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26 February 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: 26 February 2009

Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 26 February 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**REASONS FOR DECISION ON PROSECUTION'S RENEWED MOTION FOR
EVIDENCE OF WITNESS 82 TO BE PRESENTED VIA VIDEO-CONFERENCE
LINK FROM ZAGREB AND REASONS FOR DECISION ON THE REQUEST OF
THE MARKAČ DEFENCE TO CONDUCT CROSS-EXAMINATION IN ZAGREB**

Office of the Prosecutor

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PROCEDURAL HISTORY

1. On 3 February 2009, the Prosecution filed a motion (“Original Motion”) requesting that the evidence of Witness 82 (“Witness”) be presented via video-conference link, submitting that the Witness’s medical condition rendered him unable to travel to The Hague and to testify within the time remaining for the presentation of the Prosecution’s case.¹ The Original Motion was supplemented by a medical report dated 8 January 2009 (“First Medical Report”) and a declaration from a Prosecution investigator (“Prosecution Investigator”) describing his contacts with the Witness.²

2. On 4 February 2009, the Gotovina Defence objected to the Original Motion in Court, submitting that the Witness’s condition was not such as to render him unable to travel to The Hague, and that it was within the means of the Victims and Witnesses Unit to accommodate the particular needs of the Witness.³ Both the Markač and Čermak Defence joined in these submissions.⁴

3. On 5 February 2009, the Chamber decided to deny the Original Motion and communicated this informally to the parties. On 12 February 2009, the Chamber denied the Original Motion on the record, without prejudice, finding that the information contained in the First Medical Report did not depict the Witness’s health situation as serious enough to prevent him from travelling to The Hague.⁵

4. On 13 February 2009, the Prosecution filed a renewed motion (“Renewed Motion”) requesting that the evidence of the Witness be presented via video-conference link, accompanied by a new medical report, dated 9 February 2009 (“Second Medical Report”), and a new declaration (“Second Declaration”), dated 13 February 2009, by the same Prosecution Investigator who had submitted the declaration in the Original Motion.⁶ On 16 February 2009, all Defence teams objected to the Renewed Motion.⁷

5. On 17 February 2009, the Chamber granted the Renewed Motion with reasons to follow.⁸ The Markač Defence then made a request in Court to be present and conduct its

¹ Prosecution’s Motion for Evidence to be Presented via Video-Conference Link, Witness 82, 3 February 2009, paras 1-3, 6.

² Original Motion, Confidential Appendices A and B.

³ T. 15712-15713.

⁴ T. 15713.

⁵ T. 15801-15803.

⁶ Prosecution’s Renewed Motion for Evidence to Be Presented via Video-Conference Link, Witness 82, 13 February 2009, para. 3, Confidential Appendices A and B.

⁷ T. 16099-16100.

⁸ T. 16175.

cross-examination in Zagreb, at the physical location of the Witness during the video-conference link proceedings (“Request”).⁹ The Prosecution indicated that were the Request to be granted, it would also seek to be physically present at that location.¹⁰

6. On 19 February 2009, upon invitation of the Chamber, the Markač Defence made a number of submissions (“Submissions”) in Court regarding its Request.¹¹ The Chamber also asked the Prosecution to clarify whether it had any wish, independent of the Request, to be physically present at the location of the Witness during the video-conference link, and enquired of the Gotovina Defence and the Čermak Defence whether they too wished to be physically present at that location.¹² The Prosecution submitted that its wish to be there was contingent on the presence of Counsel for the Markač Defence.¹³ Neither the Gotovina Defence nor the Čermak Defence sought to be physically present at the location of the Witness.¹⁴

7. On 20 February 2009, the Chamber denied the Request with reasons to follow.¹⁵ The Decision was delivered in this manner for practical reasons, related to the short time frame within which the Witness was scheduled to testify, and possible travel arrangements to be made or to be cancelled.¹⁶

SUBMISSIONS OF THE PARTIES

Renewed Motion

8. The material submitted by the Prosecution indicated that the Witness had a medical condition requiring surgery.¹⁷ The Second Declaration describes the Prosecution Investigator’s further contacts with the Witness and receipt of the Second Medical Report.¹⁸ Specifically, the Prosecution Investigator stated that on 10 February 2009, the Witness had contacted the Tribunal’s Zagreb Liaison Office and informed the Prosecution Investigator of his medical condition and that he was expecting to have an urgent operation.¹⁹ On 13 February 2009, the Prosecution Investigator contacted the Witness, who said that he had been advised

⁹ T. 16179-16180.

¹⁰ T. 16180.

¹¹ T. 16295-16302.

¹² T. 16296, 16301.

¹³ T. 16296.

¹⁴ T. 16301.

¹⁵ T. 16442.

¹⁶ T. 16442.

¹⁷ Renewed Motion, para. 2, Confidential Appendices A and B.

¹⁸ Second Declaration, paras 4-6.

that the operation was to go ahead and that the recovery time was dependent on the form of surgery chosen, but that the minimum expected recovery time would be seven to ten days.²⁰ The Prosecution submitted that this new medical information, the pressing nature of the surgery required, as well as the recovery period, demonstrated that the Witness was unable to travel to The Hague to testify within the time remaining for the presentation of the Prosecution's case.²¹ The Prosecution incorporated by reference the arguments in its Original Motion, in particular relating to the imminent end of the Prosecution's case necessitating that the Witness be heard now, the importance of the Witness's evidence to the Prosecution's case, and the absence of prejudice to the Accused.²²

9. On 16 February 2009, the Gotovina Defence objected to the Renewed Motion in Court, submitting its belief that the Witness was "shopping for a diagnosis" in order to avoid appearing in person before the Tribunal.²³ The Čermak Defence also objected to the Renewed Motion, arguing that there was insufficient information before the Chamber to enable it to make a decision on the Renewed Motion.²⁴ The Markač Defence also objected to the Renewed Motion, on the same grounds as the Čermak Defence.²⁵

Request

10. In its 19 February 2009 Submissions in support of its Request, the Markač Defence asserted:

Your Honour, the only specific reason which I had in mind is that is completely different situation when the Defence is dealing with a very important witness than via the video-link. So my attention was when I ask for it, to be present *in situ* so that I can be close to witness to see his reaction on my question, to see the conversation and the cross-examination between the Defence counsel and the witness in every -- in every way is much more personal when the both of them are in the very same room, in the courtroom. So my intention was to be *in situ* to provide the best cross-examination on behalf of my client, and when I check the rules I see no reason what that couldn't be allowed. So that was my request.²⁶

11. The Markač Defence also submitted:

¹⁹ Second Declaration, para. 4.

²⁰ Second Declaration, para. 6.

²¹ Renewed Motion, paras 2-3.

²² Renewed Motion, para. 3, footnote 4; Original Motion, paras 3-5.

²³ T. 16099.

²⁴ T. 16100.

²⁵ T. 16100.

²⁶ T. 16295-16296.

This is a very, very important witness for the Markac Defence. So it is my opinion that I, by all means, have to be present in the very same room with that witness to conduct a proper cross-examination, and that is also a wish and a request of my client as well.²⁷

12. Upon invitation of the Chamber to substantiate its assertions with respect to the importance of the Witness, the Markač Defence stated as follows:

Maybe just to add, Your Honour, on that topic, I should use a lot of documents in cross-examination of that witness, so the manipulation of the documents is obviously much more convenient *in situ* situation than via the videolink, although that is that very much depends on the technical facilities.²⁸

13. The Chamber asked the Markač Defence how it imagined that the camera would be used if there would be two counsel and one witness, and the Defence replied:

I haven't in mind those technicalities, but I mean, just talking at the top of my head, that could be placed two cameras, so one camera could be focussed on examiner, whether it will be a Prosecution colleague on the place, or will be I, or myself.²⁹

14. The Markač Defence also submitted that:

[W]hat is my position, is that the right of accused vice versa the technical possibilities is something that could not be compared. So whatever it is, I think the right of accused is to be prevailed in such circumstances.³⁰

15. When invited by the Chamber to clarify to which right of the accused this referred, the Markač Defence responded:

Well, I'm exactly aiming at the right of accused to have an undisturbed cross-examination via witness who is, in that case, particularly very important for the Defence. So I think it is quite obvious that there is completely different situation to examine the witness via video-link than to examine the witness sitting in a very same room with him.³¹

APPLICABLE LAW

16. Under Rule 81 *bis* of the Rules of Procedure and Evidence ("Rules"), a Chamber "may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link".

17. The criteria underlying the interests of justice are reflected in the jurisprudence of the Tribunal: (a) the witness must be unable, or have good reasons to be unwilling, to come to the

²⁷ T. 16296-16297.

²⁸ T. 16297.

²⁹ T. 16299.

³⁰ T. 16299.

³¹ T. 16299-16300.

Tribunal. (b) the testimony of the witness must be sufficiently important to make it unfair to the requesting party to proceed without it, and (c) the accused must not be prejudiced in the exercise of his or her right to confront the witness.³²

18. According to jurisprudence of the Tribunal, video conferencing is an extension of the Trial Chamber to the location of the witness that neither denies the accused his or her right to confront the witness, nor causes him or her material prejudice by the physical absence of the witness.³³ Video conferencing therefore respects the right of the accused to cross-examine and directly confront Prosecution witnesses while observing their reactions, and allows the Chamber to assess the credibility and reliability of the testimony in the same manner as for a witness in the courtroom.³⁴ Testimony by video conference link should be given as much probative value as testimony presented in the courtroom.³⁵

19. The jurisprudence of the Tribunal has also set out a number of guidelines for testimony by video-conference link. These include that, unless the Trial Chamber decides otherwise, the testimony shall be given in the physical presence only of the Presiding Officer and, if necessary, of a member of the Registry technical staff.³⁶

20. Under Rule 90 (F) of the Rules, the Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth.

DISCUSSION

Renewed Motion

21. Based on the information provided in the Second Medical Report indicating that the Witness had been diagnosed with a condition requiring pressing surgery, the Chamber was

³² *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Request for Testimony by Video-Conference Link and Protective Measures, 2 July 2004, p. 3; *Delalić et al.*, IT-96-21-T, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, para. 17; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Confidential Motion for Testimony to Be Heard via Video-Conference Link, 21 March 2007, para. 3; T. 2690, 6287, 6753, 7533, 10699, 10761, 12142, 15802, 16290.

³³ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, para. 15.

³⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motion for Remaining Testimony to be Conducted via Video Link, 14 November 2007, pp. 5-6.

³⁵ E.g. *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Urgent Motion to Bar Testimony of Proposed Defence Witnesses – and – on Milan Lukić's Motion for Video-Link Testimony, 20 January 2009, p. 4.

satisfied that the Witness was unable to travel to The Hague to testify within the time remaining for the presentation of the Prosecution's case. The Chamber did not find convincing the unsubstantiated speculation in the objections of the Gotovina Defence that the Witness was "shopping for a diagnosis" in order to avoid travelling to The Hague to testify. The Chamber disagreed with the objections of the Čermak and Markač Defence that there was insufficient information before the Chamber to be able to make a decision on the Renewed Motion.

22. Having viewed the transcripts of the audio-recorded interview with the Witness, dated 10 June 1998, his witness statement, dated 28 and 29 September 2004, and the associated exhibits,³⁷ the Chamber was satisfied that the testimony of the Witness would be sufficiently important to make it unfair to the Prosecution to proceed without it.

23. The Defence did not argue, and the Chamber did not find, that receiving the Witness's testimony via video-conference link would prejudice the Accused in the exercise of their right to confront and to cross-examine the witness. This is consistent with the established jurisprudence of the Tribunal.

24. For the foregoing reasons, the Chamber granted the Renewed Motion.

Request

25. Even assuming that the Witness is important for the Markač Defence, the Chamber did not find that any right of the Accused would be prejudiced by conducting the video-conference link proceedings for the Witness in the physical presence only of the Presiding Officer and, if necessary, of a member of the Registry technical staff. Nor did the Chamber find in the Submissions any other reason to use its discretion to allow for the presence of further persons at the location of the Witness, in particular since the Defence would not suffer material prejudice by the physical absence of the witness. Under the jurisprudence of this Tribunal, testimony, including cross-examination, by video-conference link is an acceptable alternative to testimony in the physical presence of the parties and the bench, and by no means a completely different situation as asserted by the Markač Defence.

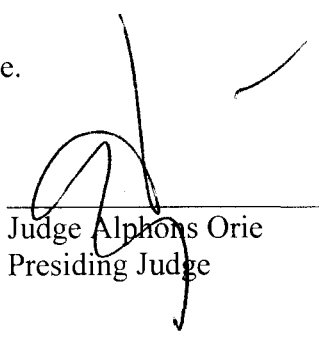
26. Consequently, the Chamber weighed its obligations under Rule 90 (F) of the Rules to exercise control over the proceedings against the reasons, expressed by the Defence Counsel,

³⁶ E.g. *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Order on Testimony via Video-Conference Link for Aleksandar Dimitrijević and Decision on Defence Request to Interview Him Prior to His Testimony, 1 July 2008, para. 3 (d).

for wanting to be physically present at the location of the Witness. The presence of, and examination by, the Prosecution and the Markač Defence at the Tribunal's Zagreb Liaison Office, while the Gotovina Defence, the Čermak Defence and the bench would be at the seat of the Tribunal, could have a substantial negative impact on the Chamber's ability, and therefore on the fulfilment of its obligation under Rule 90 (F), to exercise control over the mode of the interrogation of the Witness and the presentation of the evidence so as to make the interrogation and presentation effective for the ascertainment of the truth. Even with expanded technical facilities, such as two cameras, the Chamber would still not be able to satisfactorily supervise the interaction between those in the physical presence of the witness. The Chamber considers that one reason for the general rule in the guidelines according to which video-link testimony should be given in the physical presence only of the Presiding Officer and, if necessary, of a member of the Registry technical staff is to minimise the risk of unobserved and unsupervised interaction between the witness and other persons, including the parties, or among those other persons. This does not, as the Markač Defence submits, amount to a balance between the rights of the accused and technical considerations. Thus, the potential negative impact on the fulfilment by the Chamber of its obligation under Rule 90 (F) outweighs any inconvenience potentially caused to the Markač Defence by the denial of its Request.

27. For the foregoing reasons, the Chamber denied the Request of the Markač Defence.

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



Judge Alphons Orie
Presiding Judge

Dated this 26th day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁷ Prosecution's Submission of Rule 92 *ter* Statement and Associated Exhibits and Motion to Add One Witness-Related Document to the Rule 65 *ter* Exhibit List – Witness 82, 29 January 2009, paras 9-10, Confidential Appendices A and B.