


IT-06-90-T
D 21230 - D 21227
27 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:	27 February 2009
		Original:	English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 27 February 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

REASONS FOR THE ADDITION OF A WITNESS TO THE PROSECUTION'S WITNESS LIST AND ADMISSION INTO EVIDENCE OF TWO DOCUMENTS

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Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

Procedural history

1. On 11 November 2008, the Prosecution filed a motion requesting leave to add a witness to its Rule 65 *ter* witness list.¹ The Prosecution attached to the Motion a witness statement of the proposed witness, taken by the Prosecution on 6 November 2008. On 24 November 2008, the Gotovina Defence responded, opposing the Motion.² On 25 November 2008, the Čermak and the Markač Defence joined the Gotovina Response.³

2. In November 2008, during a witness's testimony, the Chamber had marked for identification as D898, a statement given to the Gotovina Defence by the witness proposed in the Motion.⁴

3. On 12 December 2008, the parties stated that they would, were the proposed witness to be called, only elicit such information from him so as to confirm the information contained in the statements he had given to the Prosecution and the Defence.⁵ On 20 January 2009, the parties informed the Chamber that they had agreed to stipulate that they would not appeal the issue of admissibility of each other's statements, and that the two statements would constitute effective reciprocal cross-examination of the proposed witness about acts and conduct of the accused.⁶ On 22 January, the Chamber assigned exhibit number P1281 to the Prosecution's statement of the proposed witness and admitted both P1281 and D898 into evidence.⁷ The Chamber also granted leave to add the proposed witness to the Prosecution's Rule 65 *ter* witness list, thereby granting the Motion.⁸ On 13 February 2009, the Prosecution filed an addendum to its witness list, *inter alia*, assigning witness number 174 to that witness.⁹

Reasons

4. Pursuant to Rule 73 *bis* (F) of the Rules, a Trial Chamber may grant any motion for an amendment to the Prosecution's Rule 65 *ter* witness list if satisfied that to do so is in the interests of justice.

¹ Prosecution's Second Motion to Add a Witness to its Rule 65 *ter* Witness List, 11 November 2008 ("Motion"), paras 1, 8.

² Defendant Ante Gotovina's Response to Prosecution's Second Motion to Add a Witness to its Rule 65 *ter* Witness List, 24 November 2008, paras 1, 17.

³ Ivan Čermak's Response to Prosecution's Second Motion to Add a Witness to its Rule 65 *ter* Witness List, 25 November 2008, para. 2; Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Response to Prosecution's Second Motion to Add a Witness to its Rule 65 *ter* Witness List, 25 November 2008, para. 2.

⁴ T. 11310.

⁵ T. 13561-13562.

⁶ T. 14817-14818.

⁷ T. 14840-14843.

⁸ T. 14842-14843.

⁹ Prosecution's Submission of Addenda to its 65 *ter* Witness and Exhibit Lists, 13 February 2009.

5. In spite of the broad agreement between the parties on this particular issue and considering that the stipulated agreement between the parties expressed in court on 20 January 2009 effectively amounts to a withdrawal of the Defence's initial objections against adding the proposed witness to the Prosecution's Rule 65 *ter* witness list, the Chamber evaluated whether addition to the Rule 65 *ter* witness list would be in the interests of justice. It found that the proposed witness's testimony in relation to his meeting with Mr Gotovina was *prima facie* relevant and probative. In particular in light of the fact that there was broad agreement among the parties, the Chamber was unable to find that a burden was placed on the Defence by the request for late addition, thereby concluding that the addition to the Prosecution's Rule 65 *ter* witness list was in the interests of justice.

6. Both D898 and P1281 contain interviews with Witness 174, where he describes a meeting with Mr Gotovina in 1995. In this respect, these documents corroborate the *viva voce* testimony of one other witness heard by the Chamber. Both documents are relevant to the charges in the Indictment. Furthermore, the documents contain no manifest inconsistencies, and the Chamber finds them to have probative value.

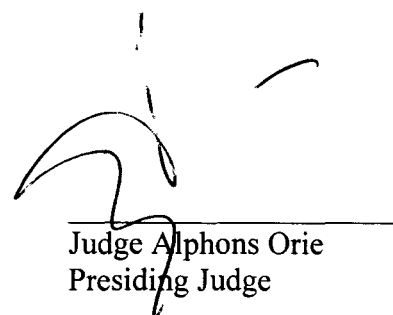
7. The Chamber recalls that Rules 92 *bis*, 92 *ter*, and 92 *quater* of the Rules are *leges speciales* for admission into evidence of witness statements taken for the purposes of proceedings before this Tribunal. Witness 174's interviews were administered by the French government upon a request for assistance and therefore taken for the purposes of the Tribunal's proceedings. While Rule 92 *quater* of the Rules clearly does not apply since Witness 174 is not unable to testify orally, Rules 92 *bis* and 92 *ter* of the Rules deserve closer examination. Apart from other requirements that might prevent application of Rule 92 *bis* of the Rules in this case, one significant difference between Rules 92 *bis* and 92 *ter* is the fact that testimony going to the acts and conduct of the accused is excluded from being admitted into evidence under Rule 92 *bis* (A), while it could be admitted under Rule 92 *ter* (B). In the two statements, Witness 174 recalls a meeting with Mr Gotovina in October 1995, thereby giving information on Mr Gotovina's conduct at the time. In light of this, Rule 92 *ter* of the Rules becomes the only possible avenue of admission.

8. Rule 92 *ter* of the Rules stipulates the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined. One important aspect of this rule relates to the fact that since such evidence may contain evidence going to the acts and

conduct of the accused, the Defence has an opportunity to challenge this evidence through cross-examination. In the present case, both parties have explicitly stated that they consider the respective statements to amount to effective cross-examination with regard to the acts and conduct of the accused. Accordingly, were Witness 174 to appear before this Tribunal, the Chamber would simply hear from the parties that there is no need to examine him beyond what is said in his two statements. Therefore, the Chamber decided not to insist on the formal conditions of Rule 92 *ter* of the Rules, as the purpose behind them has been fulfilled in this case. The exceptional circumstances with regard to Witness 174 justified the waiving of the formal conditions of Rule 92 *ter* of the Rules. The Chamber therefore admitted P1281 and D898 into evidence pursuant to Rule 92 *ter* of the Rules.

9. In light of recent agreement among the parties on this issue,¹⁰ the Chamber confirms the confidential status of Witness 174's testimony and **ORDERS** that P1281 and D898 remain under seal.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-seventh day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁰ T. 15809.