



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

Case No. IT-04-83-PT

Date: 09 July 2007

Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Bakone Justice Moloto, Presiding  
Judge Frederik Harhoff  
Judge Flavia Lattanzi

**Registrar:** Mr. Hans Holthuis

**Decision of:** 09 July 2007

**PROSECUTOR**

**v.**

**RASIM DELIĆ**

***PUBLIC***

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

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**The Office of the Prosecutor**

Mr. Daryl A. Mundis  
Ms. Laurie Sartorio  
Mr. Kyle Wood  
Mr. Aditya Menon

**Counsel for the Accused**

Ms. Vasvija Vidović  
Mr. Nicholas David Robson

**TRIAL CHAMBER I** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”);

**BEING SEISED** of the Prosecution’s “Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 22 May 2007 (“Motion”), in which the Prosecution requests the Trial Chamber to admit into evidence pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”) the transcript of Marijan Bobaš’s testimony in the *Blaškić* trial (“Transcript”) and associated exhibits (“Exhibits”),<sup>1</sup> as well as his two written statements (“Statements”), or, in the alternative, to admit the Statements and Exhibits into evidence pursuant to Rule 94(B) of the Rules;

**NOTING** the “Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*”, filed confidentially on 4 June 2007 (“Response”), in which the Defence objects the admission into evidence of the Transcript, Statements and Exhibits or alternatively requests the Trial Chamber to admit three further statements of Marijan Bobaš (“Further Statements”);<sup>2</sup>

**NOTING** the “Prosecution Motion for Leave to Reply and Reply to Defence Response to Motion for Admission of Evidence Pursuant to Rule 92 *quater*”, filed confidentially on 11 June 2007 (“Reply”);

**NOTING** that in support of the Motion the Prosecution submits that:

- (i) Marijan Bobaš died on 14 November 2003;<sup>3</sup>
- (ii) Marijan Bobaš’s evidence “is relevant because it is of probative value to the identity of those who committed the Bikoši Massacre and to the involvement of the Mujahedin and the ARBiH in the attack on Maline and the subsequent events”;<sup>4</sup>
- (iii) as the Statements are based upon Marijan Bobaš’s testimony in *Blaškić*, they “complement each other” and their admission together with the Transcript would “ensure full coverage of Mr Bobaš’ evidence”;<sup>5</sup>
- (iv) The Statements and Transcript are corroborative of each other,<sup>6</sup> and do not contain material differences;<sup>7</sup>

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<sup>1</sup> Transcript, dated 10 December 1998 with associated exhibits, attached as Annex B to the Motion.

<sup>2</sup> The statements referred to by the Defence were made to parties other than the Prosecution on 18 October 1993, 28 November 1995 and 25 June 1996, attached as Confidential Annex A to the Response.

<sup>3</sup> Motion, para. 15.

<sup>4</sup> Motion, para. 12.

<sup>5</sup> Motion, para. 13.

- (v) Marijan Bobaš's testimony in *Blaškić* was given under solemn declaration, that in the Statements Marijan Bobaš states that their contents reflect the truth to the best of his knowledge, and that the Statements were taken with the assistance of an interpreter duly qualified and approved by the Registrar;<sup>8</sup>
- (vi) Although the Statements and Transcript were "not subject to cross-examination, other Prosecution witnesses who will be subject to cross-examination will testify about the events leading up to and including the Bikoši Massacre";<sup>9</sup>
- (vii) Marijan Bobaš's evidence does not go to the acts and conduct of the Accused and that although it does address the acts and conduct of persons whom the Prosecution has alleged were the Accused's subordinates, the Accused was not proximate to the acts and conduct at issue;<sup>10</sup>
- (viii) Marijan Bobaš's evidence largely falls within the category of "crime-base" evidence and is not pivotal to the Prosecution's case as it addresses the relationship between the ARBiH and the Mujahedin only in an indirect manner;<sup>11</sup>

**NOTING** the Defence's objections to the Motion that:

- (i) Marijan Bobaš's evidence is unreliable or alternatively its probative value is substantially outweighed by the need to ensure a fair trial;<sup>12</sup>
- (ii) Marijan Bobaš's testimony in *Blaškić* was not cross-examined and he was asked a series of leading questions that went unchallenged by the Prosecution;<sup>13</sup>
- (iii) The Transcript and the Statements contain three different versions of Marijan Bobaš's recollection of the events on 8 June 1993 with material differences between them having an impact on the reliability of the evidence;<sup>14</sup>
- (iv) Further material differences are evident in the Further Statements, which contradict the Prosecution's assertion that "Mr Bobaš' evidence is relevant because it is of probative value to the identity of those who committed the Bikosi Massacre";<sup>15</sup>

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<sup>6</sup> Motion, para. 16.

<sup>7</sup> Reply, paras 4-6.

<sup>8</sup> Motion, para. 16.

<sup>9</sup> Motion, para. 16; Reply, para. 7.

<sup>10</sup> Motion, para. 17.

<sup>11</sup> Motion, paras 18-19.

<sup>12</sup> Response, para. 21.

**CONSIDERING** that Rule 92 *quater* sets out two cumulative conditions that must be satisfied, namely the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein;

**CONSIDERING** that the following factors are relevant to the assessment of the reliability of the evidence sought to be admitted pursuant to Rule 92 *quater*:

- (a) the circumstances in which the statement was made and recorded, in particular:
  - i. whether the statement was given under oath;
  - ii. whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and
  - iii. whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal;
- (b) whether the statement has been subject to cross-examination;
- (c) whether the statement, in particular an unsworn statement 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.<sup>16</sup>

**CONSIDERING** that in addition to the elements set out by Rule 92 *quater*, the general requirements of admissibility of evidence under Rule 89 must be satisfied, 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;

**CONSIDERING** that “exhibits accompanying transcripts form an inseparable and indispensable part of the testimony and can be admitted”,<sup>17</sup>

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<sup>13</sup> Response, para. 12. *See also* paras 13-14.

<sup>14</sup> Response, paras 15-21.

<sup>15</sup> Response, para. 22.

<sup>16</sup> *Prosecutor v. Milutinović et al.*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 Feb 2007, para. 7 (“*Milutinović Decision*”). *See also* *Prosecutor v. Prlić et al.*, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 27 Oct 2006, para. 10 (“*Prlić Decision*”).

<sup>17</sup> *Prosecutor v. Naletilić and Martinović*, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D), 9 Jul 2001, para. 8.

**CONSIDERING** that Marijan Bobaš is unavailable within the meaning of Rule 92 *quater* (A) as he died on 14 November 2003;

**CONSIDERING** that Marijan Bobaš's testimony in the *Blaškić* trial was given under solemn declaration;

**CONSIDERING** that the Statements were signed by Marijan Bobaš with an accompanying acknowledgement that the contents was true to the best of his recollection;

**CONSIDERING** that the Statements were taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal;

**CONSIDERING** that two of the Further Statements are signed by Marijan Bobaš and that two of the Further Statements, including the one that is not signed by Marijan Bobaš, contain statements amounting to an acknowledgement that the contents are true to the best of his recollection;<sup>18</sup>

**CONSIDERING** that the Statements, the Further Statements and the Transcript were not subjected to cross-examination but that the absence of the opportunity to cross-examine Marijan Bobaš will be given due consideration when evaluating the evidence in light of the trial record as a whole;

**CONSIDERING** that the Further Statements are sufficiently corroborated by the Transcript and the Statements, and that the Prosecution does not oppose their admission into evidence;<sup>19</sup>

**CONSIDERING** that admission into evidence of the Further Statements will provide the Trial Chamber with full presentation of Marijan Bobaš's evidence;

**CONSIDERING** that the internal inconsistencies which the Defence has pointed out between the Transcripts, the Statements and the Further Statements go to the weight to be attributed to the evidence;<sup>20</sup>

**CONSIDERING** that while determining whether particular evidence goes to the acts and conduct of the accused, special consideration should be given to the "special and sensitive situation posed by the charge of command responsibility under Article 7.3 where the evidence goes to proof of the

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<sup>18</sup> Response, Confidential Annex A.

<sup>19</sup> Reply, para. 7.

<sup>20</sup> *Milutinović* Decision, para. 10.

acts and conduct of the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know";<sup>21</sup>

**CONSIDERING** that the Transcript, the Statements and the Further Statements do not go to the acts and conduct of the Accused nor to his immediately proximate subordinates;

**CONSIDERING** that the Transcript, the Statements and the Further Statements do not go to proof of facts so fundamental to this case that it would be unfair to the Defence to allow its admission into evidence in written form since it would not be possible for the Defence to cross-examine the author of the testimony;

**CONSIDERING** that the general practice under Rule 89 is one which favours admissibility;<sup>22</sup>

**FINDING** that the Statements, the Further Statements, the Transcript and the Exhibits are reliable within the meaning of Rule 92 *quater*, that they are relevant and have probative value within the meaning of Rule 89, and that the probative value thereof is not substantially outweighed by the need to ensure a fair trial;

**FINDING** that it is not necessary to consider the Prosecution's alternative submission concerning Rule 94(B);

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<sup>21</sup> *Galić* Decision, para. 19. The Appeals Chamber in *Galić* further held that: "[...]it may well be that the subordinates of the accused (or those alleged to be his subordinates) are so proximate to the accused that either (a) the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92bis statement becomes sufficiently pivotal to the prosecution case that it would be not fair to the accused to permit the evidence to be given in written form, or (b) the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event", *id.*, para. 15.

<sup>22</sup> *Prosecutor v. Martić*, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 Jan 2006, Annex A, para. 2.

**PURSUANT** to Rule 54, 89, 92 *quater* and 126 *bis* of the Rules;

**ACCEPTS** the Reply;

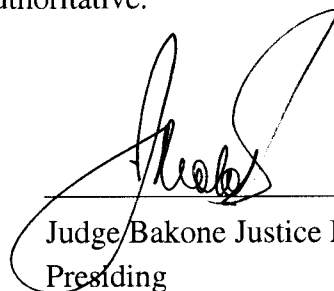
**GRANTS** the Motion;

**ADMITS** the Statements, the Further Statements, the Transcript and Associated Exhibits into evidence;

**ORDERS** the Prosecution to upload the Statements, the Further Statements, the Transcript and the Exhibits into E-Court in one collection separated by numbered tabs;

**ORDERS** the Registrar to assign one exhibit number for them on the first day of the presentation of evidence of the Prosecution.

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



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Judge Bakone Justice Moloto  
Presiding

Dated this ninth day of July 2007

At The Hague

The Netherlands

**[Seal of the Tribunal]**