

F-06-90-T
D 12896 - D 12892
24 July 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 July 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 24 July 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON THE SECOND BATCH OF RULE 92 BIS WITNESSES

Office of the Prosecutor

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Counsel for Ivan Čermak

Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

1. On 29 February 2008, the Prosecution filed a motion requesting the admission of four witness statements pursuant to Rule 92 *bis* and four statements pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ On 14 March 2008, the Čermak Defence filed a response.² The Markač Defence did not file any response. The Gotovina Defence did not file a response, but informed the Chamber orally on 12 June 2008 that it joined the Čermak Defence’s Response to which it added further arguments.³ In this Decision, the Chamber deals with the Motion only with respect to the four statements tendered pursuant to Rule 92 *bis*. The Chamber’s Decision covers the material included in the confidential annex attached to the Decision. The Rule 92 *quater* statements will be dealt with in a separate decision.

2. The Prosecution argued that the statements of all four witnesses should be admitted pursuant to Rule 92 *bis* as they constitute “crime-base” evidence which does not go to the acts and conduct of the Accused.⁴ The Prosecution also argued that the evidence is largely cumulative and corroborative of that of other witnesses.⁵ The Prosecution further submitted that all the formal requirements set out by Rule 92 *bis* of the Rules have been met.⁶

3. The Čermak Defence objected to the admission of statements of the witnesses in Table II and Table III in the Annex of this Decision pursuant to Rule 92 *bis* of the Rules.⁷ The Čermak Defence argued that the statements of these witnesses should be heard *viva voce* as they “[go] directly to the specific proof of an identified allegation within the indictment which is a significant issue between the parties,”⁸ and there is an overriding public interest in having such evidence heard *viva voce*.⁹ The Gotovina Defence objected to the admission into evidence of the statements of the witness in Table III pursuant to Rule 92 *bis* because, in its view, inconsistencies exist between these statements and the testimony and statements of a *viva voce* witness who appeared before the Chamber on 12 June 2008.¹⁰ The Gotovina Defence also stated that there existed significant new information regarding communication

¹ Prosecution Second Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 29 February 2008 (“Motion”), paras 1, 17(1). On 14 April 2008, the Prosecution filed an addendum to the Motion including an English version of the witness statement of the second witness in Table I of the Annex to this Decision.

² Ivan Čermak’s Response to Prosecution’s Second Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 14 March 2008 (“Response”).

³ T. 4879.

⁴ Motion, paras 2, 3, 6.

⁵ Motion, paras 2, 6.

⁶ Motion, paras 2, 7.

⁷ Response, paras 8, 12.

⁸ Response, paras 8, 12.

⁹ Response, paras 10, 12.

¹⁰ T. 4861–4880.

between the witness in Table III and the *viva voce* witness heard on 12 June 2008 that it wishes to cross examine the witness in Table III on.¹¹

4. 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.¹² Factors against admission include, but are not limited to, whether there is an overriding public interest in the evidence in question being presented orally and whether a party can demonstrate that the nature and source of the written statement renders it unreliable.¹³ Additionally, the Chamber has the discretion to require a witness to appear for cross-examination pursuant to Rule 92 *ter*.¹⁴

5. The Chamber considers that the information contained in the statements of the witnesses listed in Table I is cumulative to the testimony of other witnesses that have already appeared before the Chamber. The Defence has not demonstrated that there would be an overriding public interest in having the evidence of these witnesses presented orally. The Chamber therefore finds that there is no need to cross-examine the witnesses listed in Table I and admits their statements pursuant to Rule 92 *bis*.

6. Regarding the witness in Table II, the Čermak Defence raised a specific issue with a part of her statement which relates to one of the killing incidents in the Schedule to Joinder Indictment.¹⁵ The Chamber considers that under these circumstances, the witness in Table II should be called to clarify the relevant part of the statement. The Chamber therefore requires that this witness appear for cross-examination and that her statements should be dealt with pursuant to Rule 92 *ter* at that time.

7. As Witness 70 is expected to testify on facts related to the statements of the witness in Table III, the Chamber finds that it would be in the interests of a fair determination of the matter before it, to reserve its position on the admission into evidence of the latter's statements until Witness 70 has testified.

8. Regarding the Čermak Defence's concern that the summaries provided by the Prosecution for all the potential Rule 92 *bis* statements are either "misleading" or

¹¹ T. 4880.

¹² Rule 92 *bis* (A) (i) (a) of the Rules.

¹³ Rule 92 *bis* (A)(ii)(a) and (b) of the Rules.

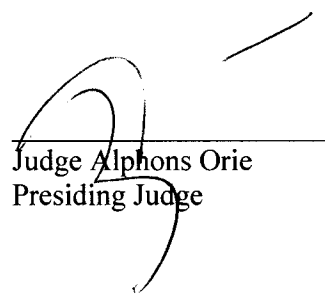
¹⁴ Rule 89 (C) and 92 *bis* (C) of the Rules.

“inaccurate,” the Chamber notes that it does not consider these summaries in determining whether the statements should be admitted into evidence under Rule 92 *bis*.¹⁶

9. Evidence admitted pursuant to Rule 92 *bis* is public unless a request for protective measures has been granted and the Chamber will therefore provisionally admit the evidence referred to in Table I under seal. The Prosecution is ordered to inform the Chamber about the security and safety status of these witnesses within seven days of the filing of this Decision.

10. Further, the Chamber 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 Orié
Presiding Judge

Dated this twenty-fourth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Response, paras 9-10.

¹⁶ Response, paras 5, 7, 11, 13.