

IT-06-90-T
D 29238 - D 29232
03 November 2009

29238
48.



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 November 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 3 November 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

REASONS FOR DECISION GRANTING PROSECUTION'S MOTION TO CROSS-
EXAMINE FOUR PROPOSED RULE 92 *BIS* WITNESSES
AND
REASONS FOR DECISION TO HEAR THE EVIDENCE OF THOSE WITNESSES
VIA VIDEO-CONFERENCE LINK

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 16 May 2008, the Gotovina Defence used the content of the written statements of eleven persons in its cross-examination of Witness Gojanović.¹ On 11 June 2008, the Chamber denied admission of these statements because the procedural requirements for admission were not fulfilled at that time.² On that occasion, the Chamber noted that this did not mean that these statements could not be admitted at a later stage once they were accompanied by the appropriate attestations.³

2. On 22 July 2009, the Gotovina Defence filed a motion (“Motion”) requesting admission of the same eleven written statements pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁴ On 29 July 2009, the Prosecution filed a response (“Response”) stating that it did not object to the admission of the eleven written statements if it could cross-examine four of the eleven witnesses, namely Witness Joško Babačić, Witness Dragan Rak, Witness Radoslav Juričev-Sudac, and Witness Davor Zafranović (“Four Witnesses”).⁵ In the Response, the Prosecution stated that if cross-examination of the Four Witnesses was granted by the Chamber, it would not object to admission of the remaining seven statements without cross-examination.⁶ Neither the Čermak Defence nor the Markač Defence responded to the Motion.

3. On 25 August 2009, the Chamber granted the Prosecution’s request to cross-examine the Four Witnesses and decided, *proprio motu*, to hear their evidence via video-conference link.⁷ The Chamber stipulated that the cross-examination would be of limited time, and stated that its reasons for these two decisions would follow.⁸ All Four Witnesses testified on 9 September 2009 and their Rule 92 *ter* statements were admitted into evidence that day.⁹

¹ These statements belonged to persons later appearing on the Gotovina Defence’s witness list, namely: Witness Joško Babačić, Witness Ratko Despot, Witness Josip Elez, Witness Boris Filipović, Witness Srećko Grubišić, Witness Tihomir Miš, Witness Davor Periša, Witness Dragan Rak, Witness Radoslav Juričev-Sudac, Witness Jordan Tudić, and Witness Davor Zafranović; see also T. 3023-3027, 3029-3032, 3035-3040, 3042-3046, 3054-3058, 3078-3080.

² T. 4819.

³ *Ibid.*

⁴ Defendant Ante Gotovina’s Motion for Admission of Evidence of Eleven Witnesses Pursuant to Rule 92 *bis*, 22 July 2009 (“Motion”), paras 1, 3, 11.

⁵ Prosecution’s Response to Defendant Ante Gotovina’s Motion for Admission of Evidence of Eleven Witnesses Pursuant to Rule 92 *bis*, 29 July 2009 (“Response”), paras 1, 7.

⁶ *Ibid.*

⁷ T. 20839-20841.

⁸ *Ibid.*

⁹ T. 21342, 21363, 21390, 21409.

SUBMISSIONS OF THE PARTIES

4. The Gotovina Defence submitted that the eleven statements satisfied both the substantive and procedural requirements for admission pursuant to Rule 92 *bis* of the Rules.¹⁰ The Gotovina Defence argued that since the statements did not go to the acts or conduct of the Accused, they were admissible under the Rules.¹¹ The Gotovina Defence further submitted that the statements were admissible, as they concerned evidence of a cumulative nature and related to relevant historical, political, or military background.¹² Additionally, the Gotovina Defence argued that the eleven statements were probative of all counts in the Indictment and that their admission would not prejudice the other parties.¹³ Finally, the Gotovina Defence argued that admitting the statements pursuant to Rule 92 *bis* would best serve the interests of having an expeditious trial.¹⁴

5. The Prosecution submitted that the Chamber should not admit the statements without allowing cross-examination of the Four Witnesses because the prejudicial effect of doing so would outweigh the probative value of the evidence, the nature of the statements rendered them unreliable, and none of the factors favouring admission under Rule 92 *bis* (A)(i) applied in the present case.¹⁵ The Prosecution added that when the Defence used the content of the statements to cross-examine Witness Gojanović, it sought to show that he did not participate in Operation Storm—a claim which he repeatedly denied.¹⁶ The Prosecution argued that the Defence's purpose in re-introducing the statements was to impeach the credibility of Witness Gojanović.¹⁷ It further argued that without allowing cross-examination of such testimony, the Chamber's ability to assess the demeanour and credibility of the Four Witnesses against that of Witness Gojanović would be impaired.¹⁸ Further, since, according to the Prosecution, three exhibits confirm that Witness Gojanović served in the Croatian Army during the Indictment period, the Prosecution argued that the statements' contrary propositions made the statements at least sufficiently unreliable.¹⁹ The Prosecution submitted that it should be allowed to test the Four Witnesses to better enable the Chamber to assess the reliability of their assertions.²⁰

¹⁰ Motion, para. 4

¹¹ *Ibid.*, paras 3, 6.

¹² *Ibid.*, paras 3, 7.

¹³ *Ibid.*, para. 8.

¹⁴ *Ibid.*, paras 3, 10.

¹⁵ Response, paras 2-6.

¹⁶ *Ibid.*, para. 3.

¹⁷ *Ibid.*, para. 4.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 5 (Exhibits P198, P199, P200); T. 3121-3126, 3133.

²⁰ Response, para. 5.

Finally, the Prosecution submitted that the statements were not of a cumulative nature, and did not refer to any historical, political, or military background relevant to this case.²¹

APPLICABLE LAW

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 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 concerns the impact of crimes upon victims.²² One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.²³ The Chamber has the discretion to require the witness to appear for cross-examination in which case Rule 92 *ter* shall apply.²⁴

7. Under Rule 81 *bis* of the Rules, upon a request from the parties or *proprio motu*, a Chamber “may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link”. The jurisprudence of this Tribunal has identified three criteria to guide the exercise of the Chamber acting pursuant to this Rule.²⁵ Those criteria are: (a) the witness must be unable, or have good reasons to be unwilling, to come to the 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.²⁶ However, after considering all relevant factors in a particular case, the ultimate determination to be made when considering a request for video-conference link testimony is whether it would be consistent with the interests of justice.²⁷

²¹ *Ibid.*, para. 6.

²² Rule 92 *bis* (A)(i)(a) and (d) of the Rules.

²³ Rule 92 *bis* (A)(ii)(b) of the Rules.

²⁴ Rule 92 *bis* (C) of the Rules.

²⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Requesting Video-Conference Link Testimony of Witness 167 and Protective Measures, 23 August 2007 (“Popović Decision”), para. 10; 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, 26 February 2009 (“26 February 2009 Decision”), para. 17; T. 2690, 6287, 6753, 7533, 10699, 10761, 12142, 15802, 16290, 18592-18593.

²⁶ *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 (“Delalić Decision”), para. 17; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/I-A, Decision on Prosecution’s Request for Testimony by Video-Conference Link and Protective Measures, 2 July 2004, p. 3; *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; 26 February 2009 Decision, para. 17; T. 2690, 6287, 6753, 7533, 10699, 10761, 12142, 15802, 16290, 18592-18593.

²⁷ Popović Decision, para 10.

8. According to the 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.²⁸ Video conferencing therefore respects the right of the accused to cross-examine and directly confront 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.²⁹ Testimony by video-conference link should be given as much probative value as testimony presented in the courtroom.³⁰

DISCUSSION

Decision to call Four Witnesses for cross-examination:

9. The eleven statements all seek to establish Witness Gojanović's non-involvement in certain military operations during Operation Storm. The contents of these statements were presented to and denied by Witness Gojanović during his cross-examination. The evidentiary value of Witness Gojanović's testimony depended heavily on his presence at the relevant operations and the eleven statements would impeach this witness's testimony. According to the statements of the Four Witnesses, they all possessed a personal knowledge of Witness Gojanović, which strengthened their claims that Witness Gojanović did not participate in the relevant operations. Allowing cross-examination of the Four Witnesses would enable the Chamber to assess their credibility, reliability, and demeanour against that of Witness Gojanović.

10. In light of these considerations, the Chamber granted the Prosecution's request to cross-examine the Four Witnesses.

Decision to hear the testimony of the Four Witnesses via video-conference link:

11. Given the potential of these four statements to discredit the testimony of Witness Gojanović, the Chamber determined that the evidence was sufficiently important to make it unfair to the Gotovina Defence to have proceeded without this evidence. As the Gotovina Defence requested the testimony of these witnesses to be admitted into evidence, the Chamber found that he would not be prejudiced by allowing cross-examination to take place via video-

²⁸ Delalić Decision, para. 15; 26 February 2009 Decision, para. 18.

²⁹ *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; 26 February 2009 Decision, para. 18.

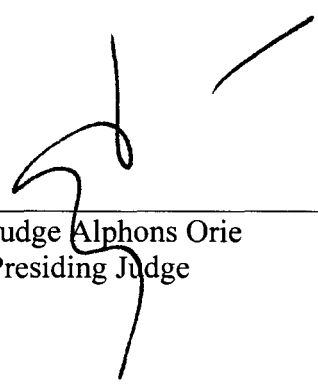
³⁰ E.g. *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Urgent Motion to Bar Testimony of Proposed Defence Witnesses – and – on Milan Lukić's Motion for Video-Link Testimony, 20 January 2009, p. 4; 26 February 2009 Decision, para. 18.

conference link. In light of the fact that neither the Čermak nor Markač defence objected to the Motion, the Chamber similarly found that they also would not be prejudiced by allowing cross-examination to take place via video-conference link.

12. Having ordered the cross-examination of the Four Witnesses *proprio motu*, the Chamber was not privy to any information about whether the witnesses were unwilling or unable to come to the Tribunal. On 24 June 2009, the Gotovina Defence had announced that it would finish its case in the first or second week of September 2009 at the latest.³¹ At that time, the Gotovina Defence did not intend to call the Four Witnesses to testify in court. On 24 July 2009, the Chamber announced that it expected the Gotovina Defence case to conclude on 11 September 2009 and the Čermak Defence case to commence on 17 September 2009.³² When the Prosecution's request to cross-examine the Four Witnesses was filed, in effect, only three and a half weeks of court time were left to hear the remaining Gotovina Defence witnesses, including a number of expert witnesses. When handing down its oral decision ordering cross-examination via video-conference link, the Chamber was aware of the fact that the Four Witnesses would each testify on a very limited, albeit important, issue in this case and determined that their combined testimonies would not take more than one court day. Under these circumstances, the Chamber found it a misuse of the Tribunal's resources, and incompatible with the expeditious completion of the trial, to have the Four Witnesses travel to The Hague to give their brief testimonies. Having considered all of the aforementioned factors, the Chamber ultimately determined that ordering cross-examination of the Four Witnesses via video-conference link was consistent with the interests of justice.

13. For the foregoing reasons, and pursuant to Rules 81 *bis* and 92 *bis* and of the Rules, the Chamber **GRANTED** the Prosecution's request to cross-examine Witness Joško Babačić, Witness Dragan Rak, Witness Radoslav Juričev-Sudac, and Witness Davor Zafranović, and **ORDERED** the cross-examinations to take place via video-conference link.

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



Judge Alphons Orie
Presiding Judge

Dated this 3rd day of November 2009

³¹ T. 19224.

³² T. 20671-20675.

At The Hague
The Netherlands

[Seal of the Tribunal]