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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-06-90-T
Date: 16 January 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza
Acting Registrar: Mr John Hocking
Decision of: 16 January 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE ADMISSION OF STATEMENTS OF TWO WITNESSES AND
ASSOCIATED DOCUMENTS PURSUANT TO RULE 92 *QUATER*

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

Procedural history

1. On 13 November 2008, the Prosecution filed a motion requesting the admission into evidence of two witness statements of Witness 143 and one witness statement of Witness 172 pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ Furthermore, it requested the admission into evidence of four documents attached to Witness 143’s statements (“Associated Documents”), as well as the granting of leave to add one of these Associated Documents to its Rule 65 *ter* exhibit list.² On 27 November 2008, all three defence teams responded to the Motion, objecting to the admission of the witness statements and the Associated Documents.³

Applicable law

2. It is within the discretion of the Chamber to grant a motion to amend the Prosecution’s Rule 65 *ter* exhibit list if it is satisfied that to do so would be in the interests of justice.⁴ In exercising this discretion, the Chamber must balance the Prosecution’s duty to present the available evidence to prove its case with the right of the accused to a fair and expeditious trial and the right to have adequate time and facilities for the preparation of their defence.⁵ In this respect, the Chamber will consider whether the document is *prima facie* relevant and probative, whether the Prosecution has shown good cause to add the document at this stage, and the extent to which the new document places additional burden on the Defence.⁶

3. Rule 92 *quater* of the Rules 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

¹ Prosecution’s Third Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 13 November 2008 (“Motion”), paras 1, 15(a), Appendices D, G.

² *Ibid.*, paras 13-14, 15(b)(c).

³ Defendant Ante Gotovina’s Response to Prosecution’s Third Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 27 November 2008 (“Gotovina Response”), paras 2, 33; Response on Behalf of Ivan Čermak to the Prosecution’s Third Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 27 November 2008 (“Čermak Response”), paras 2, 23; Defendant Mladen Markač’s Response to Prosecution’s Third Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 27 November 2008 (“Markač Response”), paras 2, 28.

⁴ Decision on Prosecution’s Motion to Amend the Exhibit List, 14 February 2008 (“February Decision”), para. 16; Decision on Prosecution’s Second Motion to Amend the Exhibit List, 15 May 2008 (“May Decision”), para. 3; Decision on Prosecution’s Motion to Admit Documents into Evidence and to Add Two Documents to the Prosecution’s Rule 65 *ter* Exhibit List, 25 November 2008 (“November Decision”), para. 9.

⁵ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Motion for Leave to Amend the Prosecution’s Witness and Exhibit Lists, 9 July 2007, p. 6; May Decision, para. 3.

⁶ February Decision, para. 17; May Decision, paras 3, 8.

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* of the Rules, the Chamber must also be satisfied that the general requirements of admissibility under Rule 89 (C) of the Rules are met, namely that the evidence is relevant and has probative value.⁷

Discussion

Addition of one Associated Document to Rule 65 ter exhibit list

5. The Prosecution requests leave to add one Associated Document (United Nations Civilian Police (“UNCIVPOL”) incident report S2-95-498) to its Rule 65 *ter* exhibit list.⁸

6. The Chamber finds that the document is *prima facie* relevant to the allegations of wanton destruction, murder, and inhumane acts and cruel treatment in Counts 5-9 of the Indictment as it describes the burning of a house and a person in the hamlet of Đurići in Plavno village. Incident report S2-95-498 is a half-page document which relates to an incident in Plavno (Scheduled Killing 2), about which other evidence has already been presented by both parties.⁹ Because the document was issued by UNCIVPOL, being a UN agency and an independent authority, the Chamber considers it to have *prima facie* probative value.

7. The Prosecution did not state when it received the document and why it has not requested to have the document added to the Rule 65 *ter* exhibit list before. In the absence of

⁷ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, 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 (“First *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 (“Second *Haradinaj* Decision”), para. 6; Decision on the Admission of Statements of Two Witnesses Pursuant to Rule 92 *quater*, 24 April 2008 (“April Decision”), para. 4; Decision on the Admission of Statements of Seven Witnesses Pursuant to Rule 92 *quater*, 16 June 2008 (“June Decision”), para. 4; Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008 (“July Decision”), para. 4.

⁸ Motion, paras 3, 14.

⁹ *Cf.* testimonies of e.g. Jovan Grubor or Mile Đurić.

any such declaration, the Chamber is unable to find good cause shown for the Prosecution's request to have the document added to the Rule 65 *ter* exhibit list at this late stage of the proceedings. However, the Chamber will consider whether it is nevertheless in the interests of justice to allow the request. The Defence has not argued that the addition of the document would place any additional burden upon them. The primary purpose of the Rule 65 *ter* list is to give notice of the Prosecution's case so that the Defence can adequately prepare.¹⁰ The brevity of the report, and the fact that the Defence is very familiar with other evidence on the event that the document concerns, minimize the risk that the primary purpose would be jeopardized, which militates in favour of granting the Prosecution's request. The Chamber therefore finds that it is in the interests of justice to add the document to the Prosecution's Rule 65 *ter* exhibit list.

Witness Statements – Witness 143

8. The Prosecution submits that Witness 143 is unable to testify orally due to his bodily condition.¹¹ It reports that Witness 143 is suffering from Parkinson's disease, which is at a stage where he has developed severe symptoms, such as paresis, vestibular dysfunction, coordination disorders and speech deterioration.¹² In addition, an aneurysm has been detected in the witness's brain.¹³ A medical report supporting these conditions has been submitted by the Prosecution in Appendix E to the Motion. The witness self-reportedly also suffers from memory loss.¹⁴

9. The Defence for all three Accused draw attention to the fact that the medical report produced by the witness, supporting his medical condition, is dated March 2005.¹⁵ They accordingly consider themselves unable to make a firm submission as to the witness's unavailability.¹⁶ The Gotovina Defence further notes that the Prosecution has been aware of the witness's deteriorating health condition since March 2005 and was specifically informed by the witness one month prior to the start of trial that he would be unable to testify in these proceedings.¹⁷ The Gotovina Defence submits that the Prosecution should have notified all

¹⁰ February Decision, para. 22.

¹¹ Motion, paras 2, 9.

¹² *Ibid.*, para. 9, Appendix E.

¹³ *Ibid.*

¹⁴ See Motion, Appendix F, para. 3.

¹⁵ Gotovina Response, para. 26; Čermak Response, para. 10; Markač Response, para. 13.

¹⁶ *Ibid.*

¹⁷ Gotovina Response, para. 27.

parties of the possibility that the evidence of Witness 143 could be submitted through Rule 92 *quater* of the Rules, so that the Defence could have adjusted their cross-examination of other witnesses accordingly.¹⁸

10. The Chamber acknowledges the concerns of the Defence regarding the medical report. Generally, recent medical reports are imperative in assisting the Chamber in the assessment of the health condition of a witness. However, due to the severity of the witness's medical conditions, and considering that Parkinson's disease is a degenerative disorder¹⁹, the Chamber is satisfied that Witness 143 is unable to testify orally. The Chamber considers that the Defence is not prejudiced by the fact that the Prosecution did not notify the parties at the beginning of the trial that the evidence of Witness 143 might be submitted through Rule 92 *quater* of the Rules. Accordingly, the Chamber finds Witness 143 unavailable within the meaning of Rule 92 *quater* (A) of the Rules.

11. The Prosecution submits that the written statements of Witnesses 143 are reliable, since they are corroborated by other evidence and accompanied by the witness's acknowledgement that the two statements are true and correct to the best of his knowledge and recollection.²⁰ The corroborating evidence has been outlined by the Prosecution in Appendix A to the Motion.

12. The Gotovina and Čermak Defence list multiple *indicia* of unreliability with regard to Witness 143's statement, which are: (i) the statement of Witness 143 was taken by an OTP investigator and was not made under oath; (ii) the statement was not written by Witness 143 but summarised by an OTP investigator; (iii) Witness 143 has never been cross-examined with regard to the claims made in his statement; (iv) the first statement of 14 February 1996 contains no indication as to when the witness was interviewed, which languages were used during the interview, and whether a qualified interpreter was present; (v) the second statement of 8 June 1997 does not have an interpreter's declaration attached; (vi) the statements do not include all subjects upon which the witness could be expected to testify and are therefore incomplete and unreliable.²¹ One example of the latter is the Čermak Defence's objection relating to the fact that Witness 143's statements make no reference to actions taken by the witness after the discovery of burning houses in Grubori on 25 August

¹⁸ Ibid.

¹⁹ Black's Medical Dictionary, 39th edition, p. 414.

²⁰ Motion, para. 6.

²¹ Gotovina Response, para. 29; Čermak Response, paras 12, 16.

1995.²² The Gotovina and Čermak Defence further submit that in light of a significant amount of corrections, amendments and further clarifications of statements of Prosecution witnesses in this trial, it is imperative that the Chamber takes a particularly cautious approach to the admission of witness statements in the absence of oral testimony.²³ The Markač Defence raises similar objections with regard to the reliability of the statements and, more specifically, submits that the witness's allegation that members of the Special Police committed crimes in Grubori, goes directly to the acts and conduct of the Accused.²⁴

13. 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.²⁵

14. As the Defence point out, the statements were not given under oath, the first statement does not mention the languages used during the interview or the presence of an interpreter, the first statement bears no signs of an interpreter's activity, and the witness has not been subject to cross-examination. On the other hand, the statements have been signed by the witness with accompanying acknowledgments that the statements are true to the best of his recollection. In his second statement, the witness repeatedly and consistently refers to the content of his first statement. Furthermore, the information contained in his statements does not show manifest or obvious internal inconsistencies and, most importantly, relates to events about which the Chamber has heard other witnesses testify.²⁶ As for the Defence's concerns regarding incompleteness, in particular concerning the Grubori incident, the Chamber does not consider the incompleteness to be so substantial as to justify a finding of unreliability. Moreover, Witness 143's statements will be weighed in light of other evidence so as to give a

²² Čermak Response, para. 16; see also Markač Response, para. 16.

²³ Gotovina Response, para. 17; Čermak Response, para. 13.

²⁴ Markač Response, paras 15-18.

²⁵ First *Haradinaj* Decision, para. 8; Second *Haradinaj* Decision, para. 8; April Decision, para. 6; June Decision, para. 6; July Decision, para. 5.

²⁶ See *e.g.* testimonies of Phil Berikoff, Edward Flynn and Lennart Widén.

complete picture. A reference to the Special Police as potential perpetrators does not automatically implicate any of the Accused. Rather, the witness's evidence is of a broader nature and might help the Chamber to get a better understanding of the events alleged in the Indictment. The Chamber is therefore satisfied that the witness statements do not contain any evidence going to proof of acts and conduct of an Accused. The Defence's concerns about a significant amount of corrections of statements of Prosecution witnesses in this case, even if taken to be true, would not in itself render the witness statements of Witness 143 unreliable. The Chamber therefore finds the statements of Witness 143 reliable for the purposes of Rule 92 *quater* of the Rules.

15. The witness's position within UNCIVPOL makes him an important eyewitness to the circumstances and events in Knin in August 1995. The witness had authority and clearance to make observations on circumstances and events in the area that are relevant to the Indictment. Since reliability is a component part of the probative value of a piece of evidence, there is no need to re-examine this aspect of the probative value where determination of reliability has already been made within the context of Rule 92 *quater* (A) (ii) of the Rules.²⁷ For these reasons, the Chamber finds that the requirements of Rule 89 (C) of the Rules are satisfied.

16. In conclusion, the Chamber finds that the requirements of Rule 92 *quater* of the Rules are met with regard to Witness 143 and that his two witness statements may be admitted into evidence.

Associated Documents

17. The Prosecution requests to have four Associated Documents admitted into evidence.²⁸ The documents it seeks to admit are UNCIVPOL incident reports S2-95-484 dated 24 August 1995 [65 *ter* no. 4131, 0037-9694-0037-9694], S2-95-589 dated 8 September 1995 [65 *ter* no. 501, 0035-2468-0035-2468], S2-95-709 dated 1 October 1995 [65 *ter* no. 4268, 0036-0589-0036-0589], and S2-95-498 dated 26 August 1995 [0037-9701-0037-9701]. The Prosecution argues that they form part of the witness's statement, without which his evidence will be incomplete given that they are specifically referred to in the statements.²⁹

²⁷ First *Haradinaj* Decision, para. 11; Second *Haradinaj* Decision, para. 6; April Decision, para. 9; July Decision, para. 8.

²⁸ Motion, paras 3, 11.

²⁹ *Ibid.*, paras 12, 14.

18. The Čermak and Markač Defence object to the admission into evidence of the four Associated Documents without specifically addressing them. With regard to incident report S2-95-484, the Gotovina Defence argues that the information contained therein has already been refuted through cross-examination of Witness 69.³⁰ With regard to the other reports, the Gotovina Defence submits that the Prosecution should have sought to tender them through a UNCIVPOL witness testifying orally so that the reports' reliability could have been tested through cross-examination.³¹

19. The Chamber finds that the documents are relevant to the allegations of plunder of public or private property, wanton destruction, murder, and inhumane acts and cruel treatment in Counts 4-9 of the Indictment. Because the documents were issued by UNCIVPOL, being a UN agency and an independent authority, the Chamber considers them to have probative value.

20. The Chamber recalls its decision of 3 November 2008, in which it admitted documents which constituted an integral part of the witness statement and which would assist the Chamber in fully understanding the witness's evidence.³² Witness 143's two statements make numerous references to the incident reports that the Prosecution seeks to admit into evidence. The Chamber is therefore satisfied that the Associated Documents constitute an integral part of Witness 143's statements and are necessary for a proper understanding of the latter. The Chamber is further satisfied that it is appropriate to tender the four incident reports through Witness 143, considering his position within UNCIVPOL and that he was the drafter of one of the reports. The fact that Witness 69 refuted the evidence contained in incident report S2-95-484 in his oral testimony before the Chamber does not prevent the Chamber from admitting the report into evidence. On the contrary, admission of the report would help the Chamber to properly understand Witness 69's refutation and make the evidentiary background more complete. The Chamber will look at every piece of evidence, including incident report S2-95-484, in light of other evidence before it. The Chamber therefore finds that the four incident reports may be admitted into evidence.

³⁰ Gotovina Response, para. 31 (the submission makes an incorrect reference to Witness 11).

³¹ Ibid., para. 32.

Witness Statement - Witness 172

21. The Prosecution submits that Witness 172 is unable to testify orally due to his bodily condition.³³ It reports that the witness is suffering from a tumour which has caused him to lose about 20 kilograms.³⁴ In addition, the witness has undergone heart bypass surgery.³⁵ Supporting documentation for these conditions, including the medical recommendation that stressful situations and air travel should be avoided, has been submitted by the Prosecution in Appendix B to the Motion. The witness also declared to the Prosecution that the stress associated with appearing as a witness in the trial proceedings would significantly deteriorate his health.³⁶ The Prosecution also draws attention to the fact that Witness 172 has been the subject of previous filings with regard to a motion for evidence to be presented via video-conference link.³⁷ The Chamber granted the motion on 10 July 2008 with reasons given on 17 July 2008.³⁸ The Prosecution submits that the witness's health has deteriorated since July 2008 and that he is no longer in a position to give testimony via video-conference link.³⁹

22. The Defence for all three Accused submit that the medical report of 8 September 2008 does not show that the medical condition of Witness 172 has deteriorated since July 2008.⁴⁰ The Gotovina Defence adds that the tumour in Witness 172's colon appears to have been detected already in 2005.⁴¹ Furthermore, the Gotovina Defence states that it does not follow from the medical report that the 20 kilogram weight loss occurred in 2005 or more recently, in particular after July 2008.⁴²

23. In July 2008, the Chamber found that even though Witness 172 was unable to come to the Tribunal to testify, he was able to testify via video-conference link pursuant to Rule 81 *bis* of the Rules ("July Video-Link Decision").⁴³ The Chamber does not question the substantive findings of the medical reports presented by the Prosecution. Rather, it must consider whether Witness 172's condition has worsened since July 2008, so as to render him unable to testify via video-conference link. While a new medical report dated 8 September

³² Third Decision on Rule 92 *bis* Witnesses, 3 November 2008, para. 17.

³³ Motion, paras 2, 7.

³⁴ *Ibid.*, para. 7.

³⁵ *Ibid.*

³⁶ Motion, Appendix C, paras 4-5.

³⁷ Motion, footnote 3; see Prosecution's Motion for Evidence to be Presented via Video-Conference Link and Submission of Rule 92 *ter* Statement, Witness 172, 8 July 2008.

³⁸ T. 6288, 6751-6754.

³⁹ Motion, footnote 3.

⁴⁰ Gotovina Response, para 10; Čermak Response, para. 20; Markač Response, para. 21.

⁴¹ Gotovina Response, para. 12.

⁴² *Ibid.*

2008 is attached to the Motion, the medical conditions not covered by the earlier report, dated 14 June 2008, are a tumour, which was already known as far back as 2005 according to the 8 September 2008 report, and a 20 kilogram weight loss without any indication as to when the weight loss occurred. Furthermore, the initial recommendation contained in the June 2008 report, that the witness should avoid stressful situations, is not reflected in the medical report of 8 September 2008. Therefore, the Chamber finds that the Prosecution has not shown that the medical condition of Witness 172 has worsened since the Chamber's July Video-Link Decision. The Chamber hence finds that the Prosecution has not demonstrated that Witness 172 is unable to testify orally pursuant to Rule 92 *quater* of the Rules.

Disposition

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

GRANTS leave to add to the Prosecution's Rule 65 *ter* exhibit list, UNCIVPOL incident report S2-95-498 dated 26 August 1995 [0037-9701-0037-9701];

ADMITS into evidence, **under seal**, the two witness statements of Witness 143 (dated 14 February 1996 and 8 June 1997);

ADMITS into evidence, **under seal**, the following Associated Documents:

- (a) UNCIVPOL incident report S2-95-484 dated 24 August 1995 [65 *ter* no. 4131, 0037-9694-0037-9694];
- (b) UNCIVPOL incident report S2-95-589 dated 8 September 1995 [65 *ter* no. 501, 0035-2468-0035-2468];
- (c) UNCIVPOL incident report S2-95-709 dated 1 October 1995 [65 *ter* no. 4268, 0036-0589-0036-0589]; and
- (d) UNCIVPOL incident report S2-95-498 dated 26 August 1995 [0037-9701-0037-9701].

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

⁴³ T. 6288, 6751-6754.

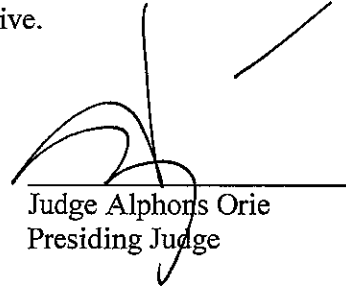
avoiding identification of other witnesses with protective measures who have testified, or who will do so at a later stage of the trial. Until the Prosecution is in a position to affirm that protective measures are not required, the Chamber has provisionally admitted this evidence under seal. The Prosecution is given 14 days to report to the Chamber whether it will apply for protective measures.

DENIES, without prejudice, the admission into evidence of the statement of Witness 172 pursuant to Rule 92 *quater* of the Rules;

REQUESTS the Prosecution to upload the admitted documents into eCourt;

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 Orié
Presiding Judge

Dated this 16th day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]