

23 APRIL 2009

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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 Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 23 April 2009

Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Bakone Justice Moloto, Presiding  
Judge Pedro David  
Judge Michèle Picard

**Acting Registrar:** Mr. John Hocking

**Decision of:** 23 April 2009

**PROSECUTOR**

v.

**MOMČILO PERIŠIĆ**

***PUBLIC***

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**DECISION ON PROSECUTION'S MOTION FOR  
ADMISSION OF EVIDENCE  
PURSUANT TO RULE 92 *QUATER***

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**The Office of the Prosecutor**

Mr. Mark Harmon  
Mr. Daniel Saxon

**Counsel for the Accused**

Mr. Novak Lukić  
Mr. Gregor Guy-Smith

**TRIAL CHAMBER I** (“Trial 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 seised of the “Prosecution Motion Pursuant to Rule 92 *quater*, with Annexes A, B and C” filed confidentially on 24 March 2009 (“Motion”) and hereby renders its Decision.

## SUBMISSIONS

### A. Prosecution

1. In its Motion, the Prosecution seeks the admission of the written evidence of Witness Huso Palo pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”), being the witness statement given to the Bosnian authorities on 24 November 1994 (“1994 Statement”), the statement of the witness given to the Office of the Prosecutor (“Prosecution”) on 24 February 1996 (“1996 Statement”), and the written record of his prior testimony in the *Dragomir Milošević* case (“Transcripts”) (jointly “92 *quater* Material”).<sup>1</sup>

2. In support of its Motion, the Prosecution submits that the 92 *quater* Material meets the requirements of Rule 92 *quater* as the witness is now deceased,<sup>2</sup> and his evidence bears sufficient indicia of reliability for admission.<sup>3</sup> In particular, the Prosecution points to the following factors which, it alleges, go to the reliability of the evidence:

- (a) the 1996 Statement is signed with an accompanying acknowledgement that it is true to the best of the witness’s recollection;
- (b) the witness’s testimony from Tribunal proceedings was made by him under oath and was subject to cross-examination and to questions posed by the Trial Chamber;<sup>4</sup>
- (c) the written evidence, in many particulars, relates to events about which there is other evidence and about which a Trial Chamber has rendered a Judgement;<sup>5</sup>

<sup>1</sup> *Prosecutor v. Dragomir Milošević*, IT-98-29/1 (“*D. Milošević* case”), Transcripts, 2 February 2007, T. 1526-1529 and 5 February 2007, T. 1533-1548. The exhibit referred to in Witness Palo’s testimony has already been admitted in the current proceedings as D46.

<sup>2</sup> Motion paras 1, 10; Annex A, Death Certificate. The Trial Chamber notes that according to the Certificate, the date of Witness Palo’s death is 11 October 2008 and not 13 October as the Motion, para. 1, suggests.

<sup>3</sup> Motion, paras 1, 10-11.

<sup>4</sup> *D. Milošević* case, T. 1526-1531 and T. 1533-1548.

<sup>5</sup> The Prosecution alleges that the witness’s testimony relates to Scheduled Incident B-8 of the Indictment, in respect of which the Trial Chamber made findings of fact in the judgement in the *D. Milošević* case, paras 277 to 289.

- (d) the witness's evidence, in relevant parts, is corroborated by another Trial Chamber's findings of fact;<sup>6</sup>
- (c) the witness's evidence does not contain manifest or obvious inconsistencies.<sup>7</sup>

3. The Prosecution also submits that the evidence sought to be admitted is crime-base evidence that supplements other evidence that has been introduced at trial and does not relate to the acts and conduct of the accused.<sup>8</sup> Finally, it argues that the documents are relevant and of probative value as required by Rule 89(C) of the Rules.<sup>9</sup>

## **B. Defence**

4. The Defence has no specific objections to the admission into evidence of the 92 *quater* Material.<sup>10</sup> However, it repeats its standing objection to 92 *quater* evidence, as set out in its previous submissions.<sup>11</sup> The Defence contends specifically that admission of such evidence violates the accused's "right to confront, right to be tried in his presence, right to the presumption of innocence, right to be treated equally before the Tribunal and the right to equality of arms."<sup>12</sup>

5. The Trial Chamber notes that in previous decisions it has already rejected the objections raised by the Defence insofar as they relate to the procedure governed by Rule 92 *quater* of the Rules.<sup>13</sup>

## **APPLICABLE LAW**

6. The Trial Chamber notes that in order for the requirements of Rule 92 *quater* to be met, the Trial Chamber must be satisfied that the person is unavailable and that the evidence which is sought to be admitted is reliable.<sup>14</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> Motion, para. 11.

<sup>8</sup> Motion, para. 12. *See also* Testimony of Sabina Šabanić, T. 681-705; Testimony of Patrick van der Weijden, T. 3024-3027; Testimony of Afeza Karačić, T. 3386-3414.

<sup>9</sup> Motion, paras 9, 13.

<sup>10</sup> E-mail from Defence Counsel to the Chamber's Legal Officer of 6 April 2009.

<sup>11</sup> Response to Prosecution's Motion for Admission of Evidence Pursuant to Rules 89 and 92 *quater* With Annex A and Confidential Annex B, 19 June 2007; Response to Prosecution's Motion for Leave to File Motion Pursuant to Rule 92 *quater* With Confidential Annexes A, B, C, D and E, 2 October 2007; Response to Prosecution's Motion for Leave to Supplement its 92 *quater* Motion of 3 September 2007, With Confidential Annexes A and B, 20 March 2008; Opposition to Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* Regarding Mr. Kučanin, 19 September 2008; Defence Memorandum Brief on the Application of the Rights Contained in the ICTY Statute and the ICCPR to the Presentation of Evidence With Appendix A, 16 May 2006 ("Defence Memorandum Brief").

<sup>12</sup> Defence Memorandum Brief, pp 33-37.

<sup>13</sup> *See* Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base, 22 September 2008, paras 15-25. *See also* Decision on Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 10 October 2008, para. 22.

7. The following indicia have been identified by the jurisprudence of the Tribunal as being relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*:

- (a) the circumstances in which the statement was made and recorded, including:
  - (i) whether the statement was given under oath; or
  - (ii) whether 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) whether 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 unsworn statement which was never 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 statements.<sup>15</sup>

8. In addition to the conditions set out in Rule 92 *quater* of the Rules, the Trial 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.<sup>16</sup>

9. The Trial Chamber also notes that Rule 92 *quater*(B) allows for the admission of evidence which may go to proof of acts and conduct of an accused as charged in the indictment, although such contents may be a factor mitigating against the admission of the evidence.

## DISCUSSION

10. The Trial Chamber finds that the Prosecution has established that the Witness is deceased and is therefore an unavailable person within the meaning of Rule 92 *quater*.

<sup>14</sup> Rule 92 *quater*. See *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, para. 29 (“*Popović et al.* Decision”).

<sup>15</sup> *Prosecutor v. Perišić*, Case IT-04-81-T, Decision on Prosecution Motions for Admission of Evidence Pursuant to Rule 92 *quater*, 10 October 2008 (“*Perišić* Decision”). See also *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 7 (“*Milutinović et al.* Decision”); *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Admission of Statements of Seven Witnesses Pursuant to Rule 92 *quater*, 16 June 2008, para. 6; *Popović et al.* Decision, para. 31.

<sup>16</sup> *Perišić* Decision, para. 20. See also *Milutinović et al.* Decision, para. 4.

11. With regard to the reliability of the evidence, the Trial Chamber notes that both the 1994 and the 1996 Statements are signed by the Witness<sup>17</sup> and that the 1996 Statement contains an affirmation of truthfulness by the Witness.<sup>18</sup> Further, in the 1996 Statement, a Registry-approved interpreter certified that the statement was read back to the Witness in Bosnian before he signed it.<sup>19</sup> The Trial Chamber also notes that the Witness confirmed the content of the 1996 Statement before the Trial Chamber in the *D. Milošević* case.<sup>20</sup> In addition, the testimony recorded in the Transcripts was made under oath, subject to cross-examination and questions posed by the Chamber.<sup>21</sup>

12. The Trial Chamber is also aware that the written evidence given by Huso Palo relates to events about which there is other evidence and about which a Trial Chamber has made certain findings of fact.<sup>22</sup> Moreover, the 92 *quater* Material is free of manifest or obvious inconsistencies and that none of its parts go to the acts or conduct of the accused as charged in the Indictment. As a consequence, the Trial Chamber finds that the 92 *quater* Material is reliable.

13. The Trial Chamber notes that the 92 *quater* Material concerns scheduled sniping incident B-8 in the Indictment and is relevant to Counts 3-4. In addition, the 1996 Statement contains information relevant to the campaign of shelling which the Indictment alleges occurred in Sarajevo.<sup>23</sup> Moreover, the abovementioned finding as to the reliability of the 92 *quater* Material militates in favour of finding this evidence of probative value.

14. As a consequence, the Trial Chamber finds that the 92 *quater* Material fulfils the requirements of Rules 89 and 92 *quater*. It is therefore admitted into evidence.

## DISPOSITION

15. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 89 and 92 *quater* of the Rules, the Trial Chamber hereby

**GRANTS** the Motion;

**ORDERS** that the 1994 Statement, the 1996 Statement and the Transcripts be admitted into evidence; and

<sup>17</sup> Motion, Annex C, the 1994 Statement, p. 1 and the 1996 Statement, p. 2.

<sup>18</sup> Motion, Annex C, the 1996 Statement, p. 2.

<sup>19</sup> *Ibid.*, p. 3.

<sup>20</sup> Transcript, 2 February 2007, T. 1529.

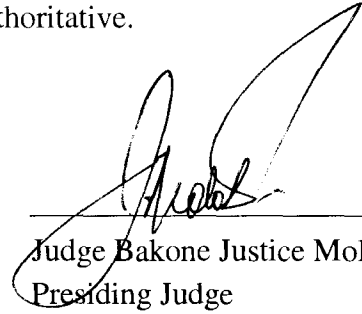
<sup>21</sup> Transcript, 2 February 2007, T. 1526-1529 and 5 February 2007, T. 1533-1548; Motion, para. 11 B.

<sup>22</sup> See footnote 5 *supra*.

<sup>23</sup> Indictment, paras 40-42 and Counts 1-4; Motion Annex B, section 2 and the 1996 Statement, paras 6-7. See also Decision on Prosecution's Submission on Interpretation of the Trial Chamber's Decision of 15 May 2007 Regarding "Unscheduled Incidents", 31 October 2008, paras 10-13.

**REQUESTS** the Registry to assign them exhibit numbers.

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



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Judge Bakone Justice Moloto  
Presiding Judge

Dated this twenty-third day of April 2009

At The Hague

The Netherlands

**[Seal of the Tribunal]**