



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-98-29/1-T
Date: 19 April 2007
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Decision of: 19 April 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON PROSECUTION'S MOTION FOR
ADMISSION OF WITNESS STATEMENTS PURSUANT
TO RULE 92 *quater***

The Office of the Prosecutor:

Mr. Alex Whiting
Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

I. INTRODUCTION

1. Trial Chamber III 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 seised of the Prosecution’s Motion For Admission of Witness Statements Pursuant to Rule 92 *quater*, with Confidential Annexes A, B, C, D, E, F, G, H, I and J, filed confidentially on 13 March 2007 (“Motion”).

II. SUBMISSIONS

2. In the Motion, the Prosecution seeks to have admitted into evidence the written statements of witnesses W-16, W-23, W-49, W-60, W-72, W-89 and W-104 (“Statements”) and their associated exhibits pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ According to the Prosecution, all the witnesses subject to the Motion are listed in its Rule 65 *ter* Witness List.²

3. The Prosecution submits that the witnesses are unable to testify orally either because they are deceased³ or, in relation to one witness, because of her bodily and mental condition.⁴ In support of its submissions, the Prosecution attaches death certificates for the deceased witnesses and an OTP Investigator’s Information Report regarding the medical condition of one of the witnesses.⁵ The Prosecution argues that the Statements and the associated exhibits are reliable, since they are corroborated by other evidence and accompanied by the witness’s acknowledgement that the Statements are true and correct to the best of the witness’s knowledge and recollection.⁶ Further, the Prosecution argues that the Statements have probative value and although Rule 92 *quater* permits the admission of evidence going to the proof of the acts and conduct of the Accused, none of the Statements speak to the acts and conduct of the Accused; rather, they contain crime base evidence that will supplement *viva voce* testimony that will or has been given by other witnesses during the Prosecution’s case.⁷

¹ Motion, para. 1 and 22.

² Motion, para. 1, with reference to the Prosecution Notice of Filing of Its Revised Updated Rule 65 *ter* Witness List and Witness Summaries, with Confidential Annexes A & B, 19 January 2007.

³ Witnesses W-16, W-23, W-60, W-72, W-89 and W-104, see Motion, para. 8.

⁴ Witness W-49, see Motion, para. 9.

⁵ Confidential Annex A and B to the Motion.

⁶ Motion, para. 10 and 11.

⁷ Motion, paras 12-20.

4. The Defence, in its response of 27 March 2007,⁸ objects to the admission of the statements of witnesses W-16 and W-104 based on their relevance for the Indictment. With regard to witness W-49, the Defence submits that the Prosecution has failed to submit a medical certificate in support of its request and that the Prosecution therefore has not shown that the witness is unavailable to testify. The Defence also argues that the testimony of witness W-49 is very important for the Prosecution's case and that the Defence wishes to cross-examine the witness, at least via video-conference link. With regard to witnesses W-60 and W-72, the Defence states that their testimony contain information about the origin of fire and other important issues for the Prosecution's case and submits that it will accept the admission of the testimonies only if those parts are redacted. The Defence does not object to the admission of the written statements of witnesses W-23 and W-89.

5. The Prosecution replied to the Response on 29 March 2007.⁹

III. DISCUSSION

1. The Prosecution's 65 ter Witness List

6. On 31 January 2006, the Prosecution filed its "List of Witnesses the Prosecution intends to call Pursuant to Rule 65 *ter* (E) (ii)".¹⁰ On 5 December 2007, the Prosecution, in its Motion Seeking Leave to Amend Rule 65 *ter* Witness List ("Motion to Amend the Witness List"), asked for leave to drop 54¹¹ witnesses from and to add fifteen new witnesses to its 65 *ter* Witness List.¹² The reason for the removal of those witnesses was *inter alia* that those witnesses were deceased, had refused to testify or were scheduled to testify to incidents which the Prosecution did not seek to prove at trial.¹³ In a footnote to the Motion to Amend the Witness List, the Prosecution mentions that, "[f]or six of the deceased witnesses, the Prosecution intends to file a motion to admit their statements pursuant to Rule 92 *quater*."¹⁴ On 21 December 2006, the Trial Chamber granted the Prosecution's request to drop the witnesses and consequently ordered the Prosecution to remove the proposed witnesses from the witness list.¹⁵ Following this Decision, the Prosecution filed its Notice of Filing

⁸ Conclusion en Response de la Requete du Procureur aux Fins D'Amission des Declarations Ecrites de Temoins (Article 92 *quater* du Règlement de Procédure et de Prevue) ("Response").

⁹ Prosecution Reply to Conclusion en response de la requete du Procureur aux Fins D'Amission des Declarations Ecrites de Temoins (Article 92 *quater* du Règlement de Procédure et de Prevue).

¹⁰ Prosecution's Submission of Pre-Trial Filings pursuant to Rule 65 *ter* and Motion for Non-Disclosure with Annexes A to C, 31 January 2006.

¹¹ The number of dropped witnesses was later changed to 53, see Corrigendum to Prosecution Motion Seeking Leave to Amend Rule 65 *ter* Witness List, 8 December 2006, para. 5.

¹² Prosecution Motion Seeking Leave to Amend Rule 65 *ter* Witness List, 5 December 2006.

¹³ Motion to Amend the Witness List, paras 5 and 8.

¹⁴ *Ibid.*, p. 4, footnote 12.

¹⁵ Decision on Prosecution Motion to Amend Its Rule 65 *ter* List, 21 December 2006, ("Decision to Amend the Witness List"), p. 7.

of its Revised Updated Rule 65 *ter* Witness List, reflecting the reduction of witnesses.¹⁶ In the Notice, the Prosecution noted that it had further identified and added to the witness list *inter alia* “the witnesses whose evidence the Prosecution is seeking to introduce under Rule 92 *quater*”.¹⁷ The Prosecution further clarified, again in a footnote, that a separate Rule 92 *quater* motion will be filed in due course with respect to these witnesses.¹⁸ Consequently, in the revised updated Rule 65 *ter* list, the Prosecution added five of the witnesses (W-16, W-23, W-60, W-72 and W-104) who had already been dropped pursuant to the Trial Chamber’s Decision to Amend the Witness List.

7. The Trial Chamber notes that five of the witnesses, the admission of whose statements the Prosecution seeks in the current Motion, namely witnesses W-16, W-23, W-60, W-72 and W-104, were included among the 53 witnesses that the Prosecution has already dropped pursuant to its own request.

8. The Trial Chamber notes that pursuant to Rule 65 *ter* (E) of the Rules, the Prosecution shall within certain time-limits set by the pre-trial Judge file the list of witnesses it intends to call with *inter alia* “the total number of witnesses and the number of witnesses who will testify against each accused and on each count” and “an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal”.¹⁹

9. It is clear from the Rule that a 65 *ter* Witness List shall include *all* witnesses the Prosecution intends to call, including witnesses who will testify pursuant to Rule 92 *bis* and *quater*. The Prosecution, upon its own initiative, asked to amend its 65 *ter* Witness List and to drop certain witnesses in order to reduce the total hours of *viva voce* evidence in the case.²⁰ In this regard, the Trial Chamber notes its previous finding that “the Accused will not be prejudiced if the Prosecution’s request to remove witnesses from the witness list is granted. The Defence will not be required to expend additional time or other resources if the witness list is so amended” and, in particular, “the Defence will no longer have to respond to the evidence of the witnesses who are to be removed from the witness list.”²¹ There is no doubt as to the legal consequences of the Trial

¹⁶ Prosecution Notice of Filing of its Revised Updated Rule 65 *ter* Witness List and Witness Summaries, with confidential Annexes A & B, 19 January 2007 (“Notice”).

¹⁷ Notice, para. 3 (ii).

¹⁸ “As anticipated in the Motion to amend the witness list (at footnote 12, p. 4), a separate Rule 92 *quater* motion will be filed in due course with respect to these witnesses.”, Notice, p. 2, footnote 9.

¹⁹ Rule 65 *ter* (E) (ii) (d) and (e).

²⁰ Motion to Amend the Witness List, paras 1 and 2.

²¹ Decision to Amend the Witness List, para. 12.

Chamber's Decision to Amend the Witness List, since it clearly states that "[t]he 53 witnesses identified in the Motion shall be removed from the witness list."²²

10. Furthermore, it is of crucial importance that the Parties, when asking for relief or amendments, use the channels provided for by the Rules. Hence, had it wished to add the five dropped witnesses onto its 65 *ter* Witness List, the Prosecution should have filed a motion pursuant to Rule 73 *bis* (F) of the Rules seeking such relief. It may also be noted that expressing an intention to file a motion in a footnote is not sufficient.

11. The Trial Chamber finds that the Prosecution has not shown good cause for the addition to its Rule 65 *ter* Witness List of the five dropped witnesses, and the Motion with regard to the already dropped witnesses W-16, W-23, W-60, W-72 and W-104, is dismissed.

12. The Trial Chamber will now consider whether the statements and documents relating to witnesses W-49 and W-89 should be admitted into evidence pursuant to Rule 92 *quater*.

2. Admission of the Statements of W-49 and W-89 pursuant to Rule 92 *quater*

13. According to Rule 92 *quater* (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. 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.²³

14. Evidence admitted pursuant to Rule 92 *quater*, contrary to evidence admitted pursuant to Rule 92 *bis*, may go to proof of acts and conduct of an accused as charged in the Indictment, although this may be a factor against the admission of such evidence.²⁴ The Trial Chamber recalls its "Decision on Prosecution Motion for Admission of Witnesses Written Statements Pursuant to Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence with Confidential Annex A", of 27 February

²² Ibid., p. 7.

²³ Rule 92 *quater* (B)

²⁴ Ibid., para. 8.

2007, in which the Trial Chamber set out the law on admission of statements pursuant to Rule 92 *bis* of the Rules and in particular the analysis of the criteria “acts and conduct of an accused”.²⁵

15. In addition, any evidence admitted pursuant to Rule 92 *quater* must satisfy the fundamental requirements for the admissibility of evidence, as set out in Rule 89 (C) and (D), namely that the evidence is relevant and has probative value.²⁶

16. Witness W-89 was a ballistic expert who investigated one of the scheduled sniping incidents mentioned in the Indictment. However, it is clear from the death certificate submitted by the Prosecution that witness W-89 is deceased and hence is unavailable to testify.²⁷ The evidence contained in witness W-89’s statements is relevant and has probative value, and the witness certified that the statements were true and correct to the best of that witness’s knowledge and recollection.²⁸ The Trial Chamber notes that the Defence did not object to the admission of the statements of witness W-89. However, part of the testimony of W-89 and the Official Report associated with it, concern the direction of fire of the incident.²⁹ As this information pertains to a critical issue of the Prosecution’s case, the statement and the Official Report will only be admitted into evidence pursuant to Rule 92 *quater* in a redacted form, expunging the following sentences from the statement of 20 November 1995: “[w]hen there is said in reports of colleagues the area of Grbavica, we mean a direction of fire. From that area was coming a lot of sniper fire from the aggressor’s positions.”³⁰ and the following parts of the Official Report: “[f]rom aggressor positions at the Grbavica location [...]”³¹ and “[f]rom aggressor positions in the Grbavica area [...]”.³² The Trial Chamber finds that admission of the statement and the Official Report in their redacted form will not cause any prejudice to the Accused and therefore admits the statement of witness W-89 and the associated Official Report, contained in Annex H, in redacted form as set out above, and admits the statement of the witness contained in Annex I to the Motion.

17. With regard to witness W-49, the Trial Chamber notes that the Defence has objected to the admission of this witness’s statements. The Defence submits that there is no medical certificate

²⁵ See paras 8-11 in the Decision on Prosecution Motion for Admission of Witnesses Written Statements Pursuant to Rules 92 *bis* and *ter* of the Rules of Procedure and Evidence with Confidential Annex A, 27 February 2007.

²⁶ See e.g., *Prosecutor v. Stanislav Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 (“*Galić* Appeal Decision), para. 12, in which the Appeals Chamber considered that the “intention of Rule 92 *bis* ... [was] to qualify the previous preference in the Rules for ‘live, in court’ testimony, and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable”.

²⁷ Annex A to the Motion.

²⁸ Annexes H and I to the Motion.

²⁹ Statement 20 November 1995, p. 3, para. 3 and Official Report, p.1, para 1 and p. 2, para. 1.

³⁰ Statement 20 November 1995, p. 3, para. 3, lines 15-17.

³¹ Official Report, p.1, para 1, lines 2-3.

supporting the Prosecution's submissions and that the testimony of witness W-49 contains evidence which is very important for the Prosecution's case. The Trial Chamber notes the Information Report attached to the Motion, in which an Investigator from the Prosecution who met the witness in May 2006 explains that the witness needs daily medical care and that she never leaves the house. During the meeting with the Investigator, the witness continually mumbled and was not able to carry on a coherent conversation through the interpreter.³³ Witness W-49 was to testify about one of the scheduled sniping incidents mentioned in the Indictment. However, the Trial Chamber notes that the testimony of W-49 concerns the location of the origin of fire of the incident and includes an opinion about the existence of military establishments in that area.³⁴ This information pertains to a critical issue of the Prosecution's case. Recalling the provision in Rule 92 *quater* (B) of the Rules that 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 and noting in particular the provisions set out in Rule 89 (D) of the Rules and the objections made by the Defence, the Trial Chamber finds that it would not be in the interests of justice to allow the Motion with regard to witness W-49. The Trial Chamber therefore denies the Motion with regard to the statements and associated medical record of witness W-49.

IV. DISPOSITION

For the foregoing reasons, and pursuant to Rules 73 *bis* (F), 89, 92 *quater* and 126 *bis* of the Rules, the Trial Chamber hereby

GRANTS the Prosecution's Request for Leave to Reply,

DISMISSES the Motion with regard to the statements of witnesses W-16, W-23, W-49, W-60, W-72 and W-104,

GRANTS the Motion **IN PART** with regard to the statements of witness W-89, and

³² Official Report, p. 2, para. 1, line 5.

³³ Annex B to the Motion.

³⁴ Statement 16 November 1995, p. 3, para. 8, lines 2-3 and Statement 11 March 1995, para. 2, lines 3-4.

ORDERS as follows:

1. The written statement of witness W-89 in Annex I to the Motion is admitted into evidence;
2. The written statement of witness W-89 in Annex H to the Motion and the Official Report associated with it, are admitted into evidence in redacted form, as set out above;
3. The Prosecution shall provide electronic versions of the redacted statement and the Official Report specified under 2) to the Registry.

The Trial Chamber requests the Registry to assign exhibit numbers to the statements of witness W-89 and to the Official Report associated with those statements - in redacted form if applicable.

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



Judge Patrick Robinson
Presiding

Dated this nineteenth day of April 2007

At The Hague

The Netherlands

[Seal of the Tribunal]