

4-06-90-T
D 27034 - D 27031
16 September 2009

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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 September 2009

Original:

English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 16 September 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON DEFENDANT ANTE GOTOVINA'S MOTION FOR ADMISSION OF
EVIDENCE OF ONE WITNESS PURSUANT TO RULE 92 *BIS*

Office of the Prosecutor

Mr Alan Tieger
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Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

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Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL BACKGROUND

1. On 4 August 2009, the Gotovina Defence requested admission into evidence of a statement by Witness AG-10 pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 24 July 2009, the Chamber pursuant to Rule 126 *bis* of the Rules had decided to extend the response time to filings to three weeks during the summer recess.² On 25 August 2009, the Prosecution responded, objecting to the Motion.³ Neither the Čermak Defence nor the Markač Defence responded to the Motion.

SUBMISSIONS OF THE PARTIES

2. The Gotovina Defence submits that the statement should be admitted into evidence pursuant to Rule 92 *bis* of the Rules in the overriding interest of an expeditious trial.⁴ It submits that Witness AG-10's statement corroborates evidence given by Witness Lazarević.⁵ It further submits that the statement does not go to the acts and conduct of the Accused and has been properly verified under Rule 92 *bis* of the Rules.⁶ The Gotovina Defence argues that the statement relates to "relevant historical, political, or military background".⁷ It argues that the statement is probative to Counts I, II, and III of the Indictment, and that it would not prejudice the other Accused to permit the evidence to be admitted in written form.⁸

3. The Prosecution submits that the statement of Witness AG-10 is not sufficiently relevant to warrant admission.⁹ It submits that the statement is not relevant to any of the counts in the Indictment and that it does not mention any event after 1991.¹⁰ The Prosecution argues that the statement does not refer to the departure of Serbs from Sector South or to Operation Storm or its immediate context.¹¹ The Prosecution further submits that the statement only corroborates less relevant portions of Witness Lazarević's testimony, such as the actions and structure of the Serb counter-intelligence activities up to 1991.¹² Finally, the

¹ Defendant Ante Gotovina's Motion for Admission of Evidence of Witness AG-10 Pursuant to Rule 92 *bis*, 4 August 2009 ("Motion"), paras 1-2, 11.

² T. 20706-20707.

³ Prosecution's Response to Gotovina Defence Motion for Admission of Evidence of One Witness Pursuant to Rule 92 *bis*, 25 August 2009 ("Response"), paras 1, 4.

⁴ Motion, paras 2, 10.

⁵ Motion, paras 2, 8.

⁶ Motion, paras 2, 4-6.

⁷ Motion, para. 7.

⁸ Motion, para. 8.

⁹ Response, paras 1, 4.

¹⁰ Response, para. 2.

¹¹ *Ibid.*

¹² Response, para. 3.

Prosecution submits that should the Chambers admit the statement, it does not wish to cross-examine witness AG-10.¹³

APPLICABLE LAW

4. Pursuant to Rule 92 *bis* (A) of the Rules, a Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. Factors in favour of admitting evidence in the form of a written statement are that it is of a cumulative nature and that it relates to relevant historical, political or military background.¹⁴ One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.¹⁵ The Chamber has the discretion to require the witness to appear for cross-examination in which case Rule 92 *ter* of the Rules shall apply.¹⁶

DISCUSSION

5. The reliability of the witness statement has not been challenged and the Chamber finds that the procedural requirements set out in Rule 92 *bis* of the Rules have been met. The Chamber is also satisfied that nothing in the statement goes to proof of the acts and conduct of the Accused. The statement is cumulative to parts of Witness Lazarević's testimony and can be seen as cumulative in this respect.

6. The content of the statement relates in large parts to matters outside the temporal and geographical scope of the Indictment. At the same time, it does provide some historical, political, and military background that is also relevant for the understanding of the events mentioned in the Indictment. The statement provides information about Serbia's involvement in, amongst others, the Krajina and about the distribution of weapons to local Serbs and the use of propaganda against Croatia. In that regard, the statement might give some broader understanding in relation to Counts I, II, and II of the Indictment.

7. The Prosecution has not requested that the witness be cross-examined and, considering this and the content of witness AG-10's evidence, the Chamber decides that the witness does not have to appear for cross-examination.

¹³ Response, para. 4.

¹⁴ Rule 92 *bis* (A) (i) (a) and (b) of the Rules.

¹⁵ Rule 92 *bis* (A) (ii) (b) of the Rules.

¹⁶ Rule 92 *bis* (C) of the Rules.

8. The Chamber is satisfied that the requirements of Rule 92 *bis* of the Rules are met and thus finds that Witness AG-10's statement can be admitted into evidence.

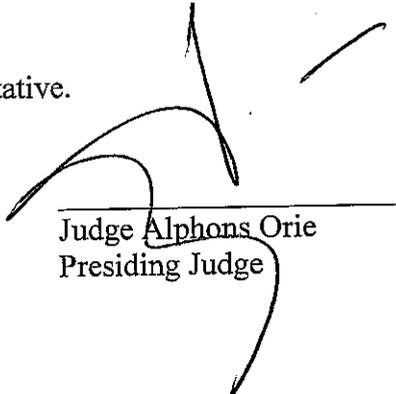
DISPOSITION

9. For the foregoing reasons, pursuant to Rule 92 *bis* of the Rules, the Chamber **GRANTS** the Motion and **ADMITS** into evidence, **under seal**, the witness statement of Witness AG-10, dated 27 May 2002 (02199075-02199086).

10. The Gotovina Defence indicates that Witness AG-10 requests protective measures.¹⁷ If the Gotovina Defence wants to apply for protective measures, the Chamber **INSTRUCTS** it to do so within seven days of the filing of this decision.

11. The Chamber **REQUESTS** the Gotovina Defence to upload the admitted document into eCourt within seven days of the filing of this decision and **REQUESTS** the Registrar to assign an exhibit number to the admitted document and inform the Chamber and the parties of the exhibit number so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this 16th day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁷ Motion, para. 3.
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