THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

Case No. IT-04-84-T

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: **Mr. Hans Holthuis**

Date Filed: **26 October 2007**

THE PROSECUTOR

v.

Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ

PUBLIC FILING WITH CONFIDENTIAL ANNEXES

PROSECUTION'S MOTION TO ADMIT THE STATEMENTS OF WITNESS 1 INTO EVIDENCE PURSUANT TO RULE 92 *QUATER*

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A. Overview

1. The evidence of Witness 1 is central to the Prosecution case. It relates to multiple counts of the Fourth Amended Indictment.[1] The witness is deceased and the Prosecution requests that his five statements be admitted into evidence under Rules 54 and 92 *quater*.[2] The interests of justice favour the admission of the relevant and probative evidence of Witness 1.

2. On 20 May 2007, Witness 1 was assigned the pseudonym SST7/1 until such time as the witness was called to testify or until further order.[3] The Prosecution requests that this pseudonym be removed.

3. Confidential Annex A shows that a large part of the evidence of Witness 1 is supported or corroborated by other evidence. Confidential Annex B is the death certificate of Witness 1. Confidential Annex C contains the five statements of Witness 1 which the Prosecution seeks to admit into evidence. Confidential Annex D contains the five statements of Witness 1 with redactions protecting the identities of other

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[1] *Prosecutor v. Haradinaj*, IT-04-84-T, Fourth Amended Indictment, 16 October 2007.
[2] The statements of Witness 1 and related documents are attached as confidential Annex C to this motion.
[3] *Prosecutor v. Haradinaj*, IT-04-84-PT, Decision on Prosecution's Application for Pre-Trial Protective Measures for Witnesses, 20 May 2005.

protected witnesses in this case. Should the Trial Chamber decide to remove the pseudonym of Witness 1 then Annex B and D may be made public.

B. Discussion of the admission of five witness statements under Rule 92 *quater*

4. The evidence of Witness 1 meets the requirements for admissibility under Rule 92 *quater* which provides that a written statement may be admitted into evidence if two cumulative conditions are met, namely that the person is unavailable to give oral evidence due to his/her physical and mental condition, and that the statements are reliable. In addition, the Trial Chamber must ensure that the general requirements of admissibility of evidence contained in Rule 89 are satisfied, namely that the evidence is relevant and has probative value as provided in Rule 89(C).[4] A factor against the admission of such evidence may be that the evidence goes to the proof of acts and conduct of an Accused.

(i) Unavailability

5. Witness 1 is deceased. His death certificate is attached as Confidential Annex B.

(ii) Reliability of the statement

6. In examining the reliability of the evidence of an unavailable witness, a Trial Chamber may take into account factors such as:

   (a) the circumstances in which the statement was made and recorded, in particular, whether the statement was (i) given under oath; (ii) signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; (iii) taken with the assistance of an interpreter duly qualified and (iv) approved by the Registry of the Tribunal;

   (b) whether the statement has been subject to cross-examination;

[4] *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007 ("Milutinović 5 March 2007 Decision"), para. 6.

(c) whether the statement, particularly an unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and

(d) other additional factors, such as the absence of manifest or obvious inconsistencies in the statements.[5]

7. The Trial Chamber may also take into account whether the witness's evidence is corroborated by other evidence adduced at trial.[6]

(a) The recording of the statements

8. On 24 August 2002, on 16 October 2002, and on 28 May 2006, Witness 1 provided statements to Prosecution Investigator Roel Versonnen. The Prosecution will call Roel Versonnen to testify about Witness 1's photo board identifications. On 11 August 2006, Witness 1 gave a statement to Prosecution Investigators Tetyana Lazarenko and Lubomir Josefčiak. On 29 October 2006, the witness gave a statement to Prosecution Investigator Catherine Driguet. All these statements were read back to the witness with the assistance of a duly qualified interpreter who was approved by the Registry of the Tribunal.

9. In the opening paragraph of each statement, the witness said that the statement was provided voluntarily. The witness also initialled or signed each page[7] and he also signed the accompanying acknowledgement that the statement was true to the best of his recollection. The statements were read back to the witness in a language he understood and signed by the interpreters and the investigators. That the proper procedure for recording statements was followed is a strong indicator for the reliability of the statements.

(b) The statements are corroborated by other evidence

[5] *Prosecutor v. Milutinović*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007; *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999; *Prosecutor v. Kordić*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of Deceased Witness, 21 July 2000, para. 27.
[6] *Prosecutor v. Prlić*, IT-04-74-T, Decision on the Prosecution Motion on the Admission of Evidence Pursuant to Rules 92 *bis* and *quater*, 27 October 2006, public redacted version filed on 29 March 2007 ("Prlić Decision"), para. 10.
[7] Due to an unintended oversight Witness 1 did not sign the first page of the Statement of 11 August 2006.

10. The statements of Witness 1 describe several episodes of conduct referred to in the Fourth Amended Indictment. As shown in Confidential Annex A, the majority of these episodes are corroborated by other evidence the Prosecution has adduced at trial or proposes to lead.

11. The corroboration of large portions of Witness 1's evidence is a strong indication of the reliability of the entirety of his evidence.

(c) The statements were not given under oath and were not subject to cross-examination

12. Annex A shows that substantial portions of Witness 1's statements, and in particular the portions relevant to proof of crimes charged in the Fourth Amended Indictment, have been covered by the testimony of other witnesses the Prosecution has called *viva voce*, and who have been cross-examined.

(d) The statements are free of manifest inconsistencies

13. The statements of Witness 1 do not contain material inconsistencies. The witness provided clear, consistent, and precise accounts of the events which he witnessed. He made corrections to a previous statement, taking care to identify mistakes.[8] He provided the basis of his information. The nature of the evidence makes apparent why Witness 1 was reluctant to give details about some incidents in his initial statement and only spoke about the issues in a later statement.[9]

14. Any inconsistencies in the witness's evidence more appropriately go to the weight of the evidence, rather than its admissibility.[10]

(iii) The acts and conduct of the Accused

15. Witness 1's statements contain evidence relating to the acts and conduct of one of the Accused, as defined by the Appeals Chamber.[11] Unlike Rule 92 *bis*, Rule 92 *quater* does not expressly disallow the admission of written evidence relating to the acts and conduct of the Accused. This rule merely states that the presence of acts and conduct "may" be a factor against the admission of such evidence, in part or in whole.

[8] U009-7609, paras. 24 and 27.
[9] Confidential Annex A para 21.
[10] In this sense *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Barbić, 14 September 2006, para. 23.
[11] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 10. See also: *Prosecutor v. Haradinaj*, Notice of Motion to Admit Written Statements Pursuant to Rule 92 *bis*, 19 February 2007, paras. 4-6.

16. Trial Chambers have admitted written evidence relating to acts and conduct of an Accused under Rule 92 *quater*. In *Prlić*, the Trial Chamber noted that

> ...contrary to the case law relating to the application of former Rule 92 *bis* (C) of the Rules, new Rule 92 *quater* of the Rules in principle permits the admission of a written statement or transcript of evidence which goes to demonstrate the acts or conduct of an accused.[12]

17. In *Milutinović*, the Trial Chamber pointed out:

> Rule 92 *bis* was modified on 12 September 2006 and the amended provisions governing admission of evidence of unavailable persons became part of new Rule 92 *quater*, which now provides for the admission of statements or transcripts of a deceased relating to acts and conduct of an accused.[13]

The Trial Chamber admitted the written statement and prior transcript of a deceased witness which related to the acts and conduct of the Accused, after declining to admit it under Rule 92 *bis* because it concerned the acts and conduct of the accused.[14]

18. The evidence of Witness 1 is highly relevant to the indictment and is highly probative. The Prosecution informed the Trial Chamber and Defence before the trial commenced that it would seek to tender Witness 1's evidence under Rule 92 *quater*. The Defence had the opportunity to cross-examine other witnesses on issues in Witness 1's statements.

C. Request to lift the protective measures

19. The Prosecution informed the Trial Chamber that it would seek to lift the pre-trial protective measures because of the publicity surrounding the witness' death. The identity of the witness is already in the public domain. To protect the identity of other witnesses, the Prosecution attaches redacted versions of Witness 1's statements as Annex D which can be made public if the Chamber decides to lift the protected measures for Witness 1. The annexes are filed confidentially. With appropriate redactions they can be made public.

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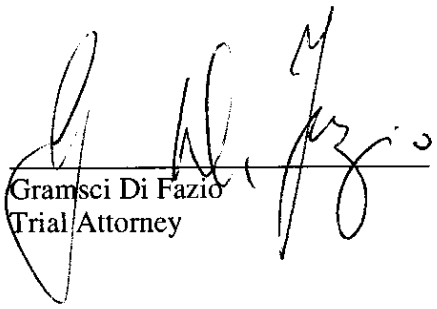
[12] Prlić Decision, para. 8.
[13] Milutinović 5 March Decision, para. 3, para. 7. See also *Prosecutor v. Milošević*, IT-98-29/1-T, Decision on Prosecution's Motion for the Admission of Witness Statements pursuant to Rule 92 *quarter*, 19 April 2007, para. 14.
[14] Milutinović 5 March Decision, para. 3 (referring to paras. 21, 23 of its "Decision on Prosecution's Rule 92 *bis* Motion" issued on 4 July 2006).
[16] U003-0784, U009-7607/7609.

D. Conclusion

20. The evidence of Witness 1 contained in his various statements meets the requirements for admission into evidence under Rule 92 *quater*. The Prosecution requests that the statements be admitted into evidence under this rule.

21. The Prosecution also requests that the protective measures for Witness 1 be lifted.

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