IT-06-90-T
D 12984 - D 12977
24 July 2008

12984

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-06-90-T
		Date:	24 July 2008
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr Hans Holthuis**

Decision of: **24 July 2008**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE ADMISSION OF STATEMENTS OF FOUR WITNESSES PURSUANT TO RULE 92 *QUATER*

Office of the Prosecutor

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1. On 29 February 2008, the Prosecution filed a motion requesting the admission of four written statements pursuant to Rule 92 *bis* and four written statements pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence ("Rules").[1] On 14 March 2008, the Čermak Defence filed its response to the Motion.[2] Neither the Gotovina Defence nor the Markač Defence responded to the Motion. In this Decision, the Chamber will decide upon the admissibility of four statements pursuant to Rule 92 *quater*. The admission of the four statements pursuant to Rule 92 *bis* is dealt with in a separate decision.

2. The Prosecution submits that Witnesses 5, 12, 28 and 14[3] are unavailable, and seeks the admission of their written statements into evidence pursuant to Rule 92 *quater* of the Rules.[4] It is submitted that Witness 5 is deceased,[5] Witness 12 could not reasonably be traced,[6] Witness 28 is unable to testify orally due to a physical condition,[7] and that Witness 14 suffers from a "mental condition" and an "emotional state" making her unavailable to give oral testimony.[8] The Prosecution further submits that all four statements are reliable as they are each corroborated by other evidence, and accompanied by the witnesses' acknowledgement that the statements are true and correct to the best of their knowledge and recollection.[9] In addition, the Prosecution submits that none of the statements contain evidence that goes to the acts and conduct of the Accused.[10] The Čermak Defence does not oppose the admission into evidence of the statements of Witness 5 and Witness 28.[11] The Čermak Defence's objections in relation to the statements of Witnesses 12 and 14 will be dealt with in the discussion of those statements below.

3. Rule 92 *quater* governs the admissibility of evidence of unavailable persons, and provides that:

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[1] Prosecution Second Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 29 February 2008 ("Motion"), paras 1, 17(2). The Prosecution filed an Addendum on 18 April 2008, containing the translation of the death certificate for one of the four witnesses whose written evidence it seeks to admit into evidence by its Motion.
[2] Ivan Čermak's Response to Prosecution's Second Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 q*uater*, 14 March 2008 ("Response").
[3] The witnesses are referred to by these numbers in the Prosecution Motion to Amend Its Witness List, 4 February 2008, Confidential Appendix A, p. 1.
[4] Motion, para. 10.
[5] Motion, para. 11.
[6] Motion, para. 12.
[7] Motion, para. 13.
[8] Motion, para. 14.
[9] Motion, para. 15.
[10] Ibid.
[11] Response, paras 14, 17.

(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.

4. In addition to the conditions set out in Rule 92 *quater*, the Chamber must also ensure that the general requirements of admissibility under Rule 89 (C) and (D) are satisfied, namely that the evidence is relevant and has probative value.[12]

5. When examining the reliability of the evidence of an unavailable witness, the Chamber will consider (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; and (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 other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statement.[13]

6. The Prosecution seeks the admission into evidence of a total of five statements of the aforementioned witnesses. The tendered statements were not given under oath, though the witnesses signed or initialled each page of their statement(s), as well as the accompanying acknowledgements that the statements were read back to the witnesses in their own language and were true to the best of their knowledge and recollection. This was confirmed by an

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[12] *Prosecutor v. Milutinović et al.*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 ("1st *Milutinović* Decision"), para. 4; *Prosecutor v. Milutinović et al.*, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007, para. 6; *Prosecutor v. Haradinaj et al.*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007 ("1st *Haradinaj* Decision"), para. 6; *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 Pursuant to Rule 92 *quater* with Confidential Annex, 28 November 2007 ("2nd *Haradinaj* Decision"), para. 6.

[13] *1st Milutinović* Decision, para. 7; 1st *Haradinaj* Decision, para. 8; 2nd *Haradinaj* Decision, para. 8.

interpreter approved by the Registry.[14] Moreover, Witness 28's two statements were certified pursuant to Rule 92 *bis* (B).[15] The Chamber finds this to be sufficient proof of the witnesses' acceptance that the written statements were true and accurate.

7. The five statements have not been subject to cross-examination. The unavailability of the witnesses for cross-examination does not bar the admission of their statements, though the Chamber will be mindful of this when deciding on the weight to be given to them.

8. With regard to the requirements of Rule 89 (C), the Chamber finds that all of these statements are relevant to the case. They offer evidence of crimes allegedly committed within the indictment period in the Krajina region. The Chamber will examine the reliability of the statements pursuant to Rule 92 *quater* (A) (ii) below, while addressing the specific objections raised by the Čermak Defence. Reliability is a component part of the probative value of a piece of evidence and there is therefore no need to examine the probative value separately.

Witness 5 and 28

9. The Prosecution has attached the death certificate of Witness 5 to its Motion.[16] The Chamber is therefore satisfied that Witness 5 is unavailable. The Prosecution submits that Witness 28 is unable to testify orally as a result of a physical condition.[17] A statement by an OTP investigator submitted together with the statements of Witness 28 sets out that although willing to testify, the witness's old age, nearly 80 when she met with the investigator, and health prevent her from leaving her house, and that she would not be able to go anywhere to give evidence, not even by video-link.[18] The Chamber is satisfied that Witness 28's physical condition renders her unable to testify orally.

10. Witness 5 and Witness 28 are crime base witnesses and their statements contain no information that goes to proof of the acts and conduct of the Accused. The statement of Witness 5 describes two occasions in August and September 1995 when he was ill-treated by Croatian soldiers.[19] The statement of Witness 28 relates to a number of Counts in the

[14] Motion, Confidential Appendix D.
[15] Ibid.
[16] Motion, Confidential Appendix D. The Chamber notes that the death certificate submitted for this witness records his date of birth as 14 January 1926, while his statement records this date as being 8 January 1926. Considering that other details of this witness' identity (place of birth, name of father) are identical, the Chamber is satisfied that the records in fact relate to the same person. An English translation of the death certificate has also been attached to an Addendum filed by the Prosecution on 18 April 2008.
[17] Motion, para 13.
[18] Motion, Confidential Appendix D, Declaration of Investigator, who met with Witness 28 on 12 July 2007.
[19] Motion, Confidential Appendix D.

Indictment, including evidence concerning Scheduled Killing # 4. The Chamber considers that the evidence contained in the statements of Witness 5 and Witness 28 is not pivotal to the Prosecution's case. The Chamber does not find that there are manifest or obvious internal inconsistencies in the statements of Witness 5 and Witness 28, or between each of those statements and the body of evidence already before the Chamber. For these reasons, and for reasons set out in paragraphs 6 through 8 above, the Chamber finds that the statements of Witness 5 and Witness 28 can be admitted into evidence pursuant to Rule 92 *quater*.

Witness 12

11. The Prosecution submits that, after repeated inquiries, it has been unable to establish the whereabouts of Witness 12. According to the Prosecution, after having been informed by the non-governmental organization VERITAS of their belief that Witness 12 was deceased, the Prosecution sought the assistance of both Croatia and Serbia in order to obtain a death certificate for this witness.[20] Neither Croatia nor Serbia was able to provide such death certificate.[21]

12. The Čermak Defence submits that the Prosecution has not exercised reasonable diligence in tracing Witness 12, having only attempted to contact him ten years after his witness statement was taken and at a late stage before the commencement of the trial.[22] The Čermak Defence argues that that for this reason, the Chamber should not admit the statement of Witness 12 pursuant to Rule 92 *quater*.[23]

13. The Prosecution submits that it has made one request each, to the Ministry of Foreign Affairs of Serbia and the Ministry of Justice of Croatia respectively, though it has only provided the Chamber with the request to the former dated 9 May 2007.[24] On 7 June 2007, the Ministry of Foreign Affairs of Serbia replied to the Prosecution's request and informed it that no person with the personal information corresponding to Witness 12 had been registered in the records of the Serbian MUP.[25] In a letter dated 25 October 2007, the Croatian Ministry of Justice informed the Prosecution that an operative check in the Registry Offices of Benkovac

[20] Motion, para. 12; *see* also Confidential Annex D, reply by Croatia to Request for Assistance ("RFA") No. 751, and reply by Serbia to RFA No. 1539.
[21] Motion, para. 12.
[22] Response, paras 15-16.
[23] Ibid.
[24] Motion, Confidential Appendix D.
[25] Ibid.

and Knin revealed that no death certificate had been entered for Witness 12.[26] In addition, the Croatian Ministry of Justice informed the Prosecution that the Croatian MUP has no information on whether Witness 12 is dead or alive, or that if he is alive, in which country he was currently residing.[27] The trial in the present case commenced on 11 March 2008.[28] The Prosecution's attempts to obtain the death certificate for Witness 12 preceded this date by over ten months. In light of the information made available to it, the Chamber does not find that the Prosecution did not act with reasonable diligence in its attempts to trace Witness 12. The Chamber is satisfied that Witness 12 is unavailable.

14. The Defence does not argue, and the Chamber does not find that there are manifest or obvious internal inconsistencies in the statement of Witness 12 or inconsistencies between that statement and the body of evidence already before the Chamber. Further, the statement of Witness 12 does not deal with evidence that goes to proof of acts and conduct of any of the Accused. For these reasons, and for reasons set out in paragraphs 6 through 8 above, the Chamber finds that the statement of Witness 12 can be admitted into evidence pursuant to Rule 92 *quater*.

Witness 14

15. The Prosecution submits that Witness 14 is unavailable to testify orally due to her "mental condition" and "emotional state".[29] A declaration by a Prosecution investigator, attached to her statement, describes that the witness, if called to testify "would break down crying and refuse to answer any questions".[30] The Čermak Defence submits that the OTP investigator has provided no evidence of a mental condition or instability, and that the use of Rule 92 *quater* for admission of evidence of this witness is not the appropriate channel.[31]

16. The Chamber does not discern, other than the mere fact that Witness 14 was highly emotional and appeared to the OTP investigator to be unable to cope with the stress of revisiting the events described in her statement, an established mental condition which would make this witness unavailable to give oral testimony within the meaning of Rule 92 *quater*. The Chamber, although mindful of the distress that the prospect of oral testimony may cause a particular witness, finds that such distress is a common feature of many witnesses, and

[26] Ibid.
[27] Ibid.
[28] Order Scheduling Start of Trial and Terminating Provisional Release, 6 February 2008.
[29] Motion, para 14.
[30] Motion, para. 14; Motion, Confidential Appendix D.

distinguishes between the "emotional state" of a witness and an established "mental condition". The Appeals Chamber has stated that for a witness to be "unavailable" within the meaning of Rule 92 *quater,* the witness must be *objectively* unable to attend a court hearing, either because he or she is deceased or because of a physical or mental impairment.[32] The Chamber, however, cannot establish that Witness 14 is objectively unable to attend a court hearing, and is therefore not satisfied of the unavailability of this witness for the purposes of Rule 92 *quater*. For these reasons the Chamber finds that the statement of Witness 14 cannot be admitted into evidence under Rule 92 *quater*.

17. The Chamber reminds the Prosecution that evidence admitted pursuant to Rule 92 *quater* 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 later stage of the trial. Until the Prosecution is in a position to affirm that protective measures are not required, the Chamber will provisionally admit this evidence under seal. The Prosecution is given fourteen days to report to the Chamber whether it will apply for protective measures.

18. For the foregoing reasons, and pursuant to Rule 89 (C) and Rule 92 *quater* of the Rules, the Chamber;

GRANTS the Motion in part;

ADMITS into evidence, **under seal**:

i. With respect to Witness 5:

   a. The statement of Witness 5, dated 21 January 1999 (0069-3300-0069-3304 and 0306-9605-0306-9609);

   b. The death certificate of Witness 5 (0613-9696);

ii. With respect to Witness 12:

   a. The statement of Witness 12, dated 26 May 1997 (0050-8165-0050-8171 and 0302-5427-0302-5433);

iii. With respect to Witness 28:

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[31] Response, para. 18.
[32] *Prosecutor v. Prlić et al.,* Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 48.

a. Statement of Witness 28, dated 1 April 1998 (0632-2520-0632-2527);

b. Supplemental statement of Witness 28, dated 12 July 2007 (0632-2528-0632-2530);

c. the Rule 92 *bis* attestation for Witness 28 statement and Declaration by Witness 28 (0632-2517-0632-2519);

DENIES admission into evidence of the statement of Witness 14 without prejudice;

REQUESTS the Prosecution to upload the admitted documents into e-Court;

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

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

Judge Alphons Orie
Presiding Judge

Dated this twenty-fourth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]