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16 June 2008

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UNITED
NATIONS



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

Case No. IT-06-90-T
Date: 16 June 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elizabeth Gwaunza
Registrar: Mr Hans Holthuis
Decision of: 16 June 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE ADMISSION OF STATEMENTS OF SEVEN WITNESSES
PURSUANT TO RULE 92 QUATER

Office of the Prosecutor

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1. On 25 October 2007, the Prosecution filed a motion requesting the admission of nine statements pursuant to Rule 92 *bis* and nine statements of deceased witnesses pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ The Defence for each of the Accused responded to the Motion.² On 18 April 2008, the Prosecution filed an addendum to the Motion, including the English translation of the death certificates for the deceased witnesses.³ The Chamber dealt with the statements of Witness 11 and Witness 42 tendered pursuant to Rule 92 *quater* in its Decision of 24 April 2008.⁴ Moreover, the Chamber dealt with the eight statements tendered pursuant to Rule 92 *bis* in its Decision of 3 June 2008.⁵ In this Decision, the Chamber will deal with the remaining 92 *quater* statements, namely those of Witnesses 8, 9, 19, 30, 32, 36, and 45.⁶

2. The Prosecution’s position is that all of these statements meet the requirements for admissibility under Rule 92 *quater*.⁷ It submits that the witnesses are unavailable because they are deceased, and that the circumstances in which the statements were recorded afford them sufficient indicia of reliability.⁸ Moreover, the Prosecution submits that the statements of Witnesses 8 and 36 were certified pursuant to Rule 92 *bis* (B), further confirming their reliability.⁹ The Prosecution also submits that the statements are of probative value, since they are directed to several of the counts in the Indictment.¹⁰ Finally, the Prosecution submits that with the exception of parts of the statement of Witness 19, all the statements consist of “crime base” evidence which does not go to the “acts and conduct” of the Accused.¹¹ Regarding the statement of Witness 19, the Prosecution submits that the fact that a written statement goes to the acts and conduct of an accused does not bar its admission under Rule 92 *quater*, but that it

¹ Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 25 October 2007 (“Motion”), paras 1, 23.

² Defendant Mladen Markač’s Response to Prosecution Motion for Admission of Written Statements Pursuant to Rules 92 *bis* and 92 *quater*, 6 November 2007 (“Markač Response”); Ivan Čermak’s Response to Prosecution’s Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 7 November 2007 (“Čermak Response”); Defendant Ante Gotovina’s Response to Prosecution Motion for Admission of Written Statements Pursuant to Rule 92 *bis* and Rule 92 *quater*, 8 November 2007 (“Gotovina Response”).

³ Addendum to Prosecution’s Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 18 April 2008 (“Addendum”).

⁴ Decision on the Admission of Statements of Two Witnesses Pursuant to Rule 92 *quater*, 24 April 2008.

⁵ Decision on the First Batch of Rule 92 *bis* Witnesses, 3 June 2008.

⁶ The witnesses are referred to by these numbers in the Prosecution Motion to Amend Its Witness List, 4 February 2008, Confidential Appendix A, p. 1.

⁷ Motion, paras 3, 15-21.

⁸ Motion, paras 16-17.

⁹ Motion, para. 18.

¹⁰ Motion, para. 20.

¹¹ Motion, para. 20 and footnote 16.

can be a factor against admitting it.¹² The Chamber will address the objections raised by the Defence while discussing the witness statements below.

3. Rule 92 *quater*, which governs the admissibility of evidence of unavailable persons, provides that:

(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.

4. In addition to the conditions set out in this Rule, the Chamber must also ensure that the general requirements of admissibility under Rule 89 (C) are satisfied, namely that the evidence is relevant and has probative value.¹³

5. The Prosecution has attached the death certificates of Witnesses 8, 9, 19, 30, 32, 36, and 45 to its Motion and filed the English translations on 18 April 2008.¹⁴ The Chamber is therefore satisfied that these seven witnesses are unavailable.

6. When examining the reliability of the evidence of an unavailable witness under Rule 92 *quater*, the Chamber will consider (a) the circumstances in which the statement was made and recorded, in particular whether (i) the statement was given under oath; (ii) 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) 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

¹² Ibid.

¹³ *Prosecutor v. Milutinović et al.*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 ("1st Milutinović Decision"), para. 4; *Prosecutor v. Milutinović et al.*, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007 ("2nd Milutinović Decision"), para. 6; *Prosecution v. Haradinaj et al.*, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007 ("1st Haradinaj Decision"), para. 6; *Prosecutor v. Haradinaj et al.*, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater* with Confidential Annex, 28 November 2007 ("2nd Haradinaj Decision"), para. 6.

¹⁴ Motion, Confidential Appendix D; Addendum, Confidential Appendix.

unsworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statement.¹⁵

7. The Prosecution seeks the admission into evidence of 10 statements of the aforementioned seven witnesses.¹⁶ The tendered statements were not given under oath, though all the witnesses signed each page of their statement(s), and signed the accompanying acknowledgements that the statement(s) were read back to them in their own language and were true to the best of their knowledge and recollection.¹⁷ On every occasion this was confirmed by an interpreter approved by the Registry.¹⁸ Moreover, the statements of Witness 8 and Witness 36 were certified pursuant to Rule 92 *bis* (B).¹⁹ The Chamber finds this to be sufficient proof of the witnesses' acceptance that the written statements were true and accurate.

8. These ten statements have not been subject to cross-examination. The unavailability of these seven witnesses for cross-examination does not bar the admission of their statements, though the Chamber will be mindful of this when deciding on the weight to be given to them.

9. With regard to the requirements of Rule 89 (C), the Chamber finds that all of these statements are relevant to the case. They offer evidence of crimes allegedly committed within the indictment period in the Krajina region. The Chamber will examine the probative value of the statements below, while addressing the specific objections raised by the Defence.

Witness 8

10. The Čermak Defence and the Markač Defence have no objections to the admission of the statements of Witness 8.²⁰ The Gotovina Defence, however, submits that the statements of Witness 8 are unreliable in their description of "Scheduled Killing #5" in the Indictment and therefore have no probative value.²¹ The Gotovina Defence submits that the statements of Witness 8 in this respect are "filled with inaccuracies".²² It refers to the discrepancy between the Indictment according to which date of "Scheduled Killing #5" (Tode Marić) was "on or about 13 August" and the statement of Witness 8 according to which Witness 8 spent "several

¹⁵ 1st *Milutinović* Decision, para. 7; 1st *Haradinaj* Decision, para. 8; 2nd *Haradinaj* Decision, para. 8.

¹⁶ Motion, para. 22, Confidential Appendix D.

¹⁷ Motion, Confidential Appendix D.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Čermak Response, para. 4; Markač Response, paras 22-26, 29.

²¹ Gotovina Response, para. 17.

²² *Ibid.*

weeks” with the victim Tode Marić after Operation Storm.²³ Moreover, the Gotovina Defence submits that its own investigation has revealed that the portion of one of the statements in which the witness refers to the place of burial of that victim is incorrect.²⁴

11. The Chamber has examined the statements of Witness 8. The witness describes the events of 5 August 1995 and then goes on to describe the alleged killing of Tode Marić as occurring “some weeks later” (rather than “several weeks” as the Gotovina Defence claims). The Gotovina Defence points to a discrepancy with the Indictment in this respect. Even if it had indicated a discrepancy with other evidence which indicated that the killing took place “on or about 13 August 1995” the Chamber considers such a discrepancy to be minor in scope. As for the place of burial of Tode Marić, it is for the Defence to present the material it relies on when claiming that the victim in fact was buried in another place. The Chamber will then assess the evidence of Witness 8 in the light of that material. In conclusion, the discrepancies that the Gotovina Defence has indicated are not of such a nature to make the statements of Witness 8 inadmissible. For these reasons, and for reasons set out in paragraphs 7 through 9 above, the Chamber finds that the statements of Witness 8 can be admitted into evidence pursuant to Rule 92 *quater*.

Witness 9, Witness 30, and Witness 32

12. The Gotovina Defence and the Čermak Defence have no objections to the admission of the statements of Witnesses 9, 30, and 32.²⁵ The Markač Defence submits that paragraph 2 of the 1999 statement of Witness 9, paragraphs 3 through 5 of the statement of Witness 30, and paragraph 3 of the statement of Witness 32 should not be admitted because they touch “upon a live and important issue between the parties, that of the alleged deportation and forcible transfer of the Serb population from the Krajina region”.²⁶

13. The Chamber finds that the fact that the evidence touches upon a live and important issue between the parties, does not necessarily bar admission of such evidence if the requirements prescribed under Rule 92 *quater* and Rule 89 are met. Moreover, the information provided in the abovementioned paragraphs in the statements of Witnesses 9, 30, and 32 relates to events about which the Chamber has received other evidence. The Defence does not argue, and the Chamber does not find that there are manifest or obvious internal inconsistencies in the statements of Witnesses 9, 30, and 32 or inconsistencies between each

²³ Ibid.

²⁴ Gotovina Response, para. 17 and footnote 4.

²⁵ Gotovina Response, para. 19; Čermak Response, para. 4.

of those statements and the body of evidence already before the Chamber. Finally, the Chamber finds that the statements of Witnesses 9, 30, and 32 do not deal with evidence that goes to proof of acts and conduct of any of the accused. For these reasons, and for reasons set out in paragraphs 7 through 9 above, the Chamber finds that the statements of Witnesses 9, 30, and 32 can be admitted into evidence pursuant to Rule 92 *quater*.

Witness 19

14. The Gotovina Defence does not object to the admission of the statement of Witness 19.²⁷ The Čermak Defence objects to the admission of the statement.²⁸ It submits that portions of the statement refer to Mr Čermak's visit to the village of Grubori.²⁹ It submits that this event is explicitly relied upon by the Prosecutor in her Pre-Trial Brief which alleges that Mr Čermak "presented a public face of rectitude" and "ingratiated himself with some victims".³⁰ The Čermak Defence does not agree with the Prosecution's characterization of events and argues that the statement does not go to the proof of a joint criminal enterprise.³¹ It requests the Chamber to deny the application for admission into evidence of Witness 19's statement pursuant to Rule 92 *quater* or redact paragraphs 2 and 3 from page 4 of the statement.³² The Markač Defence submits that parts of the statement of Witness 19 go to proof of acts and conduct of Mr Markač as charged in the Indictment since the Prosecutor alleges that those killings were carried out by the Special Police under Mr. Markač's command.³³ The Markač Defence further submits that another portion (paragraph 2) of the statement touches upon a live and important issue between the parties namely "that of the alleged deportation and forcible transfer of the Serb population from the Krajina region".³⁴ It requests the Chamber to deny the application for admission into evidence of paragraphs 2 and 5 through 9 of Witness 19's statement.³⁵

15. As far as the Markač Defence's first objection is concerned, the Chamber considers that where the Prosecution alleges that the accused participated in a joint criminal enterprise and is therefore liable for the acts of others in that joint criminal enterprise, "acts and conduct of the

²⁶ Markač Response, paras 25, 29.

²⁷ Gotovina Response, para. 19.

²⁸ Čermak Response, para. 4.

²⁹ Čermak Response, para. 6.

³⁰ *Ibid.*

³¹ Čermak Response, para. 7.

³² Čermak Response, para. 9.

³³ Markač Response, paras 23-24.

³⁴ Markač Response, para. 25.

³⁵ Markač Response, para. 29.

accused” does not include such acts and conduct of others.³⁶ The Prosecution’s allegation that the killings were committed by the Special Police under Mr. Markač’s command falls under this category. The Chamber may, in its discretion, still decide not to admit such evidence where it is so pivotal to the prosecution case and where the person whose acts and conduct the statement describes is so proximate to the accused that it would be unfair to the Defence to permit the evidence to be given in written form.³⁷ The Appeals Chamber has held that an example of such evidence would be a written statement where the described acts and conduct of a person other than the accused occurred in the presence of the accused.³⁸ The exercise of the Chamber’s discretion, however, becomes more onerous where the accused in addition to individual liability under Article 7 (1) of the Statute is also charged with individual criminal responsibility under Article 7 (3).³⁹ This difficulty arises because where widespread criminal conduct by the subordinates of the accused has been proven, there is often but a short step to a finding that the accused knew or had reason to know that those crimes were about to be committed by them.⁴⁰

16. In this particular instance however, the statement of Witness 19 is limited to describing the sighting of Croatian soldiers on their way to the village of Grubori and the subsequent discovery of bodies by the villagers without going so far as to identify the perpetrators of the alleged killings. In this respect, the Chamber considers that the statement of Witness 19 is not so pivotal to the prosecution case or that the persons whose acts and conduct the statement describes are so proximate to Mr Markač that it would be unfair to the Defence to admit the evidence pursuant to Rule 92 *quater*.

17. As for the objections raised by the Čermak Defence, the Chamber considers that in the context of a joint criminal enterprise, “acts and conduct of the accused” must be understood as any act or conduct of the accused on which the Prosecution relies in order to establish that the accused participated in the joint criminal enterprise or that he shared the requisite intent of the actual perpetrators of the crimes charged.⁴¹ In addition to charges under Article 7 (1) of the Statute, Mr. Čermak is also charged with criminal responsibility under Article 7 (3). One of the elements for establishing responsibility is that the Accused knew or had reasons to know

³⁶ *Prosecutor v. Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002 (“*Galić* Interlocutory Appeal Decision”), para. 10.

³⁷ *Prosecutor v. Brđanin & Talić*, Decision on the Admission of Rule 92 *bis* Statements, 1 May 2002 (Confidential), para. 14; *Galić* Interlocutory Appeal Decision, para. 13.

³⁸ *Galić* Interlocutory Appeal Decision, para. 13.

³⁹ *Galić* Interlocutory Appeal Decision, para. 14.

⁴⁰ *Ibid.*

⁴¹ *Galić* Interlocutory Appeal Decision, para. 10;

about crimes being committed. The Chamber is satisfied that paragraphs 2 and 3 of page 4 in Witness 19's statement go to proof of the acts and conduct of Mr Čermak. The Chamber emphasizes that it does not necessarily accept the Prosecution's characterization of the acts described by Witness 19. The Chamber will assess the evidence of Witness 19 in light of all the evidence before it in order to make a determination of the responsibility of the Accused.

18. It is within the discretion of the Chamber to admit evidence that goes to proof of the acts and conduct of an Accused. The Defence has not argued, and the Chamber does not find that there are any manifest or obvious internal inconsistencies in Witness 19's statement, or between this statement and other evidence before the Chamber. In relation to the second objection raised by the Markač Defence the Chamber adds that paragraph 2 of Witness 19's statement relates to events about which the Chamber has received other evidence. For these reasons, and for reasons set out in paragraphs 7 through 9 above, the Chamber finds that Witness 19's statement can be admitted into evidence pursuant to Rule 92 *quater*.

Witness 36 and Witness 45

19. The Čermak Defence and Markač Defence do not object to admission of the statements of Witness 36 and Witness 45.⁴² The Gotovina Defence objects to the admission of first statement of Witness 36 and the single statement of witness 45 pursuant to Rule 92 *quater*.⁴³ It submits that the statements of Witness 36 and Witness 45 are unreliable in their description of alleged murders, and thus have no probative value.⁴⁴ In addition, the Gotovina Defence submits that those statements concern the "critical issue" of whether there was excessive shelling and requests that all references to shelling be redacted should the Chamber decide to admit the statements.⁴⁵

20. The Chamber has examined the statements of Witness 36 and Witness 45. The statement of Witness 36 concerns the alleged murder of Jovan Dimitrović whereas the statement of Witness 45 concerns the alleged murder of another individual, namely Jovanka Mizdrak. The Gotovina Defence, however, has not provided the Chamber with any evidence in support of its claim that the statements are unreliable in their description of alleged murders. The Chamber does not find the statements to be unreliable in their description of alleged murders. As for the second objection raised by the Gotovina Defence, the Chamber considers that even if the evidence concerns a "critical issue", this does not necessarily bar

⁴² Čermak Response, para. 4; Markač Response, paras 22-26.

⁴³ Gotovina Response, paras 17-18.

⁴⁴ Gotovina Response, para. 17.

admission of such evidence if the requirements prescribed under Rule 92 *quater* and Rule 89 are met. Moreover, the information provided in the relevant portions of the statements of Witnesses 36 and 45 relates to events about which the Chamber has received other evidence. The Defence does not argue, and the Chamber does not find that there are manifest or obvious internal inconsistencies in the statements of Witnesses 36 and 45 or inconsistencies between those statements and the evidence already before the Chamber. Finally, the Chamber considers that the statements of Witnesses 36 and 45 do not deal with evidence that goes to proof of acts and conduct of any of the accused. For these reasons, and for reasons set out in paragraphs 7 through 9 above, the Chamber finds that the statements of Witnesses 36 and 45 can be admitted into evidence pursuant to Rule 92 *quater*.

21. The Chamber reminds the Prosecution that evidence admitted pursuant to Rule 92 *quater* is public unless a request for protective measures in relation to unavailable witnesses has been received and granted. Since all witnesses described in this Decision are deceased, a request for protective measures may be made for the purpose of avoiding identification of other witnesses with protective measures who have testified, or who will do so at a later stage of the trial. Until the Prosecution is in a position to affirm that protective measures are not required, the Chamber will provisionally admit this evidence under seal. The Prosecution is given fourteen days to report to the Chamber whether it will apply for protective measures.

22. For the foregoing reasons, and pursuant to Rule 92 *quater*, the Chamber:

GRANTS the Motion with respect to the statements of Witnesses 8, 9, 19, 30, 32, 36, and 45;

ADMITS into evidence **under seal**:

- i. With respect to Witness 8:
 - a. a written statement of Witness 8, dated 3 September 2003 (02791620-02791623 and 02791631-02791634);
 - b. a written statement of Witness 8, dated 5 September 2003 (02791624-02791626 and 02791628-02791630);
 - c. the Rule 92 *bis* attestation for Witness 8 statements and Declaration by Witness 8 (02791627 and 02791617-02791619);
 - d. the death certificate of Witness 8 (06104919-06104920 and ET 06104921-06104922);

⁴⁵ Gotovina Response, para. 18.

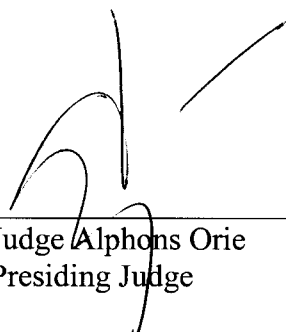
- ii. With respect to Witness 9:
 - a. a written statement of Witness 9, dated 8 July 1999 (00850590-00850595);
 - b. a written statement of Witness 9, dated 13 October 2004 (03623544-03623546);
 - c. the death certificate of Witness 9 (06104923-06104924 and ET 06104923-06104924);
- iii. With respect to Witness 19:
 - a. a written statement of Witness 19, dated 23 May 1997 (03083553-03083557 and 00508198-00508202);
 - b. the death certificate of Witness 19, (06104881 and ET 06104881);
- iv. With respect to Witness 30:
 - a. a written statement of Witness 30, dated 12 October 2004 (03623547-03623550);
 - b. the death certificate of Witness 30, (06104921-06104922 and ET 06104921-06104922);
- v. With respect to Witness 32:
 - a. a written statement of Witness 32, dated 22 April 1998 (03070006-03070009 and 00605006-00605010);
 - b. the death certificate of Witness 32, (06104925-06104926 and ET 06104925-06104926);
- vi. With respect to Witness 36:
 - a. a written statement of Witness 36, dated 3 September 2003 (02791359-02791362 and 02791367-02791370);
 - b. a written statement of Witness 36, dated 9 September 2003 (02791363-02791365 and 02791371-02791374);
 - c. the Rule 92 bis attestation for Witness 36 statement and Declaration by Witness 36 (02791356-02791358 and 02791366);

- d. the death certificate of Witness 36, (06104927-06104928 and ET 06104927-06104928);
- vii. With respect to Witness 45:
 - a. a written statement of Witness 45, dated 22 April 1998 (03068934-03068939 and 00603803-00603808);
 - b. the death certificate of Witness 45, (06104931-06104932 and ET 06104931-06104932);

REQUESTS the Prosecution to upload the aforementioned documents into e-Court;

REQUESTS the Registrar to assign exhibit numbers to them and inform the parties of the exhibit numbers so assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this 16th day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]