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03 November 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: 3 November 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 3 November 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

THIRD DECISION ON RULE 92 BIS WITNESSES

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
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Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 25 October 2007, the Prosecution filed a motion requesting the admission of nine witness statements pursuant to Rule 92 *bis* and nine witness statements pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ On 26 October 2007, the Prosecution filed a notice withdrawing the Rule 92 *bis* application with regard to one of the witnesses.² The Defence responded on 6, 7, and 8 November 2007.³ On 3 June 2008, the Chamber issued its Decision on the first batch of statements tendered pursuant to Rule 92 *bis* and admitted into evidence the statements of Jovan Mirković, Smiljana Mirković, and Dušan Torbica.⁴ The Chamber further requested that the Prosecution inform the Chamber of the security and safety status of these witnesses.⁵ The Chamber also decided that two witnesses, including Witness 66,⁶ should be called for cross-examination and that their statements should be dealt with pursuant to Rule 92 *ter*.⁷

2. The Chamber deferred its decision with regard to the statements of Witness 43, Witness 58, and Witness 65.⁸ The relevant part of the Decision of 3 June 2008 reads:

As for [Witness 43 and Witness 58], the Gotovina Defence has made reference to documents which allegedly contradict information given by the witnesses in their statements. The Chamber will not decide on whether cross-examination is required for these witnesses until it has reviewed these documents and the Prosecution has had an opportunity to comment on them. The Chamber therefore requests the Gotovina Defence to submit the documents within seven days of the filing of this Decision and the Prosecution to make their submissions, should they wish to do so, within 14 days after that.

Regarding [Witness 65], the Prosecution has not provided the Chamber with a translation of the statement dated 16 February 1996. Moreover, the Prosecution has not provided the Chamber with the three documents referred to in the statement dated 13 October 2003. The Chamber will

¹ Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 25 October 2007 (“Motion”), paras 1, 23.

² Prosecution Notification Withdrawing Rule 92 *bis* Application for Witness No. 70 (P-12), 26 October 2007.

³ Defendant Mladen Markač’s Response to Prosecution Motion for Admission of Written Statements Pursuant to Rules 92 *bis* and 92 *quater*, 6 November 2007 (“Markač Response”); Ivan Čermak’s Response to Prosecution’s Motion for Admission of Evidence Pursuant to Rules 92 *bis* and 92 *quater*, 7 November 2007 (“Čermak Response”); Defendant Ante Gotovina’s Response to Prosecution Motion for Admission of Written Statements Pursuant to Rule 92 *bis* and Rule 92 *quater*, 8 November 2007 (“Gotovina Response”).

⁴ Decision on the First Batch of Rule 92 *bis* Witnesses, 3 June 2008 (“Decision of 3 June 2008”).

⁵ Decision of 3 June 2008, para. 11.

⁶ The witness is referred to by this number in the Prosecution Motion to Amend Its Witness List, 4 February 2008, Confidential Appendix A (“Prosecution Witness List”), p. 1.

⁷ Decision of 3 June 2008, para. 8.

⁸ The witnesses are referred to by these numbers in the Prosecution Witness List, p. 1.

defer a decision on admission until the mentioned translation and documents have been provided to the Chamber.⁹

3. On 10 June 2008, the Prosecution submitted the requested statement and three documents related to Witness 65.¹⁰ The Prosecution also renewed its application to admit the statement of Witness 66 pursuant to Rule 92 *bis*, having redacted the portions of the statement which had been opposed by the Gotovina Defence.¹¹ Further, the Prosecution informed the Chamber that the three witnesses whose statements were admitted through the Chamber's Decision of 3 June 2008 would not require protective measures.¹² However, the Prosecution requested that the addresses of these witnesses, which appear on the Rule 92 *bis* attestation forms, remain confidential.¹³

4. On 10 June 2008, the Gotovina Defence submitted the documents referred to in its Response as requested by the Chamber in its Decision of 3 June 2008 (see para. 2, above).¹⁴

5. On 23 June 2008, the Gotovina Defence responded to the Prosecution's Submission that it accepted that the redacted statement of Witness 66 could be admitted pursuant to Rule 92 *bis*.¹⁵ The Gotovina Defence further submitted that it did not object to the admission of the three documents related to Witness 65.¹⁶ It did, however, object to the admission of the statement of Witness 65, dated 16 February 1996.¹⁷

6. On 24 June 2008, the Čermak Defence responded to the Prosecution's Submission that it did not object to the admission of the statement or three documents related to Witness 65 or to the admission of the redacted statement of Witness 66.¹⁸

⁹ Decision of 3 June 2008, paras 9-10 (footnotes omitted).

¹⁰ Prosecution's Submission Regarding Decision on the First Batch of Rule 92 *bis* Witnesses and Motion to Admit Redacted Written Statement of Witness 66 Pursuant to Rule 92 *bis*, 10 June 2008 ("Prosecution's Submission"), paras 1, 3, Confidential Appendix A.

¹¹ Prosecution's Submission, paras 5-9, Confidential Appendix B.

¹² *Ibid.*, para. 4.

¹³ *Ibid.*, para. 4.

¹⁴ Defendant Ante Gotovina's Submission in Relation to Trial Chamber's Decision on the First Batch of Rule 92 *bis* Witnesses, 10 June 2008 ("Gotovina's Submission").

¹⁵ Defendant Ante Gotovina's Response to Prosecution's Submission Regarding Decision on the First Batch of Rule 92 *bis* Witnesses and Motion to Admit Redacted Written Statement of Witness 66 Pursuant to Rule 92 *bis*, 23 June 2008 ("Gotovina Second Response"), para. 2.

¹⁶ *Ibid.*, para. 7.

¹⁷ *Ibid.*, paras 4-6.

¹⁸ Ivan Čermak's Response to Prosecution's Submission Regarding the Decision on the First Batch of 92 *bis* Witnesses and Motion to Admit Redacted Witness Statement of Witness 66 Pursuant to Rule 92 *bis*, 24 June 2008 ("Čermak Second Response"), para. 6.

7. On 24 June 2008, the Prosecution responded to the Gotovina Submission, reiterating that the statements of Witness 43 and Witness 58 should be admitted pursuant to Rule 92 *bis*.¹⁹

APPLICABLE LAW

8. 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.²⁰ One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.²¹ The Chamber has the discretion to require the witness to appear for cross-examination in which case Rule 92 *ter* shall apply.²²

SUBMISSIONS OF THE PARTIES AND DISCUSSION

Witness 43, Witness 58, and Witness 65

9. The Prosecution argued that the statements of Witness 43, Witness 58, and Witness 65 should be admitted pursuant to Rule 92 *bis* as they contain “crime-based” evidence which does not go to the acts and conduct of the Accused.²³ Although probative to counts in the indictment, the evidence is, in the Prosecution’s view, not so pivotal to the Prosecution’s case that it would be unfair to the accused to admit it in written form.²⁴ Moreover, the Prosecution argued that many of the statements concern evidence of a cumulative nature and relate to the “impact of crimes on the victims”.²⁵ The Prosecution further submitted that all the formal requirements set out by Rule 92 *bis* are met for the witness statements.²⁶

¹⁹ Prosecution’s Response to Defendant Ante Gotovina’s Submission Regarding Decision on the First Batch of Rule 92 *bis* Witnesses, 24 June 2008.

²⁰ Rule 92 *bis* (A)(i)(a) and (d) of the Rules.

²¹ Rule 92 *bis* (A)(ii)(b) of the Rules.

²² Rule 92 *bis* (C) of the Rules.

²³ Motion, paras 2, 4, 7.

²⁴ *Ibid.*, para. 9.

²⁵ *Ibid.*, para. 8.

²⁶ *Ibid.*, para. 6.

10. The Čermak Defence did not object to the admission of any of the witness statements pursuant to Rule 92 *bis* nor to the admission of the documents related to Witness 65.²⁷ The Markač Defence did not object to the admission of the statement of Witness 43. With regard to Witness 58 and Witness 65, the Markač Defence argued that their statements relate to “a live and important issue between the parties”, namely the alleged deportation and forcible transfer of the Serb population from the Krajina region.²⁸ The Markač Defence therefore requested the opportunity to cross-examine these witnesses.²⁹

11. The Gotovina Defence indicated one inconsistency between the statement of Witness 43 and a statement the witness made to the Croatian police concerning the status of the witness’s son as a civilian or a member of the RSK army.³⁰ In its Submission the Gotovina Defence presented documentation suggesting that Witness 43’s son was dressed in an RSK uniform at the time he was killed.³¹ In his statement, Witness 43 claimed that his son had been dressed in civilian clothes.³² It argued that Witness 43 therefore should be called for cross-examination.³³

12. With regard to Witness 58, the Gotovina Defence argued that a certain portion of this witness’s statement is inconsistent with other documentation in their possession.³⁴ In particular, it submitted that Witness 58 characterized Pedrag Simić, whose death he provides evidence about, as a civilian where the Defence has information that he was a member of the RSK army.³⁵ It therefore requested that the witness should be called for cross-examination.³⁶

13. The Gotovina Defence, while not objecting to the admission of the three documents related to Witness 65, requested that Witness 65’s statement taken by the organization Veritas on 16 February 1996 should not be admitted.³⁷ It argued that this statement was not taken for the purpose of the proceedings before this Tribunal and that its summary format and the lack of record of how it was taken makes it difficult to determine its reliability.³⁸ Furthermore, the Gotovina Defence stated that it had “already raised serious concerns regarding the reliability

²⁷ Čermak Response, para. 3; Čermak Second Response, para. 6.

²⁸ Markač Response, paras 20, 28.

²⁹ *Ibid.*, para. 28.

³⁰ Gotovina Response, para. 10; Gotovina’s Submission, para. 2.

³¹ Gotovina’s Submission, paras 3-4, Confidential Annex B.

³² Motion, Confidential Annex B.

³³ Gotovina Response, para. 10.

³⁴ Gotovina Response, para. 11; Gotovina’s Submission, para. 5.

³⁵ Gotovina Response, para. 11; Gotovina’s Submission, para. 5.

³⁶ Gotovina Response, para. 11.

³⁷ Gotovina Second Response, paras 4, 7.

³⁸ *Ibid.*, para. 5.

of evidence that has been collected by the Veritas organization, and in particular, by [the person who took the statement of Witness 65]”.³⁹

14. With regard to Witness 43, the Chamber considers that the inconsistency raised by the Defence, namely whether the victim of a murder was a civilian or an active combatant at the time of his death, concerns a central aspect of the testimony. The Chamber therefore finds that Witness 43 should be called for cross-examination and that the witness’s statement should be dealt with pursuant to Rule 92 *ter*.

15. The Chamber considers that, as far as the alleged deportation and forcible transfer of the Serb population from the Krajina region is concerned, the evidence provided in the statements of Witness 58 and Witness 65 is cumulative to evidence given by numerous other witnesses that have testified orally in this case (see para. 10, above).⁴⁰ With regard to Witness 58, assuming that the documentation provided by the Gotovina Defence indeed demonstrates that Pedrag Simić was a member of the RSK army, the submissions of the Gotovina Defence do not indicate that the inconsistency between this documentation and Witness 58’s statement are of such a nature to render the latter unreliable. Moreover, this inconsistency does not concern a central aspect of the testimony. With regard to the two statements provided by Witness 65 to the Prosecution of the Tribunal, the Defence has not argued and the Chamber does not find that the nature and source of the evidence provided by Witness 65 renders it unreliable.

16. With regard to the 16 February 1996 statement of Witness 65 taken by Veritas, the Gotovina Defence has not indicated, and the Chamber does not find that the statement is inconsistent with the statements this witness made to the Prosecution of the Tribunal in 2003 and 2007. The 16 February 1996 statement clearly specifies when, where, and by whom the statement was taken and the person who took the statement is on the Prosecution’s witness list. The Gotovina Defence has not specified how the nature and source of the statement renders it unreliable and, under these circumstances, the Chamber does not consider that this statement should be assessed differently than the other statements of Witness 65.

17. With regard to the three documents related to Witness 65, the witness explains in his statement what these documents are and when he received them. As mentioned, the Defence has not opposed the admission of these three documents. The Chamber considers that these

³⁹ Ibid., para. 5.

⁴⁰ See Decision of 3 June 2008, para. 7.

documents constitute an integral part of the witness statement and that they will assist the Chamber in understanding Witness 65's evidence.

18. In conclusion, the Chamber considers that the statements of Witness 58 and Witness 65 can be admitted into evidence and that the appearance of these witnesses for cross-examination is not required. The Chamber further finds that Witness 43 should be called for cross-examination.

Witness 66

19. In its Decision of 3 June 2008, the Chamber noted that the Gotovina Defence had raised issues relating to the reliability and credibility of the evidence contained in Witness 66's statement and found that the specific portion of the statement referred to by the Gotovina Defence was not cumulative to any other evidence.⁴¹ The Prosecution has now redacted this portion. As stated above, the Gotovina Defence does not object to the admission of the redacted statement pursuant to Rule 92 *bis*. In light of this, the Chamber finds that the redacted statement can be admitted into evidence.

Redaction of addresses on the Rule 92 bis attestations of Jovan Mirković, Smiljana Mirković, and Dušan Torbica

20. The Defence has not objected to the Prosecution's request that the addresses of Jovan Mirković, Smiljana Mirković, and Dušan Torbica remain under seal. The Chamber considers that in the interests of the privacy of these witnesses, the Rule 92 *bis* attestations should remain under seal, as requested by the Prosecution.

DISPOSITION

21. For the foregoing reasons, and pursuant to Rules 75 and 92 *bis* of the Rules, the Trial Chamber:

ORDERS that the Rule 92 *bis* attestation of Witness 58 (ERN 0279-1229-0279-1231), the witness statement dated 10 September 2003 (ERN 0279-1232-0279-1235 and 0279-1237-0279-1240), and the Rule 92 *bis* Declaration of Witness 58 (ERN 0279-1236) be admitted into evidence;

ORDERS that the Rule 92 *bis* attestation of Witness 65 (ERN 0613-7375-0613-7376), the witness statements dated 16 February 1996 (ERN 0613-7378-0613-7379 and 0044-2381), 13

October 2003 (ERN 0613-7380-0613-7384 and 0359-4871-0359-4877), and 9 July 2007 (ERN 0613-7385-0613-7388 and 0610-8388-0610-8391), as well as the Rule 92 *bis* Declaration of Witness 65 (ERN 0613-7377) be admitted into evidence;

ORDERS that the three documents related to Witness 65 and attached to the Prosecution's Submission (ERN 0359-4880-0359-4883, ET0359-4880-0359-4883, 0359-4878, ET0359-4878, 0359-4879, and ET0359-4879) be admitted into evidence;

ORDERS that the Rule 92 *bis* attestation of Witness 66 (ERN 0279-1717-0279-1719), the redacted witness statement dated 22 April 1998 (ERN 0279-1720-0279-1723 and 0060-5001-0060-5005), and the Rule 92 *bis* Declaration of Witness 66 (ERN 0279-1724) be admitted into evidence;

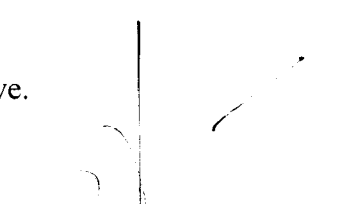
DECIDES that Witness 43 should be called for cross-examination and that, upon his appearance, the admission of his witness statement should be governed by Rule 92 *ter*;

ORDERS that the Rule 92 *bis* attestations of witnesses Jovan Mirković, Smiljana Mirković, and Dušan Torbica, which were admitted through the Chamber's Decision of 3 June 2008, remain under seal;

INSTRUCTS the Prosecution to inform the Chamber whether they will seek protective measures for Witness 58, Witness 65, and Witness 66 within seven days of the filing of this Decision;

INSTRUCTS the Prosecution to upload the admitted documents 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 Orie
Presiding Judge

Dated this 3rd day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴¹ Decision of 3 June 2008, para. 8.