



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-04-75-T
	Date: 9 May 2013
	Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding

Judge Burton Hall

Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 9 May 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION OMNIBUS MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 *quater* AND PROSECUTION MOTION
FOR THE ADMISSION OF THE EVIDENCE OF GH-083 PURSUANT TO
RULE 92 *quater***

The Office of the Prosecutor:

Mr. Douglas Stringer

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Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **THIS 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 Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Motion”), filed on 21 August 2012, with confidential and *ex parte* annexes. On 4 September 2012, the Defence filed the confidential “Response to Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Response”). On 12 September 2012, the Prosecution filed the confidential “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*” (“Reply”).

2. On 27 September 2012, the Prosecution filed the confidential “Supplement to Prosecution Omnibus Motions for Admission of Evidence Pursuant to Rule 92 *quater* and Rule 92 *bis*”, with confidential annexes (“First Supplement”). On 11 October 2012, the Defence filed the confidential “Response to Supplement to Prosecution’s Omnibus Motions for Admission of Evidence Pursuant to Rule 92 *quater* and Rule 92 *bis*” (“First Supplement Response”). On 17 October 2012, the Prosecution filed the confidential “Prosecution Request for Leave to Reply and Reply to Response to Supplement to Prosecution’s Omnibus Motions for Admission of Evidence Pursuant to Rule 92 *quater* and Rule 92 *bis*”, with a confidential annex (“First Supplement Reply”).

3. On 19 February 2013, the Prosecution filed the confidential “Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (GH-083)” (“Second Motion”). On 5 March 2013, the Defence filed the confidential “Response to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (GH-083)” (“Second Motion Response”). On 12 March 2013, the Prosecution filed the confidential “Prosecution Request for Leave to Reply and Reply to Defence ‘Response to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (GH-083)’” (“Second Motion Reply”). On 14 March 2013, the Defence filed the confidential “Surreply in Relation to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (GH-083)” (“Sur-Reply”). On 22 March 2013, the Defence filed the confidential “Supplemental Surreply in Relation to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (GH-083)” (“Supplemental Sur-Reply”).

4. On 21 March 2013, the Prosecution filed the “Supplemental Submission of Medical Documents Concerning Rule 92 *quater* Witnesses GH-005 and GH-044” (“Second Supplement”). On 4 April 2013, the Defence filed the confidential “Response to Supplemental Submissions of Medical Documents Concerning Rule 92 *quater* Witnesses GH-005 and GH-044” (“Second Supplement Response”). On 11 April 2013, the Prosecution filed the confidential “Prosecution

Request for Leave to Reply and Reply to Defence Response to Supplemental Submission of Medical Documents Concerning Rule 92 *quater* Witnesses GH-005 and GH-044” (“Second Supplement Reply”).

A. Background

5. In the Order on Pre-Trial Work Plan the Pre-Trial Judge set 21 August 2012 as the deadline for the Prosecution to submit a motion for the admission of evidence pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).¹

B. Submissions

6. In the Motion, the Prosecution requests the admission of the evidence of 25 witnesses pursuant to Rule 92 *quater*, arguing that each witness is unavailable in accordance with Rule 92 *quater* and that the evidence is probative, relevant, and reliable and meets the requirements for admission under that Rule.² The Prosecution submits that most of the evidence is crime-base evidence or provides historical, political, and military context relevant to the charges in the Indictment.³ It further submits that the evidence of the proposed Rule 92 *quater* witnesses is partially or fully corroborated by the evidence of at least one *viva voce* witness.⁴ The Prosecution submits that the tendered evidence in large part does not go to the acts and conduct of Hadžić and that, where it does, it would not unfairly prejudice the Defence if admitted.⁵ The Prosecution requests that, should the Chamber find any such references inadmissible, the references be redacted and the remaining evidence be admitted.⁶ The Prosecution requests the admission of a number of associated exhibits that accompany the statements and transcripts that, in its view, form an integral part of the witnesses’ evidence.⁷ At the time the Motion was filed, the written evidence of three witnesses was submitted without documentation demonstrating their unavailability to testify.⁸

7. In the Response, the Defence challenges the reliability of the tendered evidence where (a) the written statement was not translated in written form into a language the witness understood when the statement was signed, but was instead translated orally to the witness;⁹ (b) the written statement was not given under oath;¹⁰ and (c) the written statement was taken by Prosecution

¹ Order on Pre-Trial Work Plan, 16 December 2011, Annex, p. 1.

² Motion, paras 1, 7-12, 18.

³ Motion, para. 8.

⁴ Motion, para. 9.

⁵ Motion, paras 14-15.

⁶ Motion, para. 16.

⁷ Motion, paras 17-18.

⁸ Specifically, GH-039, GH-114, and GH-126. Motion, paras 7, 18(c).

⁹ Response, paras 6, 13.

¹⁰ Response, paras 6, 13.

investigators and may, as the Defence asserts, not contain a full and accurate record of what was said during the interview.¹¹ In relation to transcripts of prior testimony, the Defence submits that there was no meaningful cross-examination relevant to matters of concern to Hadžić and that the admission of such testimony would be prejudicial to the Defence.¹² The Defence submits that the Prosecution fails to establish that the tendered evidence is corroborated, arguing that the Prosecution (a) makes only vague submissions that do not establish corroboration and (b) provides no analysis of discrepancies and similarities between the witnesses in respect of specific elements of their testimony.¹³ The Defence further submits that, where there is doubt as to whether tendered evidence may constitute “linkage” rather than “crime-base” evidence, that evidence should be denied admission because it may have unforeseeable relevance to the trial and could result in undue prejudice to the Defence.¹⁴

8. The Defence submits that the following evidence warrants particular scrutiny to assess its potential prejudicial effect and weighs against admission: (a) evidence going to the acts and conduct of Hadžić; (b) evidence that purports to show, either directly or through inference, that Hadžić was a superior to those who actually did commit the crimes charged or participated in the JCE; (c) evidence that Hadžić shared the intent of persons who actually committed the crimes; and (d) evidence that goes to issues that are critical to the Prosecution case.¹⁵ The Defence submits that the Prosecution has not demonstrated that the tendered associated exhibits form an inseparable part of the tendered evidence.¹⁶

9. Finally, the Defence submits that the Chamber should deny any reply filed by the Prosecution. It argues that the vagueness of the Prosecution’s Motion obliged the Defence to respond without specific submissions by the Prosecution on how the evidence of each witness satisfies the requirements of Rule 92 *quater*.¹⁷

10. The Prosecution replies that the Defence’s objections are based on an unjustifiably narrow reading of Rule 92 *quater* and erroneously conflate the standard for admitting evidence with the analysis of its ultimate weight.¹⁸ It submits that the written statements are reliable because (a) Trial Chambers routinely find ICTY witness statements reliable and admissible; (b) the tendered statements have been read to the witnesses in their language and are true to the best of each

¹¹ Response, paras 6, 13.

¹² Response, para 7.

¹³ Response, para. 8.

¹⁴ Response, para. 5.

¹⁵ Response, para. 4.

¹⁶ Response, para. 10.

¹⁷ Response, para. 9.

¹⁸ Reply, paras 4-5.

witness's knowledge; and (c) they contain certifications by a Registry-approved interpreter and the witness.¹⁹ According to the Prosecution, cross-examination is not required for admission pursuant to Rule 92 *quater*,²⁰ there is no basis in the jurisprudence to reject evidence on the grounds of "unforeseeable relevance",²¹ and the tendered evidence is cumulative of, and corroborated by, other evidence that will be adduced during the trial.²²

11. In the First Supplement, the Prosecution, *inter alia*, (a) provides newly obtained medical documentation that it asserts demonstrates the unavailability of witnesses GH-039 and GH-126;²³ (b) notes that it has requested documentation from the Republic of Serbia to confirm the death of GH-114 and will provide the documents to the Chamber and Defence upon receipt;²⁴ (c) seeks to lift the *ex parte* status of Annexes C and D of the Motion;²⁵ and (d) seeks the admission, pursuant to Rule 92 *quater*, of the written evidence of two witnesses whom the Prosecution had previously indicated would provide evidence pursuant to Rule 92 *ter* and *viva voce* (GH-156 and GH-108).²⁶

12. In the First Supplement Response, the Defence submits that (a) the evidence of witnesses GH-039, GH-126, GH-108, and GH-156 should not be admitted because the witnesses are not unavailable for the purposes of Rule 92 *quater*;²⁷ (b) the evidence of GH-108 is unreliable and should not be admitted;²⁸ and (c) the evidence of GH-005 should not be admitted pursuant to Rule 92 *quater*, in particular the witness's testimony from *S. Milošević*, which is tendered as an associated exhibit.²⁹

13. In the First Supplement Reply, the Prosecution (a) provides a death certificate for GH-114; (b) re-asserts that GH-039, GH-126, GH-156, and GH-108 are unavailable; and (c) argues that the evidence of GH-108 and GH-005 is reliable and should be admitted.³⁰

14. In the Second Motion, the Prosecution seeks the admission, pursuant to Rule 92 *quater*, of the written evidence of GH-083.³¹ In the Second Motion Response, the Defence objects to the admission of GH-083's written evidence arguing, *inter alia*, that he is not unavailable within the

¹⁹ Reply, para. 6.

²⁰ Reply, para. 7.

²¹ Reply, p. 9.

²² Reply, para. 8.

²³ First Supplement, paras 2, 6, 7, confidential Annexes A and B.

²⁴ First Supplement, para. 8.

²⁵ First Supplement, paras 2, 9.

²⁶ First Supplement, paras 2, 10-14.

²⁷ First Supplement Response, paras 2-5, 7.

²⁸ First Supplement Response, paras 6-7.

²⁹ First Supplement Response, paras 8-10.

³⁰ First Supplement Reply, paras 2-5, 9, confidential Annex A.

³¹ Second Motion, paras 1, 15.

meaning of Rule 92 *quater*.³² In the Second Motion Reply, the Prosecution argues that GH-083 is unavailable within the meaning of Rule 92 *quater*, and that his evidence should be admitted.³³

15. In the Second Supplement, the Prosecution provides (a) a death certificate for GH-044 and (b) additional medical records for GH-005.³⁴ In the Second Supplement Response, the Defence argues that the additional medical documents provided in relation to GH-005 are inadequate to establish that the witness is unavailable to testify.³⁵ In the Second Supplement Reply, the Prosecution asserts that the medical documents provided in the Second Supplement are sufficient for the Chamber to find that GH-005 is unavailable.³⁶

C. Applicable Law

16. Rule 92 *quater*, entitled “Unavailable Persons”, reads as follows:

(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.

It follows from a plain reading of these provisions that evidence pertaining to the acts and conduct of an accused can be admitted under Rule 92 *quater* and that a witness’s evidence need not be admitted in its entirety, it being for the Chamber to decide which parts, if any, should be excluded. Evidence going to the acts and conduct of the accused is evidence that concerns the deeds and behaviour of that accused, rather than of anyone else for whose actions he is alleged to be responsible.³⁷

³² Second Motion Response, paras 3-6.

³³ Second Motion Reply, paras 2-6.

³⁴ Second Supplement, confidential Annex A and confidential Annex B.

³⁵ Second Supplement Response, paras 2-4.

³⁶ Second Supplement Reply, paras 1-3.

³⁷ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009 (“*Karadžić Decision*”), para. 4; *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 9.

17. In assessing the reliability of the proposed evidence, a Chamber can look at the circumstances in which it was obtained and recorded, such as whether a written statement was given under oath; whether it was signed by the witness with an acknowledgement of the truth of its contents; whether it was given with the assistance of a Registry-approved interpreter; and whether it has been subject to cross-examination. In addition, other factors, such as whether the evidence relates to events about which there is other evidence, or whether there is an absence of manifest inconsistencies in the evidence, may be considered.³⁸ If one or more of these indicia of reliability is absent, the evidence can still be admitted, and the Chamber will take this into consideration in determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case.³⁹

18. In addition, the Chamber must ensure that the general requirements for the admissibility of evidence set out in Rule 89 are met, namely that the proffered evidence is relevant and has probative value and that the probative value is not substantially outweighed by the need to ensure a fair trial.⁴⁰

19. When the testimony of an unavailable person is admitted under Rule 92 *quater*, exhibits which accompany that evidence can also be admitted if they form an “inseparable and indispensable” part of the evidence. In order to satisfy this requirement, the witness’s testimony must actually discuss the document, and the document must be one without which the witness’s testimony would become incomprehensible or of lesser probative value.⁴¹

³⁸ *Karadžić* Decision, para. 5. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Redacted Version of “Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 18 December 2008, 19 February 2009, para. 32.

³⁹ *Karadžić* Decision, para. 5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Gvero’s Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para. 24; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, paras 28-32.

⁴⁰ *Karadžić* Decision, para. 6.

⁴¹ *Karadžić* Decision, para. 7; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *ter* (ST012 and ST019) (confidential), 29 September 2009, para. 18; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*, 9 July 2008, para. 15; *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92 *bis* (D) of the Rules, 23 Jan 2004, p. 3.

D. Discussion

1. Preliminary matters

20. In accordance with paragraphs (C)(5) and (7) of the Practice Direction on the Length of Briefs and Motions (“Practice Direction”),⁴² the Chamber will grant the Defence request for leave to file a response to the Motion that exceeds the applicable word limit for responses.

21. Having considered the submissions of the parties, the Chamber, in accordance with Rule 126 *bis* of the Rules, will grant the Prosecution leave to reply to the Response and the Second Motion Response. The Chamber recalls that the Prosecution has been granted leave to reply to the First Supplement Response.⁴³ The Chamber will deny leave for the Defence to file the Sur-Reply and the Supplemental Sur-Reply and will deny leave for the Prosecution to reply to the Second Supplement Response.

2. Issues that relate to all witnesses

22. The Prosecution seeks, pursuant to Rules 89 and 92 *quater*, the admission of written evidence in lieu of *viva voce* testimony for a total of 28 witnesses and associated exhibits. The Chamber will first address issues raised in respect of much of the tendered evidence and then specifically address the evidence of each witness.

23. *Unavailability of witness.* The Prosecution has proposed the admission of evidence pursuant to Rule 92 *quater* of witnesses whom it argues are unavailable because they suffer from a bodily or mental condition that renders them incapable of testifying orally. In some instances, the Prosecution asserts that a witness is unavailable because providing oral testimony would result in, or run the risk of, aggravating the witness’s physical or mental condition.⁴⁴ The Appeals Chamber in *Prlić et al.* determined that a witness is unavailable for purposes of Rule 92 *quater* where “the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment.”⁴⁵ It further clarified that an individual who is “theoretically able to attend—as shown by the fact that he can choose to testify”—is not “unavailable” within the meaning of Rule 92 *quater*.⁴⁶ In determining whether a witness is objectively unavailable, the

⁴² IT/184 Rev. 2, 16 September 2005.

⁴³ Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis* and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 *bis*, 24 January 2013, paras 24, 71(b).

⁴⁴ First Supplement Reply, para. 3.

⁴⁵ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48.

⁴⁶ The Appeals Chamber found that the witness, one of the accused in that case, was “theoretically able to attend—as shown by the fact that he can choose to testify—but is not required to do so in order to protect his own fundamental rights” and therefore the witness was not “unavailable” within the meaning of Rule 92 *quater*. *Prosecutor v. Prlić et al.*,

Chamber will consider, accounting for the documentation provided by the Prosecution, whether a proposed witness is capable of attending a court hearing and testifying and is capable of answering questions and testifying coherently.

24. *Critical issue.* The Chamber will consider the prejudicial effect of admitting evidence which goes to issues that are “critical” to the Prosecution case. In doing so, the Chamber remains mindful that evidence in a statement admitted pursuant to Rule 92 *quater* may lead to a conviction only if there is other evidence which corroborates the statement.⁴⁷

25. *Unforeseeable relevance.* The Chamber does not consider that certain evidence should be denied admission pursuant to Rule 92 *quater* because, as submitted by the Defence, it may have “unforeseeable relevance” to the case at the time of its admission. Accordingly, the Chamber dismisses the Defence objections to tendered written evidence on this ground.

3. Individual witnesses

26. *GH-032:* The Prosecution submits a death certificate to demonstrate that GH-032 is unavailable.⁴⁸ According to the Prosecution, GH-032’s evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of nine other witnesses.⁴⁹ The Defence objects to the admission of GH-032’s written statement arguing that it is unreliable because, *inter alia*, the witness describes suffering from “headaches and occasional bleeding from [her] left ear”, which may suggest impairment of her memory and the statement gives no indication of the witness’s condition at the time she gave it and because the witness makes no expressions of doubt or uncertainty.⁵⁰ The Defence further asserts that admission of the statement would be prejudicial to Hadžić because it alleges misconduct by Božo Bolić for whose actions Hadžić is alleged to be criminally responsible.⁵¹ The Prosecution replies that the written statement contains sufficient indicia of reliability, that the witness did express uncertainty where

IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48. Relying on this jurisprudence, the Trial Chamber in *Tolimir* found that, while there was evidence that a witness suffered from a “chronic mental disorder”, it was not established the he was “objectively unavailable.” The Trial Chamber in *Tolimir* considered that “the Prosecution [had] presented medical evidence that attending court could have harmful after-effects on [the witness], but this [did] not amount to a medical statement to the effect that he [was] incapable of attending a court hearing and testifying or medical evidence that he [was] incapable of answering the questions put to him and testifying coherently.” *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution’s Motion to Admit the Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 30.

⁴⁷ *Prosecutor, Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, paras 57-59; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 12, fn 34 and the authorities cited therein.

⁴⁸ Motion, confidential Annex B, pp. 57-59; see Rule 65 *ter* 02709 for English translation.

⁴⁹ Motion, confidential Annex A, pp. 1-2.

⁵⁰ Response, paras 13-14.

relevant, and the witness clearly distinguished between what she had heard and what she saw.⁵² The Prosecution submits that evidence related to acts and conduct of those other than the accused, such as Bolić, is admissible under Rule 92 *quater*, and that the Defence will have the opportunity to cross-examine *viva voce* witnesses in this case on those issues.⁵³

27. The Defence does not dispute, and the Chamber accepts, that GH-032 is deceased, and therefore unavailable. The Chamber considers that GH-032's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement and the witness indicated where she was uncertain about particular information; and (e) the witness distinguishes between what she had heard and what she saw.⁵⁴ The Defence does not support its contention that the witness may have been suffering from memory impairment at the time she gave the statement, and the Chamber notes that the statement includes precise details indicating that GH-032 remembered the events clearly.⁵⁵ The written statement bears upon the acts of Božo Bolić who, according to GH-032, was the police chief in Erdut. In particular, GH-032 states that Bolić's parents occupied the home of a non-Serb who had been "driven away" and that Bolić visited his parents and assisted them in caring for the home.⁵⁶ The evidence is not so critical to the Prosecution case that admitting it without the opportunity for cross-examination would be unduly prejudicial to the Defence. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

28. GH-039: The Prosecution submits medical certificates to demonstrate that GH-039 is unavailable.⁵⁷ According to the Prosecution, GH-039's evidence, in the form of a written statement, is relevant to events in Dalj charged in the Indictment and is corroborated by the evidence of four other witnesses and documentary evidence.⁵⁸ The Defence counters that GH-039's stated medical conditions do not satisfy the "objective unavailability" standard required by Rule 92 *quater* and that

⁵¹ Response, para. 15.

⁵² Reply, p. 4.

⁵³ Reply, p. 4.

⁵⁴ Rule 65 *ter* 02352, Witness Statement, 17 December 1998.

⁵⁵ Rule 65 *ter* 02352, Witness Statement, 17 December 1998.

⁵⁶ Rule 65 *ter* 02352, Witness Statement, 17 December 1998, pp. 2-4.

⁵⁷ First Supplement, paras 2, 6, 21(a); First Supplement, confidential Annex A.

⁵⁸ Motion, confidential Annex A, p. 3.

her statement is unreliable and uncorroborated in part and should not be admitted.⁵⁹ The Prosecution replies that the Defence's objections in relation to reliability and corroboration go to the weight that should be afforded to the evidence rather than to its admissibility.⁶⁰ It submits that other Trial Chambers have found that similarly situated witnesses who suffer from memory loss are unavailable for the purposes of Rule 92 *quater*.⁶¹

29. The Chamber notes that the medical certificates provided by a psychiatrist state that GH-039's cognitive and mnemonic functions are seriously damaged and that she is absentminded, suspicious, prone to sleep loss, wandering, and occasionally fails to recognise household members.⁶² Considering in particular that GH-039's memory is damaged such that she occasionally fails to recognise household members, the Chamber is satisfied that GH-039 is incapable of answering questions put to her and testifying coherently and is therefore objectively unavailable within the meaning of Rule 92 *quater*.

30. The Chamber considers that GH-039's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement; and (e) the witness distinguishes between what she personally witnessed and what she heard from others.⁶³ The Chamber further notes that the witness statement was given in March 1999 whereas there is no evidence that her memory impairment began before February 2011.⁶⁴ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

31. *GH-153*: The Prosecution submits a death certificate to demonstrate that GH-153 is unavailable.⁶⁵ According to the Prosecution, GH-153's evidence, in the form of a written statement, is relevant to events in Škabrnja charged in the Indictment and is corroborated by the evidence of three other witnesses and documentary evidence.⁶⁶ The Defence objects to the admission of GH-153's written statement submitting that it is unreliable. It argues that GH-153 would have been

⁵⁹ Response, para. 17; First Supplement Response, paras 1, 3.

⁶⁰ Reply, p. 5.

⁶¹ First Supplement Reply, para. 3.

⁶² First Supplement, confidential Annex A, Medical Certificates, 28 August 2012, 20 February 2012.

⁶³ Rule 65 *ter* 02366, Witness Statement, 12 March 1999.

⁶⁴ First Supplement, confidential Annex A, Medical Certificates, 28 August 2012, 11 May 2012; Rule 65 *ter* 02366, Witness Statement, 12 March 1999.

⁶⁵ Motion, confidential Annex B, pp. 60-62; see Doc ID 0468-3837 for English translation.

⁶⁶ Motion, confidential Annex A, p. 4.

in a position to offer significant details but that such details are not included in the written statement.⁶⁷ The Defence additionally objects to the witness's allegation of a quadruple murder in Škabrnja, arguing that because this event is not charged in the Indictment it is irrelevant and prejudicial.⁶⁸ The Prosecution replies that the Defence received sufficient notice of this alleged crime in GH-153's Rule 65 *ter* witness summary and that this alleged crime is relevant to charges in the Indictment.⁶⁹ The Prosecution further replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not to its admissibility.⁷⁰

32. The Defence does not dispute, and the Chamber accepts, that GH-153 is deceased and therefore unavailable. The Chamber considers that, while the four alleged killings in Škabrnja are not specifically charged as murders in the Indictment, they are relevant to the charges of persecution, expulsions, and discriminatory measures in relation to the villages and towns in the Republic of Serbian Krajina charged in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; and (d) the witness indicated where he was uncertain about particular information.⁷¹ The alleged lack of detail in the written statement goes to the weight to be given to the evidence, not its admission. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

33. GH-044: The Prosecution submits a death certificate to demonstrate that GH-044 is unavailable.⁷² According to the Prosecution, GH-044's evidence, in the form of a transcript of his testimony in *Prosecutor v. Mrkšić et al.*,⁷³ is relevant to events in Vukovar and various detention facilities charged in the Indictment, and is corroborated by the evidence of 11 witnesses.⁷⁴ The Prosecution does not tender for admission a portion of the testimony that makes reference to Hadžić's alleged direct physical involvement in crimes at Sremska Mitrovica prison contained in

⁶⁷ Response, paras 13, 18.

⁶⁸ Response, para. 19.

⁶⁹ Reply, p. 5.

⁷⁰ Reply, p. 4.

⁷¹ Rule 65 *ter* 02467, Witness Statement, 20 March 2002.

⁷² Second Supplement, Annex A. In the Motion, which was filed before the death of GH-044 was registered, the Prosecution submitted medical certificates to demonstrate that GH-044 was unavailable. Motion, para. 7; Motion, confidential Annex B, pp. 63-68; *see* Doc ID 0681-7846 for English translation.

⁷³ Case No. IT-95-13/1-T.

⁷⁴ Motion, para. 10; Motion, confidential Annex A, pp. 5-7.

the Indictment.⁷⁵ The Prosecution seeks the admission of eight associated exhibits.⁷⁶ The Defence requests that admission of the evidence of GH-044 be denied in its entirety, arguing that it is unreliable and that the witness was not cross-examined on a matter of particular relevance to the present case. In the alternative, the Defence submits that, should the evidence be admitted, a portion of the testimony that makes express reference to the acts and conduct of Hadžić at Sremska Mitrovica, in addition to that identified by the Prosecution, should be redacted.⁷⁷ The Prosecution replies that it does not seek to rely on the evidence of GH-044 insofar as he states that Hadžić beat or mistreated him during an interview at Sremska Mitrovica, but relies on his evidence in all other respects.⁷⁸

34. The Defence does not dispute, and the Chamber accepts, that GH-044 is deceased and therefore unavailable. The Chamber considers that GH-044's evidence is relevant to charges in the Indictment. The Chamber notes that GH-044's testimony was given under oath before the Tribunal and considers that he was cross-examined on this testimony.⁷⁹ The Chamber notes that GH-044 describes (a) being met by Hadžić at Sremska Mitrovica when GH-044 was detained there⁸⁰ and (b) an incident at Sremska Mitrovica during which Hadžić interviewed and mistreated GH-044.⁸¹ The Chamber recalls that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber considers that admitting the entirety of the evidence will better enable it to determine the weight to be given to the evidence.

35. The Chamber notes that medical reports of the witness, referred to in his testimony, are uploaded into eCourt together with a witness statement provided by GH-044 to the Prosecution on 18 June 1995.⁸² The Chamber understands that the Prosecution does not seek to tender the statement, and in any event the Chamber does not consider the statement to form an inseparable and indispensable part of the testimony, and will therefore not admit the statement. The Prosecution will be ordered to upload in eCourt as Rule 65 *ter* number 02154 a document that contains only the medical reports. The Chamber finds that the medical reports and the remaining tendered associated exhibits, as referenced in the witness's prior testimony, form an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered

⁷⁵ Motion, para. 15; Motion, confidential Annex A, p. 5.

⁷⁶ Motion, confidential Annex A, p. 7.

⁷⁷ Response, paras 20-22.

⁷⁸ Reply, p. 5.

⁷⁹ Rule 65 *ter* 04481, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, 13 March 2006; Rule 65 *ter* 04482, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, 14 March 2006.

⁸⁰ Rule 65 *ter* 04482, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, 14 March 2006, T. 5982.

⁸¹ Rule 65 *ter* 04482, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, 14 March 2006, T. 6004-6007.

evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

36. The Chamber notes that portions of the testimony contained in the tendered transcripts were given in private session. As such, Rule 65 *ter* numbers 04481 and 04482 will be admitted under seal. The Prosecution will be ordered to upload and release in eCourt a public redacted version of the transcripts with the portions in private session redacted.

37. *GH-045*: The Prosecution submits a death certificate to demonstrate that GH-045 is unavailable.⁸³ According to the Prosecution, GH-045's evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of 17 other witnesses and documentary evidence.⁸⁴ The Defence objects to the admission of GH-045's written statement arguing that it is unreliable.⁸⁵ The Prosecution replies that the Defence's arguments concern the weight rather than the admissibility of the tendered evidence.⁸⁶

38. The Defence does not dispute, and the Chamber accepts, that GH-045 is deceased and therefore unavailable. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) the witness distinguishes between what he personally witnessed and what he heard from others; and (e) there are no manifest inconsistencies in the evidence.⁸⁷ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

39. The Chamber recalls that GH-045 has the protective measure of the use of a pseudonym in all proceedings before the Tribunal related to this case.⁸⁸ To give effect to this protective measure, Rule 65 *ter* number 02336 will be admitted under seal. The Prosecution will be ordered to upload and release in eCourt a public redacted version of the statement with identifying information redacted.

⁸² Rule 65 *ter* 02154.

⁸³ Motion, confidential Annex B, pp. 69-71; *see* Doc ID 0675-2297 for English translation.

⁸⁴ Motion, confidential Annex A, pp. 8-10.

⁸⁵ Response, paras 13, 23.

⁸⁶ Reply, p. 4.

⁸⁷ Rule 65 *ter* 02336, Witness Statement, 20 November 1998.

⁸⁸ Decision on Prosecution Motion for Protective Measures for Witnesses (confidential), 24 August 2012 ("Protective Measures Decision"), paras 36, 42(a)(xlvi).

40. *GH-046*: The Prosecution submits a medical certificate to demonstrate that GH-046 is unavailable.⁸⁹ According to the Prosecution, GH-046's evidence, in the form of a transcript of his prior testimony in *Prosecutor v. Mrkšić et al.*,⁹⁰ is relevant to events in Vukovar charged in the Indictment and is corroborated by the evidence of 13 witnesses and documentary evidence.⁹¹ The Prosecution seeks the admission of seven associated exhibits.⁹² The Defence does not object to the admission of GH-046's evidence.⁹³

41. The Chamber notes that the medical certificate provided by the Prosecution states that GH-046 is incapable of testifying in The Hague. The certificate states that the witness suffers from Post Traumatic Stress Disorder and dementia.⁹⁴ Considering in particular that GH-046 suffers from dementia, the Chamber is satisfied that GH-046 is incapable of answering questions put to him and testifying coherently and is therefore objectively unavailable within the meaning of Rule 92 *quater*.

42. The Chamber considers that GH-046's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the testimony was given under oath and (b) the witness was subject to cross-examination during his testimony.⁹⁵ The Prosecution has indicated that the tendered associated exhibits with Rule 65 *ter* numbers 02619 and 03002 were marked for identification and not admitted in *Mrkšić et al.*⁹⁶ The Chamber, therefore, does not consider that these two documents are appropriate for admission as associated exhibits. The Chamber finds that the tendered associated exhibits, as referenced in the prior testimony, with the exception of Rule 65 *ter* numbers 02619 and 03002, form an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and—with the exception of Rule 65 *ter* numbers 02619 and 03002—is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

43. The Chamber notes that portions of the testimony contained in the tendered transcript were given in private session. As such, Rule 65 *ter* numbers 04486 and 04487 will be admitted under

⁸⁹ Motion, confidential Annex B, pp. 72-73, 77. The Chamber notes that the Prosecution has tendered medical certificates for an additional individual with no apparent relevance to the Motion. See Motion, confidential Annex B, pp. 74-76. These will not be considered.

⁹⁰ Case No. IT-95-13/1.

⁹¹ Motion, confidential Annex A, pp. 10-13.

⁹² Motion, confidential Annex A, p. 12.

⁹³ Response, paras 11, 24.

⁹⁴ Motion, confidential Annex B, p. 73, Medical Certificate, 15 November 2011.

⁹⁵ Rule 65 *ter* 04486, *Prosecutor v. Mrkšić et al.* Case No. IT-95-13/1, 31 January 2006; Rule 65 *ter* 04487, *Prosecutor v. Mrkšić et al.* Case No. IT-95-13/1, 1 February 2006; Rule 65 *ter* 04488, *Prosecutor v. Mrkšić et al.* Case No. IT-95-13/1, 2 February 2006.

⁹⁶ Motion, confidential Annex A, p. 13.

seal.⁹⁷ The Prosecution will be ordered to upload and release in eCourt a public redacted version of the transcripts with the portions in private session redacted.

44. *GH-049*: The Prosecution submits a death certificate to demonstrate that GH-049 is unavailable.⁹⁸ According to the Prosecution, GH-049's evidence, in the form of a written statement, an addendum thereto, and a supplemental statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of three other witnesses.⁹⁹ The Prosecution seeks the admission of one associated exhibit.¹⁰⁰ The Defence objects to the admission of GH-049's written evidence arguing that it is unreliable.¹⁰¹ The Prosecution replies that the written evidence contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not its admissibility.¹⁰²

45. The Defence does not dispute, and the Chamber accepts, that GH-049 is deceased and therefore unavailable. The Chamber considers that GH-049's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement contains a proper Rule 92 *bis* attestation demonstrating its reliability; (b) the statement was made with the assistance of a Registry-approved interpreter; (c) the statement was signed by the witness with an acknowledgement of the truth of its contents; (d) the evidence relates to events about which other witnesses provide evidence; (e) there are no manifest inconsistencies in the statement and the witness indicated where he was uncertain about particular information; and (f) the witness distinguishes between what he personally witnessed and what he heard from others.¹⁰³ The Chamber finds that the tendered associated exhibit, as discussed in the statement, forms an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

46. The Chamber notes that there is no English translation of either the 7 May 1999 witness statement or the 16 June 1999 supplement attached to Rule 65 *ter* number 02520 in eCourt. Rule 65 *ter* numbers 02381 and 02395 are English translations of these documents. The Chamber will order the Prosecution to attach the English translations of the 7 May 1999 witness statement and the 16 June 1999 supplement statement to Rule 65 *ter* number 02520 and to remove Rule 65 *ter* numbers

⁹⁷ The Chamber notes that Rule 65 *ter* number 04488, which forms part of the witness's testimony, contains only evidence that was given in open session.

⁹⁸ Motion, confidential Annex B, pp. 79-80; see Doc ID 0683-9567 for English translation.

⁹⁹ Motion, confidential Annex A, pp. 14-15.

¹⁰⁰ Motion, confidential Annex A, p. 16.

¹⁰¹ Response, paras 13, 25.

¹⁰² Reply, p. 4.

¹⁰³ Rule 65 *ter* 02520, Witness Statement, 17 May 1999, Supplement Statement, 16 June 1999, Addendum to Statement, 18 June 2003.

02381 and 02395 from eCourt. The Chamber further notes that black and white photocopies of photographs are attached to the supplement statement in eCourt. As the Prosecution has indicated, these photocopies are not clear. Accordingly, the Prosecution has tendered 15 of these photographs in a clearer format as an associated exhibit which will be admitted. The Chamber will order the Prosecution to remove all the photocopies attached to Rule 65 *ter* number 02520 in eCourt.

47. *GH-008*: The Prosecution submits a death certificate to demonstrate that GH-008 is unavailable.¹⁰⁴ According to the Prosecution, GH-008's evidence, in the form of a transcript of his testimony in *Prosecutor v. S. Milošević*,¹⁰⁵ is relevant to events in Erdut, Dalj, and other locations charged in the Indictment and is corroborated by the evidence of 18 other witnesses and documentary evidence.¹⁰⁶ The Prosecution seeks the admission of 13 associated exhibits.¹⁰⁷ The Defence objects to the admission of particular portions of the witness's evidence where, it argues, (a) the witness gives the impression that the Bršadin Territorial Defence ("TO") was placed under the command of Arkan during the attack on Lužac whereas an organigram provided by the witness shows that it was not; (b) the questions put to the witness could give the impression that Arkan was subordinate to the TO; (c) the witness says that each of Arkan's men led a small group of local men, which is contradicted by an "abundance of other evidence"; and (d) the evidence makes allegations against Marko Bolić, an alleged proximate subordinate of Hadžić.¹⁰⁸ The Defence submits that the admission of this evidence, especially given its inability to clarify certain matters through cross-examination, would be unduly prejudicial. The Prosecution replies that (a) the evidence is sufficiently clear for the Chamber to assess its reliability; (b) the Defence's concerns regarding the relationship between the TO and Arkan's men can be addressed with other live witnesses; and (c) the evidence concerns the acts and conduct of another person—and thus does not go to proof of acts and conduct of Hadžić.¹⁰⁹

48. The Defence does not dispute, and the Chamber accepts, that GH-008 is deceased and therefore unavailable. The Chamber considers that the witness's evidence is relevant to charges in the Indictment. The Chamber notes that the proposition by the defence in *S. Milošević* that Arkan was subordinate to the TO was not confirmed by the witness.¹¹⁰ Therefore, the Defence's argument that questions put to the witness could lead to an adverse impression is dismissed. After reviewing the organigram provided by the witness and the witness's description of it during the contested portion of the testimony, the Chamber notes that the evidence of GH-008 is unclear, rather than

¹⁰⁴ Motion, confidential Annex B, pp. 80-88; Doc ID 0424-8774.

¹⁰⁵ Case No. IT-02-54.

¹⁰⁶ Motion, confidential Annex A, pp. 17-21.

¹⁰⁷ Motion, confidential Annex A, pp. 19-21.

¹⁰⁸ Response, paras 26-28.

¹⁰⁹ Reply, pp. 5-6.

inconsistent, as to whether the TO was under the command of Arkan during the attack on Lužac.¹¹¹ The Chamber considers that this goes to the weight to be given to the evidence, not its admission. The Chamber notes the Defence's objection to the detail that "[e]ach and every one of Arkan's men led a small group of local men".¹¹² This detail will be evaluated in light of all the evidence presented at trial and is considered admissible.

49. The Chamber notes that, in the witness statement tendered as an associated exhibit, the witness states: "Most of the locals believed that the key person involved was a man named Marko Bolić, commander of the police station in Erdut and that he knew what happened in connection with the disappearance of people."¹¹³ The Chamber does not consider that Bolić is sufficiently proximate to Hadžić or that the evidence is sufficiently pivotal to the Prosecution's case that it would be unfair to admit it in written form without the opportunity for cross-examination. The Chamber recalls that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.

50. The Chamber considers that the testimony was given under oath before the Tribunal and that the witness was subjected to cross-examination.¹¹⁴ The Chamber finds that the tendered associated exhibits, as referenced in the testimony, form an inseparable and indispensable part of the evidence. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

51. The Chamber notes that portions of the testimony contained in the tendered transcripts were given in private session and remain confidential. As such, Rule 65 *ter* numbers 04636 and 04637 will be admitted under seal, notwithstanding that the protective measures assigned to this witness have been rescinded.¹¹⁵ The Prosecution will be ordered to upload and release in eCourt a public redacted version of the transcripts with the portions in private session redacted. The Chamber also notes that the last page of the transcript of the cross-examination of GH-008 is not included in Rule

¹¹⁰ Rule 65 *ter* 04637, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, 27 November 2003, T. 29826.

¹¹¹ The witness indicates that an infantry unit, under the command of Arkan, included members of the Serb Volunteer Guard and members of the TO of Bršadin and surrounding Serb villages. He also states that, in addition to this infantry unit, the TO Bršadin was involved in the attack on Lužac. Rule 65 *ter* 04637, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, 27 November 2003, T. 29823-29824 (confidential); Rule 65 *ter* 02437, Organigram of Battles During Vukovar Campaign, p. 3.

¹¹² Rule 65 *ter* 04637, *Prosecutor v. S. Milošević*, IT-02-54-T, 27 November 2003, T. 29827 (confidential).

¹¹³ Rule 65 *ter* 02537, Witness Statement, 27 July 2003, para. 82.

¹¹⁴ Rule 65 *ter* 04636, *Prosecutor v. S. Milošević*, IT-02-54-T, 2 December 2003; Rule 65 *ter* 04637, *Prosecutor v. S. Milošević*, IT-02-54-T, 27 November 2003.

¹¹⁵ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Motion for Admission of [...]’s Testimony Pursuant to Rule 92 *quater*, 2 November 2009 (English translation 23 April 2010), p. 11.

65 *ter* number 04636 (T. 29879). The Prosecution will be ordered to add this page to the document in eCourt.

52. *GH-055*: The Prosecution submits a death certificate to demonstrate that GH-055 is unavailable.¹¹⁶ According to the Prosecution, GH-055's evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of four other witnesses.¹¹⁷ The Defence objects to the admission of GH-055's written statement arguing that (a) it is unreliable, (b) the expressions used in the English translation reflect an "ambiguity of expression in English that should raise doubts about the accuracy of the communication", and (c) it is devoid of necessary details such as the identity of particular perpetrators or the basis of the witness's knowledge.¹¹⁸ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not to its admissibility.¹¹⁹

53. The Defence does not dispute, and the Chamber accepts, that GH-055 is deceased and therefore unavailable. The Chamber considers that GH-055's evidence is relevant to charges in the Indictment. The Chamber considers that the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood. The Chamber has reviewed the language objected to by the Defence¹²⁰ and considers that within the context of the statement it is not ambiguous or unclear. The remaining details that the Defence argues are absent from the statement are considerations that go to the weight to be given to the evidence and not to its admission. The Chamber further considers that (a) the statement was signed by the witness with an acknowledgement of the truth of its contents; (b) the evidence relates to events about which other witnesses provide evidence; and (c) there are no manifest inconsistencies in the statement.¹²¹ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

54. *GH-064*: The Prosecution submits medical certificates and a letter from an investigative judge in Croatia to demonstrate that GH-064 is unavailable.¹²² According to the Prosecution, GH-064's evidence, in the form of a written statement, is relevant to events in Lovas charged in the

¹¹⁶ Motion, confidential Annex B, pp. 89-90; *see* Doc ID 0683-9568 for English translation.

¹¹⁷ Motion, confidential Annex A, p. 22.

¹¹⁸ Response, paras 13, 29-31.

¹¹⁹ Reply, p. 4.

¹²⁰ "She then told me that she had questioned about the fate of the missing Hungarians to a soldier who told her where they could be found"[*sic*]. Rule 65 *ter* 02390, Witness Statement, 9 June 1999, p. 3.

¹²¹ Rule 65 *ter* 02390, Witness Statement, 9 June 1999.

¹²² Motion, confidential Annex B, pp. 91-95; *see* Rule 65 *ter* 02788 for English translation.

Indictment and is corroborated by the evidence of 12 witnesses.¹²³ The Prosecution seeks the admission of one associated exhibit.¹²⁴ The Defence objects to the admission of GH-064's written statement arguing that it is not reliable.¹²⁵ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not to its admissibility.¹²⁶

55. The Chamber notes that in May 2009 the testimony of GH-064 was cancelled by an investigative judge of the County Court in Rijeka, Croatia because a medical expert "upon examination of [GH-064's] medical documentation, gave her opinion that [he was] not medically fit to attend hearings, because any frustration could lead to deterioration of [GH-064's] health."¹²⁷ There is no indication of what medical condition GH-064 suffered from at that time and the Chamber is therefore unable to determine if it persists. The medical certificates, dated 13 and 23 February 2012 state that GH-064 suffers from "occasional shortness of breath", "*hypertensio arterialis*", "*diabetes mellitus*", "*polineuropathia [sic] diabetica*", "*angina pectoris*", and "*dyslipidemia*".¹²⁸ Based on the documentation submitted by the Prosecution, the Chamber is not satisfied that GH-064 is incapable of attending a court hearing and testifying or that he is incapable of answering the questions put to him and testifying coherently. Accordingly, the Chamber is not satisfied that GH-064 is objectively unavailable and his testimony will not be admitted pursuant to Rule 92 *quater*.

56. *GH-152*: The Prosecution submits a death certificate to demonstrate that GH-152 is unavailable.¹²⁹ According to the Prosecution, GH-152's evidence, in the form of a written statement, is relevant to events in Hrvatska Dubica charged in the Indictment and is corroborated by the evidence of four other witnesses.¹³⁰ The Defence objects to the admission of GH-152's written statement arguing that it is unreliable.¹³¹ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not its admissibility.¹³²

¹²³ Motion, confidential Annex A, pp. 23-24.

¹²⁴ Motion, confidential Annex A, p. 24.

¹²⁵ Response, paras 13, 32.

¹²⁶ Reply, p. 4.

¹²⁷ Rule 65 *ter* 02788, Letter from Investigative Judge, 18 May 2009.

¹²⁸ Rule 65 *ter* 02788, Specialist Report, 13 February 2012; Rule 65 *ter* 02788, Specialist Report, 23 February 2012.

¹²⁹ Motion, confidential Annex B, pp. 96-108.

¹³⁰ Motion, confidential Annex A, p. 25.

¹³¹ The Chamber notes that the Defence submits in paragraph 11 of the Response that it does not object to the admission of GH-152's statement. However, at paragraph 33, it does object to the admission of the statement. Response, paras 11, 13, 33.

¹³² Reply, p. 4.

57. The Defence does not dispute, and the Chamber accepts, that GH-152 is deceased and therefore unavailable. The Chamber considers that GH-152's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement and the witness indicated where he was uncertain about particular information; and (e) the witness distinguishes between what he personally witnessed and what he heard from others.¹³³ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

58. *GH-126*: The Prosecution submits medical certificates to demonstrate that GH-126 is unavailable.¹³⁴ According to the Prosecution, GH-126's evidence, in the form of a transcript of his testimony in *Prosecutor v. Mrkšić et al.*,¹³⁵ is relevant to events in Velepromet and Vukovar charged in the Indictment and is corroborated by the evidence of 15 witnesses.¹³⁶ The Prosecution seeks the admission of nine associated exhibits.¹³⁷ The Defence submits that GH-126 is not unavailable for the purpose of Rule 92 *quater* because individuals with Parkinson's Disease are not necessarily incapable of accurate recollection and testimony.¹³⁸ The Prosecution replies that other Trial Chambers have found that a similarly situated witness that suffered from Parkinson's Disease was unavailable for the purposes of Rule 92 *quater*.¹³⁹

59. The Chamber notes that the latest medical certificate, dated 2 August 2012 states that "as for the Parkinson's disease, it is good, but a rupture of the synthetic material has occurred in the left hip."¹⁴⁰ The certificate further states that the "emotional expression is good; tremor in both arms is visible when passive [...] needs walking stick." A medical certificate dated 9 May 2012 states that GH-126 reported that he "feels he can move and is able to work a lot."¹⁴¹ Based on the documentation submitted by the Prosecution, the Chamber is not satisfied that GH-126 is incapable of attending a court hearing and testifying or that he is incapable of answering the questions put to

¹³³ Rule 65 *ter* 02422, Witness Statement, 6 November 2000.

¹³⁴ First Supplement, confidential Annex B.

¹³⁵ Case No. IT-95-13/1.

¹³⁶ Motion, confidential Annex A, pp. 26-27.

¹³⁷ Motion, confidential Annex A, pp. 27-28.

¹³⁸ First Supplement Response, para. 2.

¹³⁹ First Supplement Reply, para. 3, citing *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009, para. 10.

¹⁴⁰ First Supplement, confidential Annex B, Medical Document, 2 August 2012.

¹⁴¹ First Supplement, confidential Annex B, Medical Document, 9 May 2012.

him and testifying coherently. Accordingly, the Chamber is not satisfied that GH-126 is objectively unavailable and the evidence will not be admitted pursuant to Rule 92 *quater*.

60. *GH-157*: The Prosecution submits a death certificate to demonstrate that GH-157 is unavailable.¹⁴² According to the Prosecution, GH-157's evidence, in the form of a written statement, which is appended to an Indictment of the Osijek District Prosecutor's Office against Hadžić and others, is relevant to events in Tenja and is corroborated by the evidence of two other witnesses and documentary evidence.¹⁴³ The Defence objects to the admission of GH-157's written statement arguing that the statement (a) appears to be a summary of answers provided by the witness before a Croatian investigative magistrate; (b) was neither taken under oath nor subjected to cross-examination; (c) was taken before the end of the war at a time when national courts were unable to conduct impartial proceedings; and (d) goes to proof of the acts and conduct of Hadžić in a highly prejudicial manner.¹⁴⁴ The Prosecution replies that (a) there is no prohibition on non-ICTY statements being admitted pursuant to Rule 92 *quater*; (b) the witness was warned against providing false testimony and was cross-examined; (c) the Defence will be able to cross-examine another Prosecution witness regarding the events in Tenja; and (d) the Defence objections concern the weight to be given to the evidence and not its admissibility.¹⁴⁵

61. The Defence does not dispute, and the Chamber accepts, that GH-157 is deceased and therefore unavailable. The Chamber considers that GH-157's evidence is relevant to charges in the Indictment. The written statement tendered by the Prosecution is a summary of evidence given by GH-157 at an evidentiary proceeding in Croatia. The date of the proceedings is not recorded. The witness was "warned that he is required to tell the truth and not remain silent on any matter, and that false testimony constitutes a criminal offence", but he did not take an oath.¹⁴⁶ The witness was questioned by defence counsel,¹⁴⁷ but only one question and answer was recorded. It is not clear whether he was questioned further. It is not clear who prepared the summary and the witness did not sign it or in any other way confirm its accuracy. The Chamber also considers that the evidence goes to proof of the acts and conduct of Hadžić.¹⁴⁸ In light of these circumstances, the Chamber finds that, although the witness is unavailable to testify, the tendered evidence does not contain

¹⁴² Motion, confidential Annex B, pp. 109-111; see Doc ID 0683-9561 for English translation.

¹⁴³ Motion, confidential Annex A, pp. 28-29.

¹⁴⁴ Response, paras 35-36.

¹⁴⁵ Reply, p. 6.

¹⁴⁶ Rule 65 *ter* 02201, Witness Statement Appended to Indictment of Osijek District Public Prosecutor's Office Against Goran Hadžić and Others, pp. 8, 10.

¹⁴⁷ The statement includes: "In answer to a question by defence counsel, the witness replied [...]". Rule 65 *ter* 02201, Witness Statement Appended to Indictment of Osijek District Public Prosecutor's Office Against Goran Hadžić and Others, p. 10.

¹⁴⁸ Rule 65 *ter* 02201, Witness Statement Appended to Indictment of Osijek District Public Prosecutor's Office Against Goran Hadžić and Others, pp. 8-9.

sufficient indicia of reliability and is therefore not appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

62. *GH-073*: The Prosecution submits a death certificate to demonstrate that GH-073 is unavailable.¹⁴⁹ According to the Prosecution, GH-073's evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of 12 other witnesses and documentary evidence.¹⁵⁰ The Defence objects to a portion of GH-073's statement in which the witness states that Hadžić and his government had control over Erdut in the spring of 1992; in the view of the Defence this is contrary to other evidence and the Prosecution's view. The Defence therefore argues that other propositions in the evidence are also faulty.¹⁵¹ The Defence additionally objects to a portion of the statement which asserts that local "Serbs [...] continued to work and collaborated with the JNA, Arkan, and Hadžić" arguing that it implies an association of the three and complicity of local Serbs with them in perpetrating crimes. The Defence argues that this statement is more prejudicial than probative.¹⁵² The Prosecution replies that, in light of the Defence's objection, it will not rely on the portion of the statement alleging Hadžić's control over Erdut in the spring of 1992.¹⁵³

63. The Defence does not dispute, and the Chamber accepts, that GH-073 is deceased and therefore unavailable. The Chamber considers that GH-073's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; and (d) the witness distinguishes between what he personally witnessed and what he heard from others.¹⁵⁴

64. The Chamber notes that the witness states: "I can say that after 1 August 1991, Erdut was under the complete control of the JNA, later to be taken over by Arkan, and in the spring of 1992, by Goran Hadžić and his Government."¹⁵⁵ The witness also states: "The Serbs, who were elected into the Town Committee at the National Elections in 1990, continued to work and collaborated with the JNA, Arkan and Hadžić."¹⁵⁶ The Chamber considers that the accuracy of these statements

¹⁴⁹ Motion, confidential Annex B, pp. 112-114; *see* Doc ID 0681-1917 for English translation.

¹⁵⁰ Motion, confidential Annex A, pp. 29-31.

¹⁵¹ Response, para. 37; *see* Rule 65 *ter* 02335, Witness Statement, 18 November 1998, p. 3.

¹⁵² Response, para. 37; *see* Rule 65 *ter* 02335, Witness Statement, 18 November 1998, p. 3.

¹⁵³ Reply, p. 6.

¹⁵⁴ Rule 65 *ter* 02335, Witness Statement, 18 November 1998.

¹⁵⁵ Rule 65 *ter* 02335, Witness Statement, 18 November 1998, p. 3.

¹⁵⁶ Rule 65 *ter* 02335, Witness Statement, 18 November 1998, p. 3.

will be considered in light of all the evidence presented at trial.¹⁵⁷ The Chamber recalls that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber further considers that a possible error as to the date does not call into question the reliability of the entirety of the witness's evidence, particularly in light of the fact that there are no other manifest inconsistencies in the statement and the witness indicated where he was uncertain about particular information.¹⁵⁸ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

65. *GH-074*: The Prosecution submits a death certificate to demonstrate that GH-074 is unavailable.¹⁵⁹ According to the Prosecution, GH-074's evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of 14 other witnesses.¹⁶⁰ The Prosecution seeks the admission of one associated exhibit.¹⁶¹ The Defence objects to the admission of GH-074's written statement arguing that it is unreliable. In particular, the Defence points to two aspects of GH-074's evidence which it argues cannot be accurate.¹⁶² The Defence also specifically objects to sections of the statement where the witness states that (a) he saw Hadžić in the company of Arkan and (b) he was "of the opinion that Hadžić was the president of the Krajina military and police force at a certain period".¹⁶³ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not its admissibility.¹⁶⁴

66. The Defence does not dispute, and the Chamber accepts, that GH-074 is deceased and therefore unavailable. The Chamber considers that GH-074's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; and (c) the evidence relates to events about which other witnesses provide evidence. The Chamber notes that there are two details in the statement that appear to be typographical errors or

¹⁵⁷ In relation to the first statement, the Trial Chamber notes that in its Pre-Trial Brief the Prosecution alleges: "On 1 August 1991, the JNA and the TO attacked Erdut, causing the Croat population to flee. Several days after the attack, a local police unit and Arkan's Tigers established themselves in Erdut. Hadžić provided Arkan with the Erdut TO training centre, which became known as Arkan's training centre." Prosecution Public Pre-Trial Brief, 14 September 2012, para. 148.

¹⁵⁸ Rule 65 *ter* 02335, Witness Statement, 18 November 1998.

¹⁵⁹ Motion, confidential Annex B, pp. 115-117; *see* Doc ID 0681-1915 for English translation.

¹⁶⁰ Motion, confidential Annex A, pp. 31-32.

¹⁶¹ Motion, confidential Annex A, p. 32.

¹⁶² Response, paras 38-39.

¹⁶³ Response, paras 40-41.

¹⁶⁴ Reply, p. 7.

exaggerations by the witness: (a) where the witness describes the training of Arkan's men, he says: "Sometimes the rows of men would stretch as long as 500 metres long";¹⁶⁵ and (b) he states that he was arrested 20 times between 22 August 1991 and 10 September 1991 whereas he only provides details of two arrests during that time.¹⁶⁶ The Chamber considers however that there are no other manifest inconsistencies in the statement, the witness repeatedly indicated where he was uncertain about particular information, and the witness distinguished between what he personally witnessed and what he heard from others or had inferred.¹⁶⁷ The Chamber finds that the questionable nature of the two details does not call into question the reliability of the statement as a whole and are considerations for determining the weight to be given to the evidence and not its admissibility. The Chamber also notes that the witness states:

I saw Hadžić in the company of Arkan and some of the people mentioned above before I was expelled from Erdut. I was told that Hadžić had formed some type of Government in the Castle. I am also of the opinion that Hadžić was the president of the Krajina military and police force at a certain period after I was expelled.¹⁶⁸

The Chamber notes that the witness does not indicate in what context he saw Hadžić in the company of Arkan and does not give the source of the information that Hadžić had formed some type of government or why he was "of the opinion" that Hadžić was president of the Krajina military and police force. This statement, therefore, has limited probative value because the witness was not in a position to know such political and military details. For the same reasons, the Chamber does not consider the excerpt quoted above to be unduly prejudicial and does not find that it prevents the statement from being admitted in its entirety.

67. The Chamber notes that the Prosecution intends to tender a collection of photographs as an associated exhibit.¹⁶⁹ While references are made to the photographs in the written statement, the Prosecution has not provided Rule 65 *ter* numbers for these photographs and the information provided in the Annex is not sufficient to enable the Chamber to identify the photographs. The Chamber therefore does not consider them to have been properly tendered. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and—with the exception of the listed associated exhibit—is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

¹⁶⁵ Rule 65 *ter* 02349, Witness Statement, 16 December 1998, p. 6.

¹⁶⁶ Rule 65 *ter* 02349, Witness Statement, 16 December 1998, pp. 4, 6.

¹⁶⁷ Rule 65 *ter* 02349, Witness Statement, 16 December 1998.

¹⁶⁸ Rule 65 *ter* 02349, Witness Statement, 16 December 1998, p. 7.

¹⁶⁹ Motion, confidential Annex A, p. 32.

68. GH-133: The Prosecution submits a death certificate to demonstrate that GH-133 is unavailable.¹⁷⁰ According to the Prosecution, GH-133's evidence, in the form of a written statement, is relevant to events in Erdut charged in the Indictment and is corroborated by the evidence of 15 other witnesses.¹⁷¹ The Defence objects to the admission of GH-133's written statement arguing that it is unreliable.¹⁷² The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not its admissibility.¹⁷³

69. The Defence does not dispute, and the Chamber accepts, that GH-133 is deceased and therefore unavailable. The Chamber considers that GH-133's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement and the witness indicated where he was uncertain about particular information; and (e) the witness distinguishes between what he personally witnessed and what he heard from others.¹⁷⁴ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

70. GH-079: The Prosecution submits a medical certificate to demonstrate that GH-079 is unavailable.¹⁷⁵ According to the Prosecution, GH-079's evidence, in the form of a witness statement, is relevant to events in Dalj and Erdut as charged in the Indictment and is corroborated by the evidence of 11 other witnesses.¹⁷⁶ The Prosecution seeks the admission of one associated exhibit.¹⁷⁷ The Defence objects to the admission of GH-079's written statement arguing that it is unreliable.¹⁷⁸ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not its admissibility.¹⁷⁹

¹⁷⁰ Motion, confidential Annex B, pp. 118-119; see Doc ID 0683-9565 for English translation.

¹⁷¹ Motion, confidential Annex A, pp. 32-34.

¹⁷² Response, paras 13, 42.

¹⁷³ Reply, p. 4.

¹⁷⁴ Rule 65 *ter* 02362, Witness Statement, 5 February 1999.

¹⁷⁵ Motion, confidential Annex B, pp. 120-123.

¹⁷⁶ Motion, confidential Annex A, pp. 34-36.

¹⁷⁷ Motion, confidential Annex A, pp. 36-37.

¹⁷⁸ Response, paras 13, 43.

¹⁷⁹ Reply, p. 4.

71. The medical certificate is undated, but appears to have been sent by facsimile on 21 May 2007 in response to a letter from the Prosecution of 18 May 2007. The certificate notes that according to a “neurological control” of 5 March 2007, GH-079 had “medium-heavy partial paralysis of spastic type on the left side, walking the short distances with the help of a tool for the paralysed left leg and changes including the psycho-organic syndrome on the mental plan” [*sic*].¹⁸⁰ The Chamber notes that this medical information is over five years old and is insufficient to enable the Chamber to consider GH-079’s availability at this time. The Chamber is therefore not satisfied, in the absence of more recent information provided by a medical professional regarding the witness’s state of health and ability to testify, that GH-079 is objectively unavailable. For this reason the Chamber will deny admission of the witness’s evidence without prejudice.

72. GH-084: The Prosecution submits a death certificate to demonstrate that GH-084 is unavailable.¹⁸¹ According to the Prosecution, GH-084’s evidence, in the form of a written statement, is relevant to events in Erdut, Dalj, and Aljmaš charged in the Indictment and is corroborated by the evidence of nine other witnesses.¹⁸² The Prosecution seeks the admission of one associated exhibit.¹⁸³ The Defence objects to the admission of GH-084’s written statement arguing that it is unreliable because (a) the statement diverges in significant respects from the evidence of two other witnesses, GH-098 and GH-142, whose statements the Prosecution also tenders for admission pursuant to Rule 92 *quater*;¹⁸⁴ (b) the evidence is so vague that it is impossible to draw any inferences about its reliability based on corroboration; and (c) the corroborative value of GH-084’s and GH-098’s statements is low because neither witness was cross-examined, and it is apparent that the witnesses exchanged information about the events described in their respective statements.¹⁸⁵

73. The Defence specifically objects to the admission of a portion of the written statement in which GH-084 describes an alleged intervention by Hadžić to secure GH-084’s release, because the witness (a) fails to provide specific details; (b) does not state whether the description of the alleged event is based on direct observation or hearsay; and (c) does not provide the basis for his inference that Hadžić “secured” his release, what the witness meant by using the term “secured”, or why Hadžić may have intervened; and (d) does not state how he learned about Hadžić’s motivation for supposedly securing the release of another detainee (witness GH-098).¹⁸⁶ The Defence argues that this evidence is prejudicial because the Prosecution will interpret this event to imply that Hadžić

¹⁸⁰ Motion, confidential Annex B, pp. 121-123, Medical Certificate.

¹⁸¹ Motion, confidential Annex B, pp. 124-126; *see* Rule 65 *ter* 03392 for English translation.

¹⁸² Motion, confidential Annex A, pp. 37-38.

¹⁸³ Motion, confidential Annex A, pp. 38-39.

¹⁸⁴ Response, paras 49-50, 53.

¹⁸⁵ Response, paras 8, 51, 53.

exercised control over those directly in charge of detention and that he was responsible for not having secured the release of the other detainees.¹⁸⁷ The Defence submits that the probative value of the statement is far outweighed by its prejudicial effect.¹⁸⁸

74. The Prosecution replies that (a) the Defence's objections concerning the statement do not involve the reliability of the statement, but go to the weight to be given to it and (b) the Defence highlights minor inconsistencies between the evidence of GH-084 and GH-098 but ignores that their accounts are consistent on the central issues.¹⁸⁹ The Prosecution argues that the statement, including comments regarding Hadžić's conduct, is reliable.¹⁹⁰ The Prosecution asserts that GH-084's evidence will be corroborated by *viva voce* witnesses and documentary evidence.¹⁹¹

75. The Defence does not dispute, and the Chamber accepts, that GH-084 is deceased and therefore unavailable. The Chamber considers that GH-084's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence, (d) the witness indicated where he was uncertain about particular information; and (e) the witness distinguished between what he had heard and what he saw.¹⁹² The Chamber notes the Defence assertions that there are inconsistencies between the evidence of GH-098 and GH-084. Any inconsistencies between the evidence of these two witnesses will be weighed by the Chamber in the context of all the evidence provided. There are no manifest inconsistencies within the evidence of GH-084.

76. To the extent that the evidence goes to the acts and conduct of Hadžić, the Chamber recalls that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber finds that the tendered associated exhibit, as referenced in the statement, forms an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

¹⁸⁶ Response, para. 52.

¹⁸⁷ Response, para. 52.

¹⁸⁸ Response, para. 52.

¹⁸⁹ Reply, p. 8.

¹⁹⁰ Reply, p. 8.

¹⁹¹ Reply, p. 8.

¹⁹² Rule 65 *ter* 02372, Witness Statement, 17 April 1999.

77. *GH-022*: The Prosecution submits a death certificate to demonstrate that GH-022 is unavailable.¹⁹³ According to the Prosecution, GH-022's evidence, in the form of a transcript of his testimony in *Prosecutor v. S. Milošević*,¹⁹⁴ is relevant to events charged in the Indictment and is corroborated by the evidence of six other witnesses and documentary evidence.¹⁹⁵ The Prosecution seeks the admission of 12 associated exhibits.¹⁹⁶ The Defence objects to (a) portions of the evidence that go to the relationship between several members of the JCE and the supply of arms;¹⁹⁷ (b) the witness's specific claim that "Goran Hadžić would come often" to the witness's office, which was not subjected to cross-examination and provides no description of Hadžić's conduct, demeanour, or purpose as a visitor;¹⁹⁸ and (c) the tendered associated exhibits arguing that they do not form an indispensable and inseparable part of the testimony.¹⁹⁹ The Prosecution replies that (a) the witness was cross-examined in *S. Milošević*; (b) the witness's testimony and associated exhibits were admitted pursuant to Rule 92 *quater* in *Prosecutor v. Stanišić and Simatović*;²⁰⁰ and (c) the same considerations from *Stanišić and Simatović* warrant admission of the statement in this case.²⁰¹

78. The Defence does not dispute, and the Chamber accepts, that GH-022 is deceased and therefore unavailable. The Chamber considers that the witness's evidence is relevant to charges in the Indictment. The Chamber considers that the evidence was given under oath before the Tribunal and was subjected to cross-examination.²⁰² The Chamber further considers that the portions of the evidence challenged by the Defence, which go to the relationship between several members of the alleged JCE, the supply of arms, and Hadžić's presence at the witness's office, do not directly implicate Hadžić in any of the crimes alleged in the Indictment and are not unduly prejudicial. The Chamber recalls that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber determines that the tendered associated exhibits, as referenced in the transcript, form an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

¹⁹³ Motion, confidential Annex B, pp. 127-129; see Doc ID 0423-3500 for English translation.

¹⁹⁴ Case No. IT-02-54.

¹⁹⁵ Motion, confidential Annex A, pp. 39-42.

¹⁹⁶ Motion, confidential Annex A, pp. 40-42.

¹⁹⁷ Response, para. 46.

¹⁹⁸ Response, paras 44-46.

¹⁹⁹ Response, para. 47.

²⁰⁰ Case No. IT-03-69.

²⁰¹ Reply, pp. 7-8.

²⁰² Rule 65 *ter* 04557, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, 15 September 2003.

79. The Chamber recalls that GH-022 has the protective measure of the use of a pseudonym in all proceedings before the Tribunal related to this case.²⁰³ To give effect to this protective measure, Rule 65 *ter* numbers 00071, 00420, 01000, 01266, 02999, and 03019 will be admitted under seal. The Prosecution will be ordered to upload and release in eCourt public redacted versions of the transcript with the portions in private session redacted.

80. GH-087: The Prosecution submits a death certificate to demonstrate that GH-087 is unavailable.²⁰⁴ According to the Prosecution, GH-087's evidence, in the form of a written statement, is relevant to events in Vukovar and Dalj charged in the Indictment and is corroborated by the evidence of five other witnesses and documentary evidence.²⁰⁵ The Prosecution seeks the admission of two associated exhibits.²⁰⁶ The Defence objects to the admission of GH-087's written statement arguing that it is unreliable.²⁰⁷ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not to its admissibility.²⁰⁸

81. The Defence does not dispute, and the Chamber accepts, that GH-087 is deceased and therefore unavailable. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) the witness distinguishes between what she personally observed and she heard from others; and (e) there are no manifest inconsistencies in the statement.²⁰⁹ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

82. GH-142: The Prosecution submits a death certificate and other records to demonstrate that GH-142 is unavailable.²¹⁰ According to the Prosecution, GH-142's evidence, in the form of a written statement, is relevant to events in Dalj and Erdut charged in the Indictment and is corroborated by the evidence of seven other witnesses.²¹¹ The Defence objects to the admission of GH-142's written statement arguing that it is unreliable²¹² and that GH-142's description of his

²⁰³ Protective Measures Decision, p. 12, para 42(a)(xvii).

²⁰⁴ Motion, confidential Annex B, pp. 130-134.

²⁰⁵ Motion, confidential Annex A, pp. 42-44.

²⁰⁶ Motion, confidential Annex A, pp. 42-44.

²⁰⁷ Response, paras 13, 55.

²⁰⁸ Reply, p. 4.

²⁰⁹ Rule 65 *ter* 02453, Witness Statement, 16 May 2001.

²¹⁰ Motion, confidential Annex B, pp. 135-142; *see* Rule 65 *ter* 04075, 04076, 04077 for English translations.

²¹¹ Motion, confidential Annex A, pp. 44-45.

²¹² Response, paras 13, 56.

detention with GH-084 and GH-098 is so vague that it cannot be considered to be corroborated by the statements of those two witnesses.²¹³ The Prosecution replies that the written statement contains sufficient indicia of reliability and that the objections made by the Defence go to the weight to be given to the evidence and not to its admissibility.²¹⁴

83. The Chamber considers that the records submitted by the Prosecution regarding GH-142's unavailability do not relate to this witness. While the name on the documentation matches the name on the tendered statement, there is a 26 year discrepancy between the dates of birth denoted in the tendered statement and in the death certificate.²¹⁵ Further, the documentation indicates that the date of death was 19 November 1991, whereas the witness statement is dated 8 June 1999.²¹⁶ The Chamber is therefore not satisfied, in the absence of documentation demonstrating that the witness is deceased, that GH-142 is unavailable. For this reason the Chamber will deny admission of the witness's evidence without prejudice.

84. *GH-098*: The Prosecution submits a death certificate to demonstrate that GH-098 is unavailable.²¹⁷ According to the Prosecution, GH-098's evidence, in the form of a transcript of his prior testimony in *Prosecutor v. Stanišić and Simatović*,²¹⁸ is relevant to events in Dalj and Erdut charged in the Indictment and is corroborated by the evidence of 22 witnesses and documentary evidence.²¹⁹ The Prosecution seeks the admission of five associated exhibits, including a witness statement and a transcript of GH-098's prior testimony in *Prosecutor v. S. Milošević*.²²⁰ The Defence objects to the admission of GH-098's evidence arguing that it is unreliable because, *inter alia*, (a) there are numerous inconsistencies between his evidence and the evidence of GH-084 and GH-142;²²¹ (b) the transcript of his testimony in *Stanišić and Simatović* suggests that his memory was failing and so he was open to suggestion by the Prosecution;²²² and (c) his successive statements contain internal discrepancies.²²³

85. The Defence specifically objects to the admission of a portion of the evidence that it submits goes to the acts and conduct of Hadžić, which could be highly prejudicial.²²⁴ The Defence submits

²¹³ Response, para. 57.

²¹⁴ Reply, p. 4.

²¹⁵ Rule 65 *ter* 02387, Witness Statement, 8 June 1999, p. 1; Rule 65 *ter* number 04075, Death Certificate dated 11 June 2001, p. 1.

²¹⁶ Rule 65 *ter* 02387, Witness Statement, 8 June 1999, p. 1; Rule 65 *ter* number 04075, Death Certificate dated 11 June 2001, p. 1.

²¹⁷ Motion, confidential Annex B, pp. 143-144; see Doc ID 0683-9569 for English translation.

²¹⁸ Case No. IT-03-69.

²¹⁹ Motion, confidential Annex A, pp. 45-48.

²²⁰ Case No. IT-02-54. Motion, confidential Annex A, pp. 48-49.

²²¹ Response, para. 62.

²²² Response, para. 63.

²²³ Response, para. 64.

²²⁴ Response, paras 58-61, 65.

that GH-098 was never meaningfully cross-examined on this evidence, which could be interpreted to (a) directly incriminate Hadžić for a specific crime; (b) go to proof of the alleged JCE; and (c) demonstrate that Arkan's men reported to Hadžić.²²⁵ The Defence also submits that the evidence is vague in relation to Hadžić's alleged conduct.²²⁶ The Defence requests that, should the evidence not be denied admission in its entirety, the associated witness statements be denied admission, all references to the witness's alleged release from detention by Hadžić be denied admission, or at least the references to Arkan's men "snapping to attention" before Hadžić be expunged.²²⁷ The Prosecution replies that GH-098's written evidence is reliable because (a) his testimony in *Stanišić and Simatović* and *S. Milošević* was consistent and credible; (b) his evidence regarding the acknowledgement by Arkan's men of Hadžić can be addressed during the testimony of live witnesses; and (c) he was subject to sufficient cross-examination in *Stanišić and Simatović* and *S. Milošević*.²²⁸

86. The Defence does not dispute, and the Chamber accepts, that GH-098 is deceased and therefore unavailable. The Chamber considers that GH-098's evidence is relevant to charges in the Indictment. The Chamber notes that (a) GH-098 gave evidence before the Tribunal under oath in two trials and that his testimony was transcribed and became part of the official records of those proceedings; and (b) that he was subjected to cross-examination by accused with similar interests as Hadžić.²²⁹ The Chamber therefore finds that, based on the circumstances in which the evidence was given, the transcript has a sufficient degree of reliability. The Chamber has considered the inconsistencies alleged by the Defence and finds that they do not call into question the reliability of the evidence as a whole and are considerations for determining the weight to be given to the evidence and not its admissibility.

87. The Chamber notes that there was limited cross-examination of the witness on issues that may have specific prejudicial effect to Hadžić in this case. The Chamber recalls, however, that it cannot and will not base a conviction solely on uncorroborated evidence admitted pursuant to Rule 92 *quater*. The Chamber therefore finds that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber finds that the tendered associated exhibits, as discussed in the transcript from GH-098's testimony in *Stanišić and Simatović*, form an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

²²⁵ Response, paras 58-61.

²²⁶ Response, para. 60.

²²⁷ Response, para. 65.

88. *GH-144*: The Prosecution submits a death certificate to demonstrate that GH-144 is unavailable.²³⁰ According to the Prosecution, GH-144's evidence, in the form of a written statement, is relevant to events in Dalj and Erdut charged in the Indictment and is corroborated by the evidence of 14 other witnesses.²³¹ The Prosecution seeks the admission of two associated exhibits.²³² The Defence objects to the admission of GH-144's written statement arguing that details in the statement may have "unforeseeable relevance".²³³ The Prosecution replies that the possibility of an adverse impact of evidence at a future point in trial does not preclude admission under Rule 92 *quater*.²³⁴

89. The Defence does not dispute, and the Chamber accepts, that GH-144 is deceased and therefore unavailable. The Chamber considers that GH-144's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement; and (e) the witness distinguishes between what he personally witnessed and what he heard from others.²³⁵ The Prosecution has not provided a Rule 65 *ter* number for one of the two photographs it intends to tender. The information that is provided in the Annex is not sufficient to enable the Chamber to identify the photograph. The Chamber therefore does not consider it to have been properly tendered. The Chamber finds that the other tendered associated exhibit, one photograph included in Rule 65 *ter* number 05863 (ERN 0217-1619), as referenced in the statement, forms an inseparable and indispensable part of the testimony. However, the Chamber notes that Rule 65 *ter* number 05863 (ERN 0217-1619) will be admitted as an associated exhibit of the evidence of GH-084 and therefore will not be admitted in duplicate. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

90. *GH-114*: The Prosecution submits a death certificate to demonstrate that GH-114 is unavailable.²³⁶ According to the Prosecution, GH-114's evidence, in the form of a transcript of his

²²⁸ Reply, pp. 8-9.

²²⁹ Rule 65 *ter* 04579, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69, 5 March 2010.

²³⁰ Motion, confidential Annex B, pp. 145-150; see Doc ID 0683-9570 for English translation.

²³¹ Motion, confidential Annex A, pp. 49-50.

²³² Motion, confidential Annex A, pp. 50-51.

²³³ Response, para. 66.

²³⁴ Reply, p. 9.

²³⁵ Rule 65 *ter* 02373, Witness Statement, 17 April 1999.

²³⁶ First Supplement Reply, Annex A.

testimony in *Prosecutor v. Mrkšić et al.*,²³⁷ is relevant to events in Vukovar charged in the Indictment and is corroborated by the evidence of 16 other witnesses.²³⁸ The Prosecution seeks the admission of nine associated exhibits.²³⁹ The Defence does not object to the admission of GH-114's statement.²⁴⁰

91. The Defence does not dispute, and the Chamber accepts, that GH-114 is deceased and therefore unavailable. The Chamber considers that GH-114's evidence is relevant to charges in the Indictment. The Chamber considers that (a) the testimony was given under oath and (b) the witness was subjected to cross-examination during his testimony.²⁴¹ The Chamber finds that the tendered associated exhibits, as discussed in the transcript, form an inseparable and indispensable part of the testimony. The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

92. The Chamber notes that portions of the testimony contained in the tendered transcripts were given in private session and remain confidential. As such, Rule 65 *ter* numbers 04633, 04634, and 04635 will be admitted under seal, notwithstanding that the protective measures assigned to this witness have been rescinded.²⁴² The Prosecution will be ordered to upload and release in eCourt a public redacted version of the transcripts with the portions in private session redacted.

93. *GH-005*: The Prosecution submits medical certificates to demonstrate that GH-005 is unavailable.²⁴³ According to the Prosecution, GH-005's evidence, in the form of a transcript of his testimony in *Prosecutor v. Šešelj*,²⁴⁴ is relevant to events in Vukovar, Borovo Selo, and Ovčara as charged in the Indictment and is corroborated by the evidence of 17 witnesses.²⁴⁵ The Prosecution seeks the admission of 21 associated exhibits.²⁴⁶ In the First Supplement, the Prosecution seeks to lift the *ex parte* status of Annexes C and D of the Motion and discloses the information contained therein to the Defence. Annexes C and D of the Motion had been filed *ex parte* the Defence because GH-005 has the protective measure of delayed disclosure of his identity until 30 days before

²³⁷ Case No. IT-95-13/1.

²³⁸ Motion, confidential Annex A, pp. 51-53.

²³⁹ Motion, confidential Annex A, pp. 53-54.

²⁴⁰ Response, para. 11.

²⁴¹ Rule 65 *ter* 04633, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, 23 November 2005; Rule 65 *ter* 04634, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, 24 November 2005; Rule 65 *ter* 04635, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, 25 November 2005.

²⁴² Protective Measures Decision, paras 41, 42(c).

²⁴³ First Supplement, confidential Annex D, pp. 41-70; Second Supplement, confidential Annex B.

²⁴⁴ Case No. IT-03-67.

²⁴⁵ First Supplement, confidential Annex D, pp. 36-40.

²⁴⁶ First Supplement, confidential Annex D, pp. 36-40.

testimony.²⁴⁷ In the First Supplement Response, the Defence submits that it does not have access to the documentation supporting the unavailability of GH-005 and therefore objects to the statement being tendered without having an opportunity to comment upon the witness's unavailability.²⁴⁸ The Defence submits that GH-005's testimony is *prima facie* suspect, having been found not credible by the Trial Chamber in the *Mrkšić et al.* case.²⁴⁹ The Defence further submits that GH-005's prior testimony from *S. Milošević*—tendered as an associated exhibit—should be denied admission because it has not been submitted pursuant to Rule 92 *quater* in its own right.²⁵⁰ In the First Supplement Reply, the Prosecution submits that the tendered transcript from *S. Milošević* was the subject of numerous questions during the testimony in *Šešelj*, and forms an evidentiary package suitable for admission pursuant to Rule 92 *quater*.²⁵¹ In the Second Supplement, the Prosecution submitted additional medical documents and in the Second Supplement Reply the Defence argued that this additional documentation “continues to be inadequate to establish that GH-005 is unavailable”.²⁵²

94. The Chamber notes that the documents initially submitted by the Prosecution to demonstrate GH-005's unavailability were attached as confidential Annex D to the First Supplement, which was not *ex parte* the Defence. Therefore, the documents were available to the Defence at the time it filed the First Supplement Response. The additional documents regarding GH-005's state of health submitted by the Prosecution in the Second Supplement are available to the Defence.²⁵³

95. According to the most recent psychiatrist's report, GH-005 suffers from Alzheimer's Disease and Parkinson's Disease; it is further noted that he is disoriented in time and that his disease is progressing.²⁵⁴ A report provided by a neuropsychiatrist states that GH-005 “does not understand some instructions” and has “[r]educed mnemonic functions”.²⁵⁵ The 17 January 2013 psychiatrist's report concludes that “[d]ue to the nature of the illness and current [stage] the patient is unfit to give testimony in court.”²⁵⁶ Considering the contents of these medical certificates, the Chamber is satisfied that GH-005 is incapable of answering questions put to him and testifying coherently and is therefore objectively unavailable within the meaning of Rule 92 *quater*.

²⁴⁷ First Supplement, paras 2, 9; First Supplement, confidential Annex D.

²⁴⁸ First Supplement Response, para. 8.

²⁴⁹ First Supplement Response, para. 10. Case No. IT-95-13/1-T.

²⁵⁰ First Supplement Response, para. 9.

²⁵¹ First Supplement Reply, para. 5.

²⁵² Second Supplement, confidential Annex B; Second Supplement Response, paras 2-4.

²⁵³ Second Supplement, confidential Annex B.

²⁵⁴ Second Supplement, confidential Annex B. See Specialist's Report by Psychiatrist, dated 17 January 2013. See also Specialist's Report by Psychiatrist, dated 25 December 2012.

²⁵⁵ Second Supplement, confidential Annex B. See Findings and Opinion of Neuropsychiatrist, 23 March 2012.

²⁵⁶ Second Supplement, confidential Annex B. See Specialist's Report, 17 January 2013.

96. The Chamber notes that some of the witness's evidence is relevant to charges in the Indictment. The Chamber further notes that GH-005, appearing as a Chamber witness in the *Šešelj* case, provided evidence under oath before the Tribunal and was cross-examined by the accused Šešelj. However, the Chamber has concerns about the reliability of the evidence. Having reviewed the transcript of testimony, it appears that the witness may have been in a poor state of mental health during his testimony in the *Šešelj* proceedings. On a number of occasions, the witness had difficulty comprehending questions put to him and providing coherent answers; other answers appear to be based on misapprehension of the question. The witness's ability to remember and recall information, even when prompted, was at times poor; the witness himself admitted suffering from memory problems. In this regard, the witness, the Chamber, and the Prosecution all expressed concern in relation to the above matters during the hearing.²⁵⁷ The Chamber notes that the Prosecution, based on its stated concerns and with the support of the *Šešelj* Chamber, essentially waived the option provided to it by the Chamber to put questions to the witness and instead tendered portions of the witness's prior testimony from *S. Milošević* pursuant to Rule 92 *bis*.²⁵⁸

97. The Chamber is concerned that, given the above and in the absence of the opportunity to have observed the witness during his testimony, it is unable to assess the reliability of the witness's evidence. The Trial Chamber therefore finds that the probative value of the evidence is substantially outweighed by the need to ensure a fair trial and that, although the witness is unavailable to testify, the evidence will not be admitted pursuant to Rule 92 *quater*.

98. *GH-108*: The Prosecution submits a medical certificate to demonstrate that GH-108 is unavailable.²⁵⁹ According to the Prosecution, GH-108's evidence, in the form of a written statement and a transcript of his testimony in *Prosecutor v. Dokmanović*,²⁶⁰ is relevant to events in Vukovar and the JCE charged in the Indictment and is corroborated by the evidence of six witnesses.²⁶¹ The Prosecution seeks the admission of eight associated exhibits.²⁶² The Defence argues that GH-108's condition "does not come close to satisfying the requirement of unavailability in Rule 92 *quater*" and that his statement is unreliable because he was allegedly "'prepar[ed]' by Croatian State Security before appearing as a witness before this Tribunal."²⁶³ In the First Supplement Reply, the

²⁵⁷ See, e.g., GH-005, Rule 65 *ter* 05761, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, 7 July 2009, T. 14614 (confidential); GH-005, Rule 65 *ter* 05762, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, 8 July 2009, T. 14620, 14627, 14629, 14634 (confidential).

²⁵⁸ GH-005, Rule 65 *ter* 05762, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, 8 July 2009, T. 14620-14621 (confidential).

²⁵⁹ First Supplement, confidential Annex F, pp. 86-91. In the Motion, the Prosecution noted that it may seek to have GH-108's evidence admitted pursuant to Rule 92 *quater*, as it had recently learned the witness may be unavailable. See Motion, para. 1, fn. 2.

²⁶⁰ Case No. IT-95-13a.

²⁶¹ First Supplement, confidential Annex F, pp. 92-94.

²⁶² First Supplement, confidential Annex F, pp. 92-94.

²⁶³ First Supplement Response, paras 4-6.

Prosecution reiterates that GH-108 is unavailable because there is documented evidence that testifying would risk aggravating his condition and asserts that there is nothing to suggest that the Croatian government manipulated or interfered with his evidence to render it unreliable.²⁶⁴

99. The Chamber notes that the medical certificate provided by a psychiatrist states that GH-108 has been diagnosed with “permanent personality change after PTSP”, “psychosis”, and “depression” for which he has been prescribed medication.²⁶⁵ It indicates that GH-108 “[a]ppears tense, shows anxiety, lacks will-power, shows anhedonia and depressive mood” and that “he affirms difficulties in performing daily routine [*sic*] and shows signs of paranoia.” The report states that “[m]nestic and intellectual functions appear to be in agreement with his age and education.”²⁶⁶ However, the Prosecution has not filed any medical documentation to reinforce claims made by its investigator in an attached declaration that (a) GH-108 was hospitalised for more than one month due to re-traumatisation resulting from his testifying in *Dokmanović* or (b) that “any discussion of past events will cause him mental suffering and will increase the possibility of further hospitalization”.²⁶⁷ The Chamber notes that the Prosecution investigator observed that, while GH-108 appeared to have difficulty concentrating, he was able to answer questions and that the investigator indicated that GH-108 is not refusing to testify.²⁶⁸ While there is evidence that GH-108 suffers from mental illness and has himself informed the Prosecution that attending court could have harmful after-effects on his mental health, based on the documentation submitted by the Prosecution, the Chamber is not satisfied that GH-108 is incapable of attending a court hearing and testifying or that he is incapable of answering the questions put to him and testifying coherently. Accordingly, the Chamber is not satisfied that GH-108 is objectively unavailable and the evidence will not be admitted pursuant to Rule 92 *quater*.

100. *GH-156*: The Prosecution submits medical certificates to demonstrate that GH-156 is unavailable.²⁶⁹ According to the Prosecution, GH-156’s evidence, in the form of a written statement, is relevant to events in Lovas charged in the Indictment and is corroborated by the evidence of nine witnesses.²⁷⁰ The Defence argues that the doctor’s conclusion in the submitted

²⁶⁴ First Supplement Reply, paras 3-4.

²⁶⁵ The Chamber understands this abbreviation as a reference to Post-Traumatic Stress Disorder.

²⁶⁶ First Supplement, confidential Annex F, pp. 88-89, Medical Certificate, 6 September 2012.

²⁶⁷ First Supplement, para. 12; First Supplement, confidential Annex F, pp. 90-91, Declaration of Investigator, 26 September 2012.

²⁶⁸ First Supplement, confidential Annex F, Declaration of Investigator, pp. 90-91, 26 September 2012.

²⁶⁹ First Supplement, confidential Annex E, pp. 71-83.

²⁷⁰ First Supplement, confidential Annex E, pp. 84-85.

medical certificate, that testifying “would further worsen [sic] her condition”, does not render GH-156 unavailable for purposes of Rule 92 *quater*.²⁷¹

101. The Chamber notes that the medical certificate provided by a doctor states that GH-156 suffers from “a post traumatic stress disorder”, “high blood pressure”, and “tachycardia”. The doctor concludes that GH-156 “is not fit for testifying – it would worsen her condition”, and the doctor “oppose[es] any exposure to a stressful situation.”²⁷² A psychiatrist treating GH-156 stated that GH-156 “was involved in a car accident as a passenger in a vehicle suffering injuries to the head (contusion), right ear and right arm” and that “this situation has caused exacerbation of the PTSP [...] thus the patient’s condition now is worse.”²⁷³ The psychiatrist states that “any further exposure to stress may have grave consequences.”²⁷⁴ Considering the contents of these medical certificates, the Chamber is satisfied that GH-156 is objectively unavailable within the meaning of Rule 92 *quater*.

102. The Chamber considers that GH-156’s evidence is relevant to charges in the Indictment. The Chamber considers that (a) the statement was made with the assistance of a Registry-approved interpreter who orally translated the statement into a language the witness understood; (b) the statement was signed by the witness with an acknowledgement of the truth of its contents; (c) the evidence relates to events about which other witnesses provide evidence; (d) there are no manifest inconsistencies in the statement and the witness indicated where she was uncertain about particular information; and (e) the witness clearly distinguished between what she personally witnessed and what she heard from others.²⁷⁵ The Chamber is satisfied that the witness is unavailable and finds that the tendered evidence is reliable, is relevant, has probative value, and is appropriate for admission pursuant to Rules 89(C) and 92 *quater*.

103. GH-083: The Prosecution submits a medical certificate to demonstrate that GH-083 is unavailable,²⁷⁶ and asserts that his ill health prevents him from being able to give evidence via video-conference link.²⁷⁷ According to the Prosecution, GH-083’s evidence, in the form of a written statement, with a supplement and addendum, and a transcript of his testimony in *Prosecutor v. S. Milošević*,²⁷⁸ is relevant to events in Dalj charged in the Indictment and is corroborated by the

²⁷¹ First Supplement Response, para. 7.

²⁷² First Supplement, confidential Annex E, pp. 74-75, Medical Certificate, 4 September 2012.

²⁷³ The Chamber understands this abbreviation as a reference to Post-Traumatic Stress Disorder.

²⁷⁴ First Supplement, confidential Annex E, pp. 72-73, Medical Certificate, 10 September 2012.

²⁷⁵ Rule 65 *ter* 02245, Witness Statement, 15 March 1996 (confidential).

²⁷⁶ Second Motion, confidential Annex B.

²⁷⁷ Second Motion, para. 5.

²⁷⁸ Case No. IT-02-54-T. The Chamber notes that in confidential Annex A, the Prosecution incorrectly indicated that the transcript came from Case No. IT-95-54-T. There is no case before this Tribunal with this number.

evidence of four other witnesses.²⁷⁹ The Prosecution seeks the approval of the Chamber to compile GH-083's evidence into a single amalgamated document.²⁸⁰ The Prosecution seeks the admission of two associated exhibits.²⁸¹ The Defence objects to the admission of GH-083's written evidence arguing that GH-083 is not unavailable within the meaning of Rule 92 *quater* because no psychological condition meeting the requirement of "objective unavailability" has been established,²⁸² nor has any physical infirmity been established that would prevent the witness, at the very least, from testifying by video-conference link.²⁸³ The Defence also argues that the evidence purports to show, through inference, that Hadžić was aware of the existence of the alleged JCE due to the acts of alleged proximate subordinates and that there was no meaningful cross-examination on matters that may be relevant to the potential criminal liability of Hadžić.²⁸⁴ It argues that should the Chamber be inclined to admit GH-083's evidence, that two paragraphs contained in GH-083's statement (Rule 65 *ter* 02445) be redacted.²⁸⁵ In reply, the Prosecution asserts that GH-083 is unavailable and that his evidence is appropriate for admission pursuant to Rule 92 *quater*.²⁸⁶ The Prosecution requests that if the Trial Chamber finds that the existing medical documents are insufficient to justify admission pursuant to Rule 92 *quater*, that the Prosecution be given the opportunity to provide supplementary documentation.²⁸⁷

104. The Chamber notes that the medical certificate, dated 26 November 2012, states that GH-083 had a stroke in 1988 which resulted in partial paralysis of his left foot, leg, and hip, and that he now drags his left foot; it does not state that he is immobile. In 2012 he had a "possible TIA attack."²⁸⁸ The medical certificate indicates that GH-083 suffers from "[a] sleeping disorder, nightmares, anxiety and depression" and that "[t]his could be an expression of posttraumatic stressdisorder [*sic*]."²⁸⁹ According to the medical certificate, GH-083 has been referred to a psychiatric ward "for an assessment", however, the Prosecution has not provided the results of this assessment, if there are any. The medical certificate states that "[GH-083] has now been summoned to give evidence making him feel that this gives him increased difficulties and that he feel unsure that he can handle such a pressing situation [*sic*]."²⁹⁰ This statement appears only to recount GH-083's stated concerns about attending court in this case. The Chamber notes that this does not

²⁷⁹ Second Motion, paras 8-10, confidential Annex A.

²⁸⁰ Second Motion, para. 7.

²⁸¹ Second Motion, confidential Annex A.

²⁸² Second Motion Response, para. 4-6.

²⁸³ Second Motion Response, para. 3.

²⁸⁴ Second Motion Response, paras 7-8.

²⁸⁵ Second Motion Response, paras 7-9.

²⁸⁶ Second Motion Reply.

²⁸⁷ Second Motion Reply, para. 4.

²⁸⁸ Second Motion, confidential Annex B.

²⁸⁹ Second Motion, confidential Annex B.

²⁹⁰ Second Motion, confidential Annex B.

constitute a medical opinion regarding GH-083's ability to testify. Based on the documentation submitted by the Prosecution, the Chamber is not satisfied that GH-083 is incapable of attending a court hearing and testifying or that he is incapable of answering the questions put to him and testifying coherently. Accordingly, the Chamber, based on the documents before it, is not satisfied that GH-083 is objectively unavailable and will deny admission of the witness's evidence pursuant to Rule 92 *quater* without prejudice.

E. Disposition

105. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, 92 *quater*, and 126 *bis* of the Rules and paragraphs (C)(5) and (7) of the Practice Direction, hereby

- (a) **GRANTS** the Defence leave to file a response to the Motion that exceeds the applicable word limit;
- (b) **GRANTS** the Prosecution leave to file the Reply and Second Motion Reply;
- (c) **DENIES** the Defence leave to file the Sur-Reply and the Supplemental Sur-Reply;
- (d) **DENIES** the Prosecution leave to file the Second Supplement Reply;
- (e) **GRANTS** the Supplement, in part, and **ORDERS** that the *ex parte* status of Annexes C and D of the Motion be lifted with immediate effect;
- (f) **GRANTS** the Motion, in part;
- (g) **ADMITS** the following into evidence:
 - (i) *GH-032*: Rule 65 *ter* number 02352;
 - (ii) *GH-039*: Rule 65 *ter* number 02366;
 - (iii) *GH-153*: Rule 65 *ter* number 02467;
 - (iv) *GH-044*: Rule 65 *ter* numbers 04481 (under seal), 04482 (under seal), 02669, 02671, 00653, 02673, 02670, 02672, 02406;
 - (v) *GH-045*: Rule 65 *ter* number 02336 (under seal);
 - (vi) *GH-046*: Rule 65 *ter* numbers 04486 (under seal), 04487 (under seal), 04488, 02546, 02616, 02823, 02795, 02615;

- (vii) *GH-049*: Rule 65 *ter* numbers 02869 (ERN 9539-01A), 02869 (ERN 9539-02A), 02869 (ERN 9539-00A), 02869 (ERN 9538-13A), 02869 (ERN 9538-16A, 9538-15A), 02869 (ERN 9538-14A), 02869 (ERN 9537-13A), 02869 (ERN 9537-14A), 02869 (ERN 9537-15A), 02869 (ERN 9537-11A), 02869 (ERN 9537-12A), 02869 (ERN 9537-10A), 02869 (ERN 9538-07A), 02869 (ERN 9538-06A);
- (viii) *GH-008*: Rule 65 *ter* numbers 04637 (under seal), 02537 (under seal), 02548 (under seal), 00124 (under seal), 00131, 00195, 00217, 02536 (under seal), 02849, 02029 (under seal), 02032, 00445 (under seal), 02437, 02842;
- (ix) *GH-055*: Rule 65 *ter* number 02390;
- (x) *GH-152*: Rule 65 *ter* number 02422;
- (xi) *GH-073*: Rule 65 *ter* number 02335;
- (xii) *GH-074*: Rule 65 *ter* number 02349;
- (xiii) *GH-133*: Rule 65 *ter* number 02362;
- (xiv) *GH-084*: Rule 65 *ter* numbers 02372, 05863 (ERN 0217-1467), 05863 (ERN 0217-1619), 05863 (ERN 0217-1620), 05863 (ERN 0217-1621);
- (xv) *GH-022*: Rule 65 *ter* numbers 04557 (under seal), 00071 (under seal), 00420 (under seal), 00787, 00882, 01000 (under seal), 01033, 01168, 01245, 01266 (under seal), 02999 (under seal), 03010, 03019 (under seal);
- (xvi) *GH-087*: Rule 65 *ter* numbers 02453, 02454, 02455;
- (xvii) *GH-098*: Rule 65 *ter* numbers 04579, 02374, 02519, 03036, 04578, 02772;
- (xviii) *GH-144*: Rule 65 *ter* numbers 02373;
- (xix) *GH-114*: Rule 65 *ter* numbers 04633 (under seal), 04634 (under seal), 04635 (under seal), 02280, 02599, 02598, 02582 (under seal), 01506 (under seal), 01509 (under seal), 02592, 02597 (under seal), 03038;
- (xx) *GH-156*: Rule 65 *ter* number 02245;

(h) **ORDERS** the Prosecution—by no later than 24 May 2013—to (i) replace Rule 65 *ter* number 02154 with a document that contains only the medical reports, and not the witness


statement, and (ii) file a written notice on the official record of the proceedings when it has done so, after which it shall be deemed admitted into evidence, under seal;

- (i) **ORDERS** the Prosecution—by no later than 24 May 2013—to (i) attach the English translation of Rule 65 *ter* number 02520, as found in Rule 65 *ter* numbers 02381 and 02395, to Rule 65 *ter* number 02520; (ii) remove Rule 65 *ter* numbers 02381 and 02395 from eCourt; (iii) remove the photocopies of photographs from Rule 65 *ter* number 02520 in eCourt; and (iv) file a written notice on the official record of the proceedings when it has done so, after which Rule 65 *ter* number 02520 shall be deemed admitted into evidence, under seal;
- (j) **ORDERS** the Prosecution—by no later than 24 May 2013—to attach the last page of the transcript of testimony to Rule 65 *ter* number 04636 (T. 29879), and to file a written notice on the official record of the proceedings when it has done so, after which Rule 65 *ter* number 04636 shall be deemed admitted into evidence, under seal;
- (k) **DENIES** without prejudice the admission of the tendered written evidence of GH-079, GH-142, and GH-083;
- (l) **INVITES** the Prosecution—by no later than 11 June 2013—to submit additional documentation demonstrating that GH-079, GH-142, and GH-083 are unavailable;
- (m) **DENIES** admission of the tendered written evidence of GH-064, GH-126, GH-157, GH-005, and GH-108;
- (n) **DENIES** the Motion in all other respects;
- (o) **DENIES** the Second Motion;
- (p) **ORDERS** the Prosecution—by no later than 24 May 2013—to (i) upload to and release in eCourt a public redacted version of each of the written statements and transcripts admitted in this decision under seal and (ii) file a written notice on the official record of the proceedings when it has done so, after which the public redacted versions shall be deemed admitted into evidence;
- (q) **INSTRUCTS** the Registry to take all appropriate and necessary measures to implement this decision; and

(r) **DISMISSES** the Supplement in all other respects with which the Chamber was hitherto seised.

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

Done this ninth day of May 2013,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]