

IT-06-90-T
D10702-D10697
03 JUNE 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: 3 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: 3 June 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON THE FIRST BATCH OF RULE 92 BIS WITNESSES

Office of the Prosecutor

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Mr Steven Kay, QC
Mr Andrew Cayley
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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

1. On 25 October 2007, the Prosecution filed a motion requesting the admission of nine witness 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 On 26 October 2007, the Prosecution filed a notice withdrawing the Rule 92 *bis* application with regard to one of the witnesses.² The Defence for each of the Accused responded to the Motion.³ In this Decision, the Chamber will deal with the Motion only with regard to the eight statements tendered pursuant to Rule 92 *bis*. The Chamber’s Decision covers the material included in the confidential annex to the Decision. The Rule 92 *quater* statements are dealt with in separate decisions.

2. The Prosecution argued that the statements of all eight witnesses should be admitted pursuant to Rule 92 *bis* as it is “crime-base” evidence and does not go to the acts and conduct of the Accused.⁴ Although probative to the counts in the indictment, the evidence is, in the Prosecution’s submission, not so pivotal to the Prosecution’s case that it would be unfair to the accused to admit it in written form.⁵ Moreover, the Prosecution argued that many of the statements concern evidence of a cumulative nature and relate to the “impact of crimes on the victims”.⁶ The Prosecution further submitted that all the formal requirements set out by Rule 92 *bis* are met for the eight witness statements.⁷

3. The Čermak Defence did not object to the admission of any of the witness statements pursuant to Rule 92 *bis*.⁸

4. The Gotovina Defence objected to the admission of witness statements pursuant to Rule 92 *bis* which report “murders” without corroborating evidence.⁹ This includes the statements of the first two witnesses in Table I in the Annex of this Decision.¹⁰ The Gotovina Defence argued that the statements of the second and third witness in Table I deal with

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

² Prosecution Notification Withdrawing Rule 92 *bis* Application for Witness No. 70 (P-12), 26 October 2007.

³ 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”).

⁴ Motion, paras 2, 4, 7.

⁵ Motion, para. 9.

⁶ Motion, para. 8.

⁷ Motion, para. 6.

⁸ Čermak Response, para. 3.

⁹ Gotovina Response, paras 1, 6, 9.

deportation through excessive shelling and that this is “a live and important issue between the parties”.¹¹ Therefore, the Gotovina Defence requested to cross-examine these witnesses.¹²

5. As for the three witnesses in Table I, the Markač Defence argued that their statements deal with the alleged deportation and forcible transfer of the Serb population from the Krajina region and that this is “a live and important issue between the parties”.¹³ The Markač Defence therefore requested the opportunity to cross-examine these witnesses.¹⁴

6. Pursuant to Rule 92 *bis* (A), a Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of an oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. One factor in favour of admitting evidence in the form of a written statement is that it is of a cumulative nature.¹⁵ One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.¹⁶ The Chamber has the discretion to require the witness to appear for cross-examination in which case Rule 92 *ter* shall apply.¹⁷

7. The Chamber considers that, as far as the alleged deportation and forcible transfer of the Serb population from the Krajina region is concerned, the evidence in the statements by witnesses referred to in Table I is cumulative to evidence given by numerous other witnesses that have or will testify orally in this case. The same goes for alleged deportation through excessive shelling about which the Chamber has received, and expects to continue to receive evidence. The Defence has not argued, and the Chamber does not find, that the nature and source of the evidence provided by the witnesses in Table I renders it unreliable. As for the objection to admission of statements reporting “murders” without corroborating evidence, the Chamber does not find that granting cross-examination of the relevant witnesses would address the concerns mentioned by the Gotovina Defence. Notably, the Gotovina Defence does not request cross-examination of these witnesses.¹⁸ The Chamber finds that there is no

¹⁰ Gotovina Response, para. 9.

¹¹ Gotovina Response, para. 13.

¹² Gotovina Response, para. 13.

¹³ Markač Response, paras 20, 28.

¹⁴ Markač Response, para. 28.

¹⁵ Rule 92 *bis* (A)(i)(a) of the Rules.

¹⁶ Rule 92 *bis* (A)(ii)(b) of the Rules.

¹⁷ Rule 92 *bis* (C) of the Rules.

¹⁸ Gotovina Response, para. 9.

need to cross-examine the witnesses in Table I and admits their statements pursuant to Rule 92 *bis*.

8. The Gotovina Defence has challenged the content of the statements of the witnesses mentioned in Table II of the Annex of the Decision.¹⁹ It has raised issues relating to reliability and credibility of the evidence contained in those statements. The specific portions of the statements referred to by the Gotovina Defence are not cumulative to any other evidence. The Chamber therefore finds that the two witnesses in Table II should be called for cross-examination and that their statements should be dealt with pursuant to Rule 92 *ter* at that time.

9. As for the first two witnesses in Table III in the Annex to this Decision, the Gotovina Defence has made reference to documents which allegedly contradict information given by the witnesses in their statements.²⁰ The Chamber will not decide on whether cross-examination is required for these witnesses until it has reviewed these documents and the Prosecution has had an opportunity to comment on them. The Chamber therefore requests the Gotovina Defence to submit the documents within seven days of the filing of this Decision and the Prosecution to make their submissions, should they wish to do so, within 14 days after that.

10. Regarding the third witness in Table III, the Prosecution has not provided the Chamber with a translation of the statement dated 16 February 1996. Moreover, the Prosecution has not provided the Chamber with the three documents referred to in the statement dated 13 October 2003. The Chamber will defer a decision on admission until the mentioned translation and documents have been provided to the Chamber.

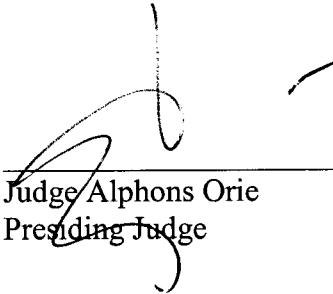
11. The Chamber reminds the Prosecution that the evidence admitted pursuant to Rule 92 *bis* is public unless a request for protective measures has been received and granted. Until the Prosecution affirms that the persons referred to in Table I do not require protective measures, the Chamber will provisionally admit this evidence under seal. The Chamber requests the Prosecution to inform the Chamber about the security and safety status of these witnesses within seven days of the filing of this Decision.

¹⁹ Gotovina Response, paras 12, 14.

²⁰ Gotovina Response, paras 10-11.

12. The Chamber further requests the Prosecution to upload the documents listed in Table I into eCourt, and the Registrar to assign exhibit numbers to them, and to inform the parties of the exhibit numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this 3rd day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]