

Y-06-90-T
D 21117 - D 21113
05 March 2009

21117 HB



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: 5 March 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: 5 March 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON PROSECUTION'S THIRD MOTION FOR
ADMISSION OF EVIDENCE PURSUANT TO RULE 92 *BIS*

Office of the Prosecutor

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Mr Tomislav Kuzmanović

Procedural history

1. On 23 January 2009, the Prosecution filed its third motion requesting the admission of written testimony of Witnesses 46 and 67 pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 4 and 6 February 2009, the Čermak and Markač Defence responded respectively, not objecting to the Motion.² On 6 February 2009, the Gotovina Defence filed a response, not objecting to the admission of Witness 67's statements, but objecting in part to those of Witness 46.³

Applicable law

2. 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. 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.⁴ One important factor against such admission is that a party can demonstrate that the nature and source of the written statement renders it unreliable.⁵ The Chamber has the discretion to require the witness to appear for cross-examination in which case Rule 92 *ter* of the Rules shall apply.⁶

Discussion

3. The Prosecution submits that there is no disagreement among the parties with regard to the admission into evidence under Rule 92 *bis* of the Rules of Witness 67's statements.⁷ It submits that Witness 67's statements provide evidence relevant for Counts 1, 4, 5, 6, 7, and specifically information on Scheduled Killing incident no. 7.⁸ The Prosecution argues that

¹ Prosecution's Third Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 23 January 2009 ("Motion"), paras 1, 11.

² Defendant Ivan Čermak's Response to Prosecution's Third Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 4 February 2009 ("Čermak Response"), para. 2; Defendant Mladen Markač's Response to Prosecution's Third Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 6 February 2009 ("Markač Response"), para. 2.

³ Defendant Ante Gotovina's Response to Prosecution's Third Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 6 February 2009 ("Gotovina Response"), paras 2-3.

⁴ Rule 92 *bis* (A) (i) (a) and (d) of the Rules.

⁵ Rule 92 *bis* (A) (ii) (b) of the Rules.

⁶ Rule 92 *bis* (C) of the Rules.

⁷ Motion, paras 2, 10.

⁸ Motion, Appendix C, para. 1.

Witness 67's testimony is corroborated by *viva voce* and documentary evidence.⁹ The Defence confirms that it does not object to admission of Witness 67's statements.¹⁰

4. The Chamber considers that the evidence provided in the statements of Witness 67 is cumulative to other evidence before the Chamber. The Defence has not argued and the Chamber does not find that the nature and source of the evidence provided by Witness 67 renders it unreliable. The evidence of Witness 67 does not go to the acts and conduct of the accused. Therefore, the Chamber is satisfied that all requirements of Rule 92 *bis* of the Rules are met and finds that Witness 67's statements can be admitted into evidence.

5. In relation to Witness 46, the Prosecution submits that the witness's statements provide evidence relevant for Counts 1, 2, 3, 6, 7, 8, and 9.¹¹ More specifically, the statements provide details on clarification killing no. 159.¹² The Prosecution argues that the killing incident is corroborated by forensic documentation already in evidence.¹³

6. The Gotovina Defence only objects to the part of Witness 46's statements that relate to killing incident no. 159.¹⁴ It challenges the reliability of the statements, notes that the corroborative evidence cited by the Prosecution is all part of a decision that the Defence has requested the Chamber to reconsider¹⁵, and also asserts that the failure to add this incident to the Prosecution's original clarification of identity of victims prejudices the Defence.¹⁶

7. The two latter arguments of the Gotovina Defence have been addressed in the Chamber's Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims filed 2 March 2009 and the Chamber's Decision on Gotovina's Motion to Reconsider the Trial Chamber's Decision of 25 November 2008 read out on 5 March 2009.

8. The Chamber will therefore proceed to consider the arguments of the Gotovina Defence in relation to the substance of the statements, challenging the reliability of Witness 46's statements. The Gotovina Defence puts forth three main arguments in order to undermine the reliability of Witness 46's statements: (i) The witness's description of her husband's

⁹ *Ibid.*, para. 3, making reference to the testimony of Witness 3 and Junjga Dragutin, as well as to P2000, D352, P2024, P1534, P1316, P2018, P1528, P1310, P2022, P1532, P1314, P2019, P1529, P1311, P2020, P1530, P1312, P2023, P1533, P1315, P2021, P1531, and P1313.

¹⁰ Gotovina Response, para. 2; Čermak Response, para. 2; Markač Response, para. 2.

¹¹ Motion, para. 6.

¹² *Ibid.*, paras 6-7.

¹³ *Ibid.*, para. 8, making reference to P1999, P2088, P1614, P1416, and D367.

¹⁴ Gotovina Response, para. 3.

¹⁵ Gotovina's Motion to Reconsider the Trial Chamber's Decision of 25 November 2008, 3 February 2009.

¹⁶ Gotovina Response, paras 8-13.

clothes is inconsistent with the clothes found on the body of her husband, according to the autopsy report (P1614); (ii) The witness's acknowledgment that her husband was a soldier in the military undermines the unlawfulness of the killing incident; and (iii) The forensic examination of the victim's body suggests that Witness 46's husband may have been killed in combat,¹⁷ while Witness 46 states that the last time she saw him was when he was taken behind a building by soldiers.

9. The Chamber considers that the evidence provided in the statements of Witness 46 is corroborated by other evidence before this Chamber, e.g. P1999, P2088, P1614, P1416, and D367. The inconsistency asserted by the Gotovina Defence between the autopsy report and the witness statements merely concerns the colour of the pants the victim was wearing: the witness speaks of brown trousers, the autopsy report of grey ones. The Chamber finds that the failure to remember the exact colour of pieces of clothing of other persons represents an acceptable lack of circumstantial awareness, and finds that this aspect does not render the statements unreliable.

10. As to the second ground of alleged unreliability, the Gotovina Defence has not pointed to any inconsistencies between Witness 46's statements and other documentation with regard to the death of her husband. The Gotovina Defence merely seems to suggest that simply because the victim may have been a soldier, he could not have been killed unlawfully. The issue of the statements' reliability does therefore not arise.

11. With regard to the third ground of alleged unreliability, the Gotovina Defence infers that the findings of the autopsy report, stating that "the deceased sustained multiple projectile injuries to his head and body, at least three of which were high-velocity gunshots, whilst there were approximately seven additional extensive bodily injuries that could have been due to either direct bullet injuries or extensive bullet shrapnel damage",¹⁸ may suggest that he was killed in combat. The Chamber finds that this argument goes to weight of this evidence and will be considered in the totality of all the evidence before it.

12. Therefore, the Chamber finds that the Gotovina Defence has not demonstrated that the evidence provided by Witness 46 is unreliable. The evidence of Witness 46 further does not go to the acts and conduct of the accused. The Chamber is satisfied that all requirements of Rule 92 *bis* of the Rules are met and thus finds that Witness 46's statements can be admitted into evidence.

¹⁷ *Ibid.*, paras 11-13.

Disposition

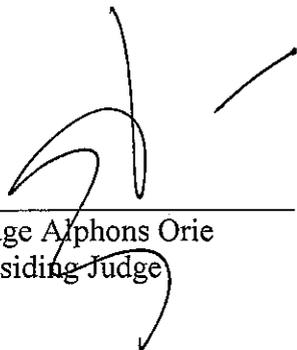
13. For the foregoing reasons, pursuant to Rule 92 *bis* of the Rules, the Chamber **GRANTS** the Motion and **ADMITS** into evidence, *under seal*:

- A. The affidavit of Witness 46 [06457757-06457759];
- B. The statement of Witness 46 of 1 April 1998 [06457761-06457772];
- C. The statement of Witness 46 of 22 February 2008 [06457774-06457781];
- D. The Rule 92 *bis* attestation of Witness 67 [06457287-06457289];
- E. The statement of Witness 67 of 31 March 1998 [06457290-06457298];
- F. The supplemental statement of Witness 67 of 3 April 2007 [06457299-06457302].

14. The Prosecution indicated that it will file a motion for protective measures for Witness 67.¹⁹ The Chamber **INSTRUCTS** the Prosecution to do so within seven days of the filing of this decision and to inform the Chamber whether protective measures will also be sought for Witness 46.

15. The Chamber **REQUESTS** the Prosecution to upload the admitted documents into eCourt 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 fifth day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ P1614 (Autopsy report for KN01/397B, 24 July 2001), p. 1.

¹⁹ Motion, para. 9.