be the case where witnesses mention names and describe units, which allegedly participated in the crimes referred to in the Indictment and are considered by the Prosecution to be subordinated to or under the control of Simatović.¹⁷ It submits

⁹ Motion, paras 1, 22.

¹⁰ Motion, paras 2, 6, Annex A.

¹¹ Motion, para. 7.

¹² See Response, para. 9.

¹³ Response, paras 6-8.

¹⁴ Response, paras 5-6.

¹⁵ Response, paras 4-6.

¹⁶ Response, para. 7.

¹⁷ Response, para. 8.

that evidence of Witnesses C-1072 and C-1202 relates to events in which alleged subordinates of the Simatović and members of the same alleged joint criminal enterprise (“JCE”) participated.¹⁸

9. The Prosecution in its Reply stresses that Rule 92 *quater* allows for the admission of evidence which is pivotal for the Prosecution’s case or goes to proof of acts and conduct of the accused, when the evidence is corroborated by other evidence.¹⁹

III. APPLICABLE LAW

10. Rule 92 *quater* governs the admissibility of evidence of unavailable persons, and provides 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.

11. In the assessment of the reliability of the evidence of an unavailable witness pursuant to Rule 92 *quater*, the following criteria may be considered:

(a) the circumstances in which the statement was made and recorded, in particular whether;

(i) the statement was given under oath;

(ii) 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) 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 un-sworn statement that has never been subject to cross-examination, relates to events about which there is no other evidence;

(d) other factors, such as the absence of manifest or obvious inconsistencies in the statement.²⁰

¹⁸ Response, para. 10.

¹⁹ Reply, para. 12.

²⁰ *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 Decision*”), para. 7; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution’s Motion to Admit Five Statements of Witness 1 into Evidence

12. With regard to the term “acts and conduct of the accused”, the Trial Chamber in the case of *Prosecutor v. Slobodan Milošević* held, although within the context of Rule 92 *bis* of the Rules, that it:

[i]s a plain expression and should be given its ordinary meaning: deeds and behaviour of the Accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so.²¹

13. The Appeals Chamber later confirmed the Trial Chamber’s interpretation, pointing out the:

[...] clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the Accused is individually responsible, and (b) the acts and conduct of the Accused as charged in the indictment which would establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis*(A) excludes from the procedure laid down in that Rule.²²

14. As evidence tendered and admitted pursuant to Rule 92 *quater* would previously have been subject to Rule 92 *bis*, the Chamber considers it appropriate to draw upon Tribunal jurisprudence interpreting this rule to the extent that it still applies to the new provision, including the definition of “acts and conduct of the Accused”.²³ In the specific situation of a JCE, written statements which go to proof of acts and conduct of an accused upon which the Prosecution relies to establish that the said accused participated in that JCE or shared with the person who actually committed the crimes charged, the required intent for those crimes, might be a factor against admission.²⁴ Such shared intent can be inferred from a written statement which indicates the presence of the accused during the occurrence of crimes committed by individuals other than the accused.²⁵

15. In addition to the conditions set out in Rule 92 *quater* of the Rules, the Chamber must also be satisfied that the general requirements of admissibility under Rule 89 (C) and (D) are met,

Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of two Witnesses and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009 (“First *Gotovina* Decision”), para. 13; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of a Witness Statement Pursuant to Rule 92 *quater*, 5 March 2009, para. 10.

²¹ *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. 22 (citation omitted).

²² *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 (“*Galić* Appeals Decision”), para. 9.

²³ See also *Milutinović* Decision, para. 7; *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, para. 12; *Prosecutor v. Gotovina*, Case No. IT-06-90-T, Decision on the Admission of Statements of Seven Witnesses Pursuant to Rule 92 *quater*, 16 June 2008, para. 15.

²⁴ *Galić* Appeals Decision, para. 10.

²⁵ *Galić* Appeals Decision, para. 13.

namely that the evidence is relevant, has probative value, and that its probative value is not substantially outweighed by the need to ensure a fair trial.²⁶

IV. DISCUSSION

16. The Chamber is convinced that the Witnesses are deceased and therefore unavailable pursuant to Rule 92 *quater* of the Rules.

17. The Chamber finds that the Witness Statements are relevant to the case as they relate to crimes allegedly committed within the indictment period in Erdut, Škabrnja, and Hrvatska Dubica.

18. While the Witness Statements were not given under oath and the witnesses have not been subject to cross-examination, the Witnesses attested that the statements were true to the best of their knowledge and recollection.²⁷ In addition, each statement is accompanied by the certification of an interpreter duly qualified and approved by the Registry of the Tribunal, and has been signed by the respective witness.²⁸ The Simatović Defence does not challenge the reliability of the Witness Statements. The Chamber considers that the Witness Statements do not contain manifest or obvious internal inconsistencies. The Chamber also finds that the Witness Statements corroborate evidence of other witnesses who have testified or the prospective evidence of witnesses who are due to give evidence in this case.²⁹ In light of the above, the Chamber finds that the Proffered Evidence is reliable for the purposes of its admission pursuant to Rule 92 *quater*.

19. The Chamber further finds that the Proffered Evidence is of probative value within the meaning of Rule 89 of the Rules.

20. The Chamber considers the Witness Statements to be of a crime-base nature which might assist the Chamber in getting a better understanding of the events alleged in the Indictment. The C-1051 Statement relates to crimes allegedly committed by Arkan's associates or subordinates. However, it does not go to proof of acts and conduct of Stanišić or Simatović ("the Accused") and

²⁶ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008, para. 4; First *Gotovina* Decision, para. 4.

²⁷ C-1051 Statement, p. 5; C-1202 Statement, p. 5; C-1072 Statement, p. 6.

²⁸ C-1051 Statement, p. 6; C-1202 Statement, p. 6; C-1072 Statement, p. 6.

²⁹ For witnesses who have testified, see the testimony of Jasna Denona, T. 2018-2037. For witnesses who are due to give evidence, see Prosecution Witness List, wherein the evidence of C-1051 corroborates that of other witnesses testifying about the attack on Erdut and the events at Erdut Training Center (SAO SBWS), in particular the evidence of Witness C-1162 and Witness JF-003. The evidence of C-1072 corroborates that of other witnesses testifying about events in Škabrnja, Nadin and Bruška (SAO Krajina), in particular the evidence of Witnesses C-1091, C-1123, C-1152, C-1166, C-1202 (no. 86 on the Prosecution Witness List), C-1205 and MM-043. The

nothing in the statement indicates a situation from where the Accused's participation in the alleged JCE or an intent shared by the Accused could be inferred. Similarly, the Chamber finds that the statements of Witnesses C-1072 and C-1202, which concern the attacks on the villages of Škabrnja and Hrvatska Dubica, do not contain allegations which go to proof of acts and conduct of the Accused, nor do they point towards a situation from which the Accused's participation in the alleged JCE or an intent shared by the Accused could be inferred.

V. DISPOSITION

21. For the foregoing reasons and pursuant to Rules 89 (C), 92 *quater* and 126 *bis* of the Rules, the Chamber:

GRANTS the Prosecution request for leave to file a reply;

GRANTS the Motion;

ADMITS into evidence **under seal**:

- (i) the C-1051 Statement (ERN BCS 0301-2898-0301-2902 and ET 0081-4786-0081-4791);
- (ii) the C-1072 Statement (ERN BCS 0305-5377-0305-5381 and ET 0217-0268-0217-0273);
- (iii) the C-1202 Statement (ERN BCS 0302-3358-0302-3363 and ET 0106-2752-0106-2757);
- (iv) the C-1051 Death Certificate (ERN BCS 0608-5759);
- (v) the C-1072 Death Certificate (ERN BCS 0342-3497 and ET 0342-3497);
- (vi) the C-1202 Death Certificate (ERN BCS 0468-3835 and ET 0468-3839);

REMINDS the Prosecution that evidence admitted pursuant to Rule 92 *quater* of the Rules is public unless a request for protective measures in relation to unavailable witnesses has been received and granted. A request for protective measures may be made for the purpose of avoiding identification of other witnesses with protective measures who have testified, or who will do so at a

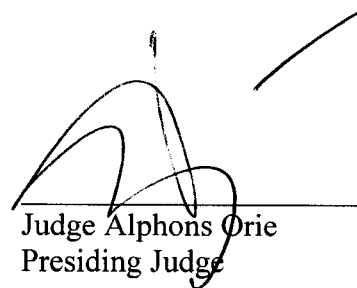
evidence of Witness C-1202 corroborates that of other witnesses testifying about events in the area of Hrvatska Dubica (SAO Krajina), in particular the evidence of Witnesses C-1084, B-1235 and C-1141.

later stage of the trial. Until the Prosecution is in a position to affirm that protective measures are not required, the Chamber is provisionally admitting the Proffered Evidence under seal. The Prosecution is given 14 days to report to the Chamber whether it will apply for protective measures;

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

REQUESTS the Prosecution to upload an English translation of the death certificate of Witness C-1051 into eCourt.

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



Judge Alphons Orie
Presiding Judge

Dated this sixteenth day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]