

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-05-87/1-T
Date: 23 July 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking

Decision: 23 July 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S RENEWED MOTION FOR
ADMISSION OF EVIDENCE OF ANTONIO RUSSO
PURSUANT TO RULE 92 *quater***

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

I. BACKGROUND

1. This Trial Chamber (“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’s Renewed Motion for Admission of Evidence of Antonio Russo Pursuant to Rule 92 *quater*” (“Motion”) filed by the Office of the Prosecutor (“Prosecution”) on 3 July 2009 whereby the Prosecution seeks the admission into evidence of Antonio Russo’s written statement pursuant to Rule 92*quater* of the Rules of Procedure and Evidence (“Rules”). On 17 July 2009, Counsel for Vlastimir Đorđević (“Defence”) filed a Response opposing the Motion.¹ On 21 July 2009 the Prosecution sought leave to file a reply and submitted a Reply to the Defence’s Response.²

2. The Prosecution initially sought to admit Antonio Russo’s statement pursuant to Rule 92*quater* in a motion filed on 28 October 2008.³ On 5 February 2009 the Chamber denied admission of Antonio Russo’s statement pursuant to Rule 92*quater* on the ground that it was not established that Antonio Russo was dead and, therefore, an unavailable person within the meaning of Rule 92*quater*.⁴

II. SUBMISSIONS

3. The Prosecution renews its motion to admit Antonio Russo’s statement into evidence pursuant to Rule 92*quater* and submits – as proof of his death – a copy of a death certificate, obtained from Italian authorities on 13 May 2009.⁵ The Prosecution submits that the written statement meets the requirements for admission pursuant to Rule 92*quater* and refers to its submissions in the Original Motion. In particular, the Prosecution submits that the statement bears sufficient indicia of reliability for admission and that Antonio Russo’s evidence does not relate to acts and conduct of Vlastimir Đorđević (“Accused”).⁶ It is submitted that the statement given by Antonio Russo to the Prosecution on 24 April 1999 was signed on each page and supplemented with an acknowledgement that the statement was true to the best of the witness’s knowledge and recollection (“witness acknowledgment”). Additionally, it was provided that his account of the

¹ Vlastimir Đorđević’s Response to Prosecution’s Renewed Motion for Admission of Evidence of Antonio Russo Pursuant to Rule 92 *quater*, 17 July 2009 (“Response”).

² Prosecution’s Reply to Defence Response to Prosecution’s Renewed Motion for Admission of Evidence of Antonio Russo Pursuant to Rule 92 *quater* (“Reply”).

³ Prosecution’s Motion for Admission of Evidence pursuant to Rule 92*quater*, (“Original Motion”); Vlastimir Đorđević’s Response to Prosecution’s Motion for Admission of Evidence pursuant to Rule 92 *quater*, filed on 11 November 2008 (“Original Response”).

⁴ Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92*quater*, (“Decision”).

⁵ Motion, para 3.

⁶ Motion, para 4.

deportation is corroborative to the evidence of other witnesses and that his evidence is a crime-base evidence, directly relevant to the allegations in paragraphs 72(g), 95 and 96 of the Indictment.⁷

4. The Defence opposes the motion and submits that the witness's evidence was never subjected to cross-examination, was not taken under oath,⁸ and is not reliable.⁹

III. THE LAW

5. The law on Rule 92*quater* has been set out in the Chamber's earlier Decision and need not to be repeated here. The Chamber will emphasise that in order to admit evidence pursuant to Rule 92*quater* it must be satisfied that the person is unavailable and that the proposed evidence is reliable. It recalls, that relevant to the Chamber's assessment of reliability are the circumstances in which the statement was made and recorded, whether the statement has been subject to cross-examination, and whether the statement relates to events about which other evidence exists, among other factors.¹⁰ Pursuant to Rule 92*quater* (B) factors that may mitigate against admission is whether the proposed evidence goes to proof of acts and conduct of the Accused.

IV. DISCUSSION

6. The Chamber has been provided with a copy of a death certificate, issued by the Rome municipality on 13 May 2009, indicating that Antonio Russo died on 16 October 2000 in Gardabani, Georgia. In the Chamber's view this document suffices to prove the death of the witness and thereby his unavailability. The first requirement for admission pursuant Rule 92*quater*, therefore, is met.

7. The statement of Antonio Russo was given on 24 April 1999 to the ICTY (Rule 65*ter* number 02261). The interview was conducted without an interpreter and the statement was signed on each page by the witness himself. It is supplemented with a witness acknowledgement. The statement contains information relevant to Antonio Russo's time as a freelance journalist in Kosovo from February or March 1998 to April 1999. The statement describes Antonio Russo's interviews with various members of the Tahiri family in Priština/Prishtinë, who told him about a Serb offensive in a village near Klina/Klinë, the Tahiris' flight from there and their return. Antonio Russo explains in his statement that he saw many empty villages where the houses had not been destroyed and his conclusion that the inhabitants of these villages were ordered to leave. His statement contains observation of persecutions of Albanians in the vicinity of Kosovska

⁷ Original Motion, para 20.

⁸ Original Response, paras 19-20.

⁹ Response, para 2.

Mitrovica/Mitrovicë. He testified to killings at Račak/Reçak and other locations in December 1998 and the deployment of the VJ surrounding Priština/Prishtinë at the end of February 1999 which led to the request to the media personnel to leave in March 1999. The witness stayed in Kosovo during the NATO intervention. Antonio Russo described the deportation of Albanians from Velanja to the railway station and from there by train to Blace, from where he went to Macedonia.

8. Pursuant to Rule 89 (C) evidence may be admitted if relevant and of probative value. The statement of Antonio Russo discusses events relevant to the Indictment and relates in particular to allegations contained in paragraphs 72(g), 95 and 96. It was given before representatives of the ICTY, contains the witness's signature on each page and is therefore, *prima facie*, reliable.

9. The first submission of the Defence concerns the language in which the interview was conducted and the statement recorded and Antonio Russo's ability to speak and understand English.¹¹ While the absence of an interpreter may be a relevant factor, in the present circumstances the Chamber is not satisfied that the absence of an interpreter renders the statement inadmissible. By his signature recorded on each page and the witness acknowledgement, Antonio Russo indicated that he speaks and understands English.

10. The Defence submits that the portion in which the witness testified that he was "posing as an ethnic Albanian" as well as the lack of distinction between the witness's first hand information and information he obtained from others or the mixture of facts and opinions and conclusions makes the statement unclear.¹² Further, it submits that the way he conducted his interviews, received the information from others and made his deductions, is not clearly described and, could lead to inconsistencies in the statement.¹³ Also relevant in this respect is the Defence's submission that in the practice of the Tribunal, witnesses clarify or even change their evidence during testimony in court or amend their statements regularly.¹⁴ In the view of the Chamber, the arguments advanced by the Defence in the present circumstances have no bearing on the admission of the written statement but on the weight to be given to it by the Chamber.

11. Finally, the Defence submits that the statement refers to an audio and a video tape which were not provided to the Defence, and that even if they were, they could not be analysed properly without the help of the witness.¹⁵ The Prosecution in its Reply submits that the video tape was

¹⁰ Decision, para 6.

¹¹ Response, para 6.

¹² Response, paras 7-9.

¹³ See: Decision, para 6 (d).

¹⁴ Response, para 10.

¹⁵ Response, para 11.

found and disclosed to the Defence, and that it does not intend to tender it an exhibit in the trial.¹⁶ Thus, the evidence of the deceased Antonio Russo can be clarified by the video footage, if necessary.

12. The Defence submits, that the evidence goes directly to the acts and conduct of the Accused as charged in the Indictment. While this fact alone would not render the statement inadmissible, the Chamber notes that the statement does not go to proof of acts and conduct of the Accused as this is interpreted by the Tribunal's jurisprudence. The absence of an opportunity for cross-examination is a factor that will be considered with respect to weight. The Chamber also takes into account that there is evidence from other witnesses about the same or related events (e.g. Nazlie Bala and Emin Kabashi) which enables at least some testing of the statement of Antonio Russo by the cross-examination of these other witnesses and by a comparison of their accounts with the statement of Antonio Russo.

V. DISPOSITION

13. For these reasons, pursuant to Rules 89 and 92*quater*, the Chamber

- (1) Grants leave to the Prosecution to file a Reply and takes note of the content of the Reply;
- (2) Grants the Motion and orders that Antonio Russo's written statement dated 24 April 1999 will be admitted into evidence;
- (3) Requests the Registry to assign an exhibit number to the admitted statement and to inform the parties and the Chamber accordingly.

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

Dated this twenty-third day of July 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]

¹⁶ Reply, paras 5-6.