

4-06-90-T
D 2056 - D 2049
05 March 2009

2056
KB

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: 5 March 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: 5 March 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE ADMISSION OF A WITNESS STATEMENT 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 27 November 2008, the Prosecution filed a motion requesting the admission into evidence of one written statement of Witness 43 pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ On 11 December 2008, the Gotovina Defence responded, objecting to the Motion.² The Markač Defence responded, joining the Gotovina Response, on 11 December 2008.³ The Čermak Defence joined the Gotovina Response on 12 December 2008, one day late pursuant to Rule 126 *bis* of the Rules, yet the Chamber will consider the submission nonetheless.⁴
2. On 3 November 2008, the Chamber had decided that Witness 43 should be called for cross-examination and accordingly denied a Prosecution motion for admission into evidence of his statement pursuant to Rule 92 *bis* of the Rules.⁵
3. On 26 February 2009, the Chamber invited the Gotovina Defence to tender additional documents of an earlier Gotovina Defence submission pertaining to Witness 43.⁶ The requested documents and two additional documents were tendered on 3 March 2009. The Prosecution stated that it would not object unless the Motion were to be denied.⁷ Similarly, the Gotovina Defence expressed that their tendering of the documents was contingent on the fact that the Motion were to be granted.⁸

Applicable law

4. 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 reason of bodily or mental condition unable to testify orally may be admitted,

¹ Prosecution’s Fourth Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 27 November 2008 (“Motion”), paras 1, 12.

² Defendant Ante Gotovina’s Response to Prosecution’s Fourth Motion for Admission of Evidence Pursuant to Rule 92 *quater* of Witness 43, 11 December 2008 (“Gotovina Response”), paras 2, 31.

³ Defendant Mladen Markač’s Joinder to Defendant Ante Gotovina’s Response to Prosecution’s Fourth Motion for Admission of Evidence Pursuant to Rule 92 *quater* (Witness 43), 11 December 2008 (“Markač Joinder”), para. 2.

⁴ Ivan Čermak’s Response to Prosecution’s Fourth Motion for Admission of Evidence Pursuant to Rule 92 *quater* (Witness 43), 12 December 2008 (“Čermak Joinder”), para. 2.

⁵ Third Decision on Rule 92 *bis* Witnesses, 3 November 2008, paras 14, 21.

⁶ T. 16816-16817.

⁷ T. 17080.

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.

5. In addition to the conditions set out in Rule 92 *quater* of the Rules, the Chamber must also ensure that the general requirements of admissibility under Rule 89 (C) of the Rules are satisfied, namely that the evidence is relevant and has probative value.⁹

Discussion

6. The Prosecution submits that the Chamber's decision of 3 November 2008, denying admission of Witness 43's statement into evidence pursuant to Rule 92 *bis* of the Rules does not in itself bar admission under Rule 92 *quater* of the Rules and cites Tribunal case-law in support of its position.¹⁰ It submits that Witness 43 is unable to testify orally due to the fact that he is deceased.¹¹ A death certificate of Witness 43 is attached in Appendix B to the Motion. None of the Defence teams dispute the fact that Witness 43 is deceased and, accordingly, unavailable.¹² The Chamber is satisfied that Witness 43 is unavailable within the meaning of Rule 92 *quater* (A) of the Rules.

7. The Prosecution submits that Witness 43's statement is reliable as it is corroborated by other evidence, as well as accompanied by the witness's acknowledgement that the

⁸ Ibid.

⁹ *Prosecutor v. Haradinaj et al.*, Trial Chamber, 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.*, Trial Chamber, 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 2008 Decision"), para. 4; Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008 ("July 2008 Decision"), para. 4; Decision on the Admission of Statements of two Witnesses and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009 ("January 2009 Decision"), para. 4.

¹⁰ Motion, para. 5.

¹¹ Motion, paras 2, 7.

¹² Gotovina Response, para. 7; Čermak Joinder, para. 2; Markač Joinder, para. 2.

statement is true and correct to the best of his knowledge and recollection.¹³ The corroborating evidence relied upon by the Prosecution is contained in footnote 6 of its Motion, making reference to the testimonies of Witnesses 17, 57, 98, 127, 128, and 154.¹⁴ The Prosecution does concede to one inconsistency in Witness 43's statement, relating to the status of his son as a member of the military at the time of his death, but states that it is willing to resolve this inconsistency in the Defence's favour by stipulating that the witness's son was a member of an armed group at the time of his death.¹⁵

8. The Gotovina Defence objects to the admission into evidence of the witness statement of Witness 43 on grounds of unreliability and lists multiple *indicia* of unreliability in relation to Witness 43's statement: (i) documentary evidence contradicts the representations of Witness 43 in his statement; (ii) obvious and manifest inconsistencies in Witness 43's statement; (iii) such contradictory evidence undermines the Rule 92 *bis* attestation of Witness 43; (iv) the statement was not written by Witness 43 but summarized by an OTP investigator; and (v) Witness 43 has never been cross-examined with regard to the claims made in his statement.¹⁶

9. The Gotovina Defence submits that Witness 43's statement is unreliable and contradicts other documentary evidence, in particular in relation to the following facts: the assertion that Witness 43's son wore civilian clothing at the time of his death¹⁷; the status of the perpetrators¹⁸; the exact location of the body¹⁹; the number of shots Witness 43 heard²⁰; the exact date of the removal of Witness 43's son's body²¹; who identified the body²²; the personal effects found on the body²³; the status of Witness 43's son in the ARSK (Army of the Republic of Serb Krajina)²⁴; and the claim that both of the witness's son's arms were handcuffed in the front.²⁵ The Gotovina Defence further submits that in light of what it asserts are a significant amount of corrections, amendments, and further clarifications of statements of Prosecution witnesses in this trial to date, it is imperative that the Chamber

¹³ Motion, paras 2, 7.

¹⁴ The Motion makes an incorrect reference to Witness 70.

¹⁵ Motion, paras 9-11.

¹⁶ Gotovina Response, paras 9-29.

¹⁷ *Ibid.*, paras 11-12.

¹⁸ *Ibid.*, para. 27.

¹⁹ *Ibid.*, para. 13.

²⁰ *Ibid.*, paras 14-15.

²¹ *Ibid.*, paras 16-18.

²² *Ibid.*, para. 20.

²³ *Ibid.*, paras 19, 21.

²⁴ *Ibid.*, paras 22-25.

²⁵ *Ibid.*, para. 26.

takes a particularly cautious approach to the admission of witness statements in the absence of oral testimony, and also submits that the admission of the statement here would result in an incomplete and misleading account of an allegation of murder.²⁶

10. When examining the reliability of the evidence of an unavailable witness under Rule 92 *quater* of the Rules, 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.²⁷

11. A denial of a motion to admit a particular witness statement under Rule 92 *bis* of the Rules and the order to call that witness for cross-examination does not immediately put such witness solely within the purview of Rule 92 *ter* of the Rules. A witness may later become unavailable, whereby Rule 92 *quater* of the Rules then becomes the only possible avenue of admission. Rules 92 *bis* and 92 *quater* of the Rules are, therefore, not mutually exclusive in the sense that the denial of a motion concerning the former necessarily bars any later admission of a witness statement under the latter.²⁸

12. The witness statement was neither given under oath nor has been subjected to cross-examination. On the other hand, the Chamber has previously admitted other documentary evidence relating to the specific killing incident described in the witness statement, such as P1397, P1597, P2071, and D382. Furthermore, the witness signed or initialled each page of his statement, as well as 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.²⁹ This was also confirmed by an interpreter approved by the Registry.³⁰ Moreover, Witness 43's

²⁶ *Ibid.*, paras 29-30.

²⁷ First *Haradinaj* Decision, para. 8; Second *Haradinaj* Decision, para. 8; April 2008 Decision, para. 6; July 2008 Decision, para. 5; January 2009 Decision, para. 13.

²⁸ *Cf. Prosecutor v. Milutinović et al.*, Trial Chamber, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007, paras 2-3, 10; *Prosecutor v. Prlić et al.*, Trial Chamber, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvić), 14 January 2008, paras 2, 9.

²⁹ Motion, Confidential Appendix A.

³⁰ *Ibid.*

statement was certified pursuant to Rule 92 *bis* (B) of the Rules.³¹ The Chamber also finds that there are no manifest or obvious internal inconsistencies in Witness 43's statement. The Defence's concerns about what it views to be a significant amount of corrections of statements of Prosecution witnesses in this case, even if taken to be true, do not, in themselves, render a particular witness statement unreliable.³²

13. With regard to the *indicia* of unreliability asserted by the Gotovina Defence, the Chamber considers the exact location of where the body was found as well as the exact number of shots fired, a matter of less significance and one that may be explained by an inaccuracy of perception or a faulty memory, which does not affect the reliability of the statement as a whole. Similarly, the Chamber finds that inconsistencies with regard to the exact date of the removal of Witness 43's son's body represent an acceptable lack of time awareness. With regard to who exactly identified the body of Witness 43's son, the Chamber recognises that a Report on Facts of Death (P2071) corroborates the witness statement, and does not necessarily contradict a Details of Identified Body Report (P1397), which seems to date from the 1990s and not 2002, when the official identification took place. Moreover, the statement that his son's wristwatch led to his identification in Zagreb, something that does not find corroboration in other documents, is clearly marked by the witness as hearsay, as he did not personally go to Zagreb.

14. With regard to the claim that both of Witness 43's son's arms were handcuffed in the front, the Chamber finds that the presence of handcuffs on the victim is consistent with the witness's memory and that whether only one arm or both arms were handcuffed may be explained by events not observed by the witness. The Chamber considers that the witness's statement that the alleged perpetrators were HVO soldiers, if indeed contradicted by other evidence before the Chamber as alleged by the Gotovina Defence, could represent an inaccuracy in the witness's observations or recollections within reasonable limits. As regards the status of the witness's son, the Chamber, in light of other evidence before it, acknowledges a contradiction with the witness statement. Furthermore, the Prosecution also conceded to the fact that other documentary evidence prevails over the witness statement in this respect.³³ The Chamber finds that this inconsistency with other documentary evidence is not such as to render the statement as a whole unreliable. In the Chamber's view the *indicia* of unreliability brought forth by the Gotovina Defence, taken as a whole, do not oppose

³¹ Ibid.

³² See January 2009 Decision, para. 14.

admission into evidence of the witness statement. The Chamber therefore finds that Witness 43's statement is reliable for the purposes of Rule 92 *quater* of the Rules.

15. The statement of Witness 43 describes the circumstances surrounding the death of his son. The witness's presence in the vicinity of the alleged killing incident makes him an important witness with regard to this incident. The witness is in a position to describe the precursors and aftermath of the alleged killing, as well as some of the circumstances surrounding it. The statement offers evidence of crimes allegedly committed within the Indictment period in the Krajina region and relates to Counts 1, 6, and 7 of the Indictment. Therefore, the Chamber finds that Witness 43's statement is relevant. 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.³⁴ 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 43 and that his statement may be admitted into evidence.

17. In order to rely on an evidentiary background that is as complete as possible, the Chamber also found that three of the additionally tendered documents (D1455 MFI, D1456 MFI, and D1457 MFI) are relevant and probative and can be admitted into evidence as associated exhibits. One other documents (D1458 MFI) was not specifically requested and does not assist the Chamber in determining the evidentiary picture of Witness 43.

Disposition

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

ADMITS into evidence, **under seal**,

- a. the written statement of Witness 43, dated 9 September 2003 [02791545-02791549 and 02791551-02791555];
- b. the Rule 92 *bis* attestation for Witness 43's statement, dated 13 September 2003 [02791542-02791544];

³³ See Motion, paras 9-11.

- c. the Rule 92 *bis* declaration by Witness 43, dated 13 September 2003 [02791550];
- d. the death certificate of Witness 43, dated 3 October 2007 [06445892 and 06445892 ET];
- e. D1455;
- f. D1456;
- g. D1457.

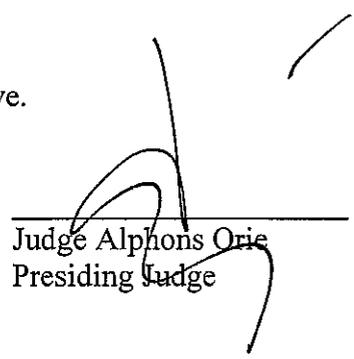
REMINDS the Prosecution that evidence admitted pursuant to Rule 92 *quater* of the Rules is public unless a request for protective measures in relation to unavailable witnesses has been received and granted. A request for protective measures may be made for the purpose of avoiding identification of other witnesses with protective measures who have testified, or who will do so at a later stage of the trial. Until the Prosecution is in a position to affirm that protective measures are not required, the Chamber provisionally admits this evidence under seal. The Prosecution is given seven days to report to the Chamber whether it will apply for protective measures.

REQUESTS the Prosecution to upload the admitted documents into eCourt within seven days of the filing of this decision;

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

DENIES admission of D1458 MFI and **REQUESTS** the Registrar to adjust the exhibit status of D1455, D1456, D1457, and D1458 in eCourt accordingly.

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



Judge Alphons Orie
Presiding Judge

Dated this fifth day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁴ First *Haradinaj* Decision, para. 11; Second *Haradinaj* Decision, para. 6; April 2008 Decision, para. 9; July 2008 Decision, para. 8; January 2009 Decision, para. 15.