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11 November 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: 11 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: 11 November 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON DEFENDANT IVAN ČERMAK'S MOTION FOR ADMISSION OF
EVIDENCE OF TWO WITNESSES PURSUANT TO RULE 92 *BIS*
AND
DECISION ON DEFENDANT IVAN ČERMAK'S THIRD MOTION FOR
PROTECTIVE MEASURES FOR WITNESSES IC-12 AND IC-16

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 22 September 2009, the Čermak Defence requested admission into evidence of one statement by Witness IC-12 and one statement by Witness IC-16 pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 6 October 2009, the Prosecution responded, partially objecting to the 92 *bis* Motion.²
2. On 22 September 2009, the Čermak Defence also requested the protective measures of pseudonym and under seal treatment for Witnesses IC-12 and IC-16 and their statements.³ On 6 October 2009, the Prosecution responded, not objecting to the Protective Measures Motion.⁴
3. The Gotovina Defence and the Markač Defence did not respond to either the 92 *bis* Motion or the Protective Measures Motion.

II. SUBMISSIONS OF THE PARTIES

(a) 92 *bis* Motion and 92 *bis* Response

4. The Čermak Defence submits that the witness statements should be admitted into evidence pursuant to Rule 92 *bis* of the Rules as they are cumulative to the evidence already adduced in the case generally. Even if the statements in part refer to the acts and conduct of Mr Čermak, these references are not matters of dispute and the Prosecution will not rely on these statements to establish the criminal liability of Mr Čermak.⁵ It further submits that the statements have been properly attested to and been verified under Rule 92 *bis* of the Rules.⁶
5. The Prosecution only objects to the first two sentences of paragraph 12 of Witness IC-16's statement and does not oppose the remainder of the 92 *bis* Motion.⁷ It submits that both statements contain references to the acts and conduct of Mr Čermak, however, aside from the first two sentences in paragraph 12 of Witness IC-16's statement, these references are not

¹ Defendant Ivan Čermak's Motion for Admission of Evidence of Witness IC-12 and Witness IC-16 Pursuant to Rule 92 *bis*, 22 September 2009 ("92 *bis* Motion"), paras 1, 15.

² Prosecution's Response to Ivan Čermak's Motion for Admission of Evidence of two Witnesses Pursuant to Rule 92 *bis*, 6 October 2009 ("92 *bis* Response"), paras 3, 6.

³ Defendant Ivan Čermak's Third Motion for Protective Measures for Witness IC-12 and Witness IC-16, 22 September 2009 ("Protective Measures Motion"), paras 2, 12.

⁴ Prosecution's Response to Ivan Čermak's Third Motion for Protective Measures for Witness IC-12 and Witness IC-16, 6 October 2009 ("Protective Measures Response"), para. 2.

⁵ Motion, paras 12-13.

⁶ Motion, paras 2, 4-6, Appendices A, B.

⁷ Response, paras 3, 6.

relevant to, or probative of, any contentious issues in this case.⁸ The first two sentences of paragraph 12 of Witness IC-16's statement on the other hand, refer, according to the Prosecution, to a live and important issue between the parties, namely Mr Čermak's role in Knin, which relates to his position as a superior and his alleged failure to take necessary and reasonable measures.⁹ The Prosecution argues that even if the two sentences are cumulative to evidence already adduced in this case and the Prosecution would not rely on that evidence to establish the criminal liability of Mr Čermak, this is not a permitted exception to Rule 92 *bis* of the Rules.¹⁰

(b) Protective Measures Motion and Protective Measures Response

6. The Čermak Defence submits that both Witness IC-12 and Witness IC-16 should be granted protective measures as they have objectively grounded fears for their safety and that of their families if their identities were to be made public in this case.¹¹ It argues that both witnesses, Croatian Serbs currently residing in Croatia, may suffer considerably, in light of their age and health, from reactions to their testimony, which may antagonize people in the witnesses' or their families' surroundings.¹²

7. The Prosecution did not object to the Protective Measures Motion.¹³

III. APPLICABLE LAW

8. 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. Rule 92 *bis* (A) of the Rules thus also excludes from admission into evidence the acts and conduct of the accused as charged in the indictment which would establish his responsibility for the acts and conduct of others.¹⁴ Acts and conduct should be given the meaning of deeds and behaviour of the accused.¹⁵ Factors in favour of admitting evidence in the form of a written statement include that it is of a cumulative nature and that it relates to

⁸ Response, paras 2-3.

⁹ Response, para. 3.

¹⁰ Response, paras 4-5.

¹¹ Protective Measures Motion, paras 2-3, 7, 9-12, Appendices A, B.

¹² Protective Measures Motion, paras 9-10, Appendices A, B.

¹³ Protective Measures Response, para. 2.

¹⁴ See *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 9.

relevant historical, political, or military background.¹⁶ One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.¹⁷ For all documents to be admitted into evidence, the general requirements of Rules 89 (C) and (D) must be fulfilled.

9. Rule 75 (A) of the Rules permits a Trial Chamber to order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. Under Rule 75 (B) of the Rules, protective measures may include, *inter alia*, the assignment of a pseudonym.

10. As the Chamber has held in previous decisions, the party seeking protective measures must demonstrate an objectively grounded risk to the security or welfare of the witness or the witness's family, should it become known that the witness has given evidence before the Tribunal.¹⁸ Even though the granting of protective measures is, and should be, the exception to the rule of a public trial, the threshold for granting such measures cannot be set too high. For example, to exclude persons who have not experienced threats and harassment would defy the purpose of the measures; namely, protection for risks that might occur as a result of the testimony. As reiterated on previous occasions, the Chamber must therefore make a risk assessment, and inherent in such an assessment is applying a certain level of caution.¹⁹

IV. DISCUSSION

(a) 92 bis Motion

11. Both Witness IC-12 and Witness IC-16 in their statements refer in part to acts and conduct of Mr Čermak. Witness IC-12, in his statement, gives information about the presence of Mr Čermak in the UN compound on 7 August 1995. The statement of Witness IC-16, in the first two sentences of paragraph 12, contains information about the presence of Mr Čermak on 7 August 1995 in Knin and some of his actions, for example, the clean-up of the town and the hospital compound. Mr Čermak's alleged actions in Knin during and in the aftermath of Operation Storm are relevant for establishing what kind of authority, if any, Mr Čermak had at the time. As Rule 92 bis of the Rules excludes a statement going to the acts and conduct of

¹⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 bis, 21 March 2002, para. 22.

¹⁶ Rule 92 bis (A) (i) (a) and (b) of the Rules.

¹⁷ Rule 92 bis (A) (ii) (b) of the Rules.

¹⁸ See e.g. T. 21787-21789.

¹⁹ See e.g. T. 18343-18346.

the accused as charged in the indictment, the statements of Witness IC-12 and Witness IC-16 cannot be admitted into evidence under that rule.

12. Statements going to the acts and conduct of the accused can, however, be admitted under Rule 92 *ter* of the Rules. 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 other party has an opportunity to challenge this evidence through cross-examination. The Prosecution has not objected to the admission into evidence of the statement of Witness IC-12 as a whole and the statement of Witness IC-16 with the exception of the first two sentences of paragraph 12. In light of this situation, the Chamber holds that, were the witnesses to appear before this Tribunal, the parties would feel no need to examine them beyond what is said in their statements except for the first two sentences in paragraph 12 of Witness IC-16's statement.²⁰ For that reason, and considering that the two witnesses have attested to their statements following the procedure of Rule 92 *bis* of the Rules, the Chamber decides 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. Considering that the statements are also relevant and of probative value, the Chamber therefore admits the statements of Witness IC-12 and the statement of Witness IC-16, except for the first two sentences in paragraph 12, into evidence pursuant to Rule 92 *ter* of the Rules.

(b) Protective Measures Motion

13. Although the witnesses have not suffered from any threats directed against them, the Chamber considers that there is a risk that their statements may antagonise persons in their or their family's immediate surroundings. The statements of Witnesses IC-12 and IC-16 describe the way they were treated by the Croatian authorities after Operation Storm. Witness IC-2, who has given a statement concerning the same issue and who is also a Croatian Serb residing in Croatia, has experienced threats.²¹ Furthermore, Witnesses IC-12 and IC-16 both have health problems, thereby increasing the risk that hostile reactions to their testimony may be detrimental to their well-being. On the basis of the foregoing, and considering that there was

²⁰ See Reasons for the Addition of a Witness to the Prosecution's Witness List and Admission into Evidence of Two Documents, 27 February 2009, for a similar situation.

²¹ T. 21787-21789. That Witness IC-2 eventually has not been called by the Čermak Defence to appear in Court does not affect the validity of the reasoning.

no objection to the Protective Measures Motion, the Chamber finds that the Čermak Defence has demonstrated an objectively grounded risk to the security and welfare of Witnesses IC-12 and IC-16, should it become known that they have given evidence before this Tribunal. Both witnesses will therefore be granted the protective measures of a pseudonym and under seal treatment for their statements.

V. DISPOSITION

14. For the foregoing reasons, pursuant to Rules 75, 92 *bis*, and 92 *ter* of the Rules, the Chamber

GRANTS the 92 *bis* Motion in part;

ADMITS into evidence, **under seal**, the witness statement of Witness IC-12, dated 16 May 2009;

ADMITS into evidence, **under seal**, the witness statement of Witness IC-16, dated 16 May 2009, with the exception of the first two sentences of paragraph 12;

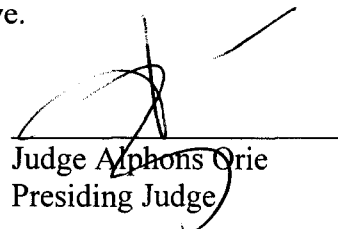
DENIES the admission into evidence of the first two sentences of paragraph 12 of the witness statement of Witness IC-16, dated 16 May 2009;

GRANTS the Protective Measures Motion;

REQUESTS the Čermak Defence to upload the admitted documents into eCourt after having made the necessary redactions, within seven days of the filing of this decision; and

REQUESTS the Registrar to assign exhibit numbers to the admitted documents and inform the Chamber and the parties of the exhibit numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this 11th day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]