

IT-06-90-T
D 8396 - D 8391
24 April 2008

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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: 24 April 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Uldis Ķiniš
Judge Elisabeth Gwaunza

Registrar: Mr Hans Holthuis

Decision of: 24 April 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

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

Office of the Prosecutor

Mr Alan Tieger
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Counsel for Ante Gotovina

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Mr Gregory Kehoe
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Counsel for Ivan Čermak

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Mr Tomislav Kuzmanović

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 In this Decision, the Chamber will deal with the Motion only with regard to the statements of Witness 11 and Witness 42.³ The remaining Rule 92 *bis* statements and Rule 92 *quater* statements will be dealt with separately and in decisions to follow.

2. The Prosecution’s position is that the statements of Witness 11 and Witness 42 meet the requirements for admissibility under Rule 92 *quater*.⁴ 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.⁵ Moreover, the Prosecution submits that the statements of Witness 11 were certified pursuant to Rule 92 *bis* (B), further confirming their reliability.⁶ The Prosecution also submits that the statements are of probative value, since they are directed to several of the counts in the Indictment.⁷ Finally, the Prosecution submits that the statements consist entirely of “crime base” evidence which does not go to the “acts and conduct” of the Accused.⁸ None of the Defence teams has objected to the Motion insofar as it seeks the admission into evidence of the statements of Witness 11 and Witness 42 pursuant to Rule 92 *quater*.⁹

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:

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 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.

⁴ Motion, paras 3, 15-21.

⁵ *Ibid.*, paras 16-17.

⁶ *Ibid.*, para. 18.

⁷ *Ibid.*, para. 20.

⁸ *Ibid.*

⁹ Markač Response, paras 22-30; Čermak Response, paras 4, 9; Gotovina Response, para. 19.

- (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.¹⁰

5. The Prosecution has attached the death certificates of Witnesses 11 and 42 to its Motion.¹¹ The English translation of the two death certificates was filed on 18 April 2008.¹² The Chamber is therefore satisfied that these two 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 un-sworn 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.¹³

7. The Prosecution seeks the admission into evidence of two statements of Witness 11 and one statement of Witness 42.¹⁴ The tendered statements were not given under oath, though both the witnesses signed each page of their statement(s), as well as the accompanying

¹⁰ *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.

¹¹ Motion, Confidential Appendix D.

¹² Addendum to Prosecution's Motions for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 18 April 2008, Confidential Appendix.

¹³ 1st *Milutinović* Decision, para. 7; 1st *Haradinaj* Decision, para. 8; 2nd *Haradinaj* Decision, para. 8.

¹⁴ Motion, para. 22, Confidential Appendix C.

acknowledgements that the statements were read back to the witnesses in their own language and were true to the best of their knowledge and recollection. This was confirmed by an interpreter approved by the Registry.¹⁵ Moreover, Witness 11's two statements were certified pursuant to Rule 92 *bis* (B).¹⁶ The Chamber finds this to be sufficient proof of the witnesses' acceptance that the written statements were true and accurate.

8. The statements of Witness 11 and Witness 42 have not been subject to cross-examination. The unavailability of Witness 11 and Witness 42 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. The statements of the witnesses contain no allegations that go to proof of the acts and conduct of the Accused. The Chamber considers that the statements of Witness 11 and Witness 42 are relatively peripheral to the Prosecution's case. Moreover, they relate to alleged crimes for which the Prosecution intends to introduce corroborative evidence. The Chamber does not find that there are manifest or obvious inconsistencies in the statements of Witness 11 and Witness 42, or between those statements and the evidence which so far has been presented by other witnesses.

9. With regard to the requirements of Rule 89 (C), the Chamber finds that the statements are relevant to the case. They offer evidence of crimes allegedly committed within the indictment period in Gošić and Kakanj both in the municipality of Kistanje. The statements of Witness 11 relate to the discovery of the dead bodies of an entire family as well as lootings and burnings. The statement of Witness 42 concerns the eighth scheduled killing charged under counts 6 and 7 of the Indictment.¹⁷ Since reliability is a component part of the probative value of a piece of evidence, there is no need to re-examine the issue of probative value where examination has already been made within the context of Rule 92 *quater* (A) (ii).¹⁸ Therefore, the Chamber finds that the requirements of Rule 89 (C) are satisfied.

10. The Chamber reminds the Prosecution that the evidence admitted pursuant to Rule 92 *quater* is public unless a request for protective measures in relation to the unavailable witnesses has been received and granted. Since both Witness 11 and Witness 42 are deceased, a request for protective measures may be for the purpose of avoiding identification of other witnesses with protective measures who have testified, or will do so at a later stage in the

¹⁵ Motion, Confidential Appendix D.

¹⁶ *Ibid.*

¹⁷ Amended Joinder Indictment, 21 February 2008, Schedule to Joinder Indictment, p. 2.

case. 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.

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

GRANTS the Motion in part, and **DEFERS** the Decision on the outstanding matters raised in the Motion;

ADMITS into evidence **under seal**:

- (i) the death certificate of Witness 11 (ERN 06104933-06104934 and ETN 06104933-06104934);
- (ii) the Rule 92 *bis* attestation for Witness 11's statements (ERN 02791285-02791287 and 02791296);
- (iii) a written statement of Witness 11, signed and dated 13 September 2003 (ERN 02791288-02791292 and 02791297-02791302);
- (iv) a written statement of Witness 11, signed and dated 10 September 2003 (ERN 02791293-02791295 and 02791303-02791306);
- (v) the death certificate of Witness 42 (ERN 0610-4929-0610-4930 and ET 06104929-06104930);
- (vi) a written statement of Witness 42, signed and dated 23 January 1999 (ERN 03012714-03012721 and 00693315-00693322);

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.

¹⁸ *Prosecutor v. Prlić et al.*, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, dated 27 October 2006, filed 29 March 2007, para. 11; 1st *Haradinaj* Decision, para. 11; 2nd *Haradinaj* Decision, para. 6.

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Judge Alphons Orié
Presiding Judge

Dated this 24th day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]