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30 March 2010

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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:

30 March 2010

Original:

English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 30 March 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

GUIDANCE ON THE ADMISSIBILITY INTO EVIDENCE OF UNATTESTED
PARTS OF RULE 92 *TER* STATEMENTS AS PREVIOUS INCONSISTENT
STATEMENTS

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I. PROCEDURAL HISTORY

1. On 9 October 2009, the Prosecution and the Gotovina Defence made initial oral submissions in court on the admissibility into evidence of unattested parts of a Rule 92 *ter* statement.¹ On 14 October 2009, the Chamber invited the Parties to file written submissions on the practical implications of the Tribunal's case law regarding previous inconsistent statements for the admission of parts of Rule 92 *ter* statements that had not been attested to in court.² On 28 October 2009, the Prosecution filed its submissions on the admission of prior inconsistent statements in the context of Rule 92 *ter*.³ On the same day, the Čermak Defence filed its submissions, focussing on the admission into evidence of parts of Witness Pašić's written statement.⁴ Also on the same day, the Gotovina Defence joined the Čermak Defence Submissions.⁵

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that the Chamber has the discretion to admit into evidence unattested parts of Rule 92 *ter* statements for the truth of their contents, where (i) a party contests a witness's subsequent modifications to his statement by, for example, confronting the witness with inconsistencies between the unattested parts and the witness's subsequent oral and written evidence, and (ii) the Chamber is satisfied that the unattested parts are relevant and sufficiently reliable to be accepted as probative.⁶ The Prosecution further submits that where a party or the Chamber challenges the witness's modifications by confronting him with inconsistencies, challenging his explanations, or otherwise signalling that the modifications are contested, the opposing parties are notified that the confronting party contests the modifications, and the Chamber is in a favourable position to determine the truthfulness of the previous statement.⁷ The Prosecution additionally submits that when a witness is challenged on modifications to a previous statement, there should be no further procedural requirement for a Chamber to admit into evidence an unattested part of a Rule 92 *ter* statement for the truth of its contents, because the previous inconsistent statement will be built into the witness's evidence already and forms part of the trial record.⁸ The Prosecution submits that it would be superfluous to require the party seeking to rely on the previous

¹ T. 22872-22881.

² T. 23069-23070.

³ Prosecution's Submission on the Admission of Prior Inconsistent Statements in the Context of Rule 92 *ter*, 28 October 2009 ("Prosecution's Submissions").

⁴ Submissions in Relation to Petar Pašić's OTP Statement following the Trial Chamber's Invitation of 9 October 2009, 28 October 2009 ("Čermak Defence Submissions").

⁵ T. 23384-23385.

⁶ Prosecution's Submissions, paras 2, 6.

⁷ Prosecution's Submissions, paras 13-14.

inconsistent statement to re-tender, or require the Chamber to re-admit, an inconsistent part of a Rule 92 *ter* statement.⁹

3. The Čermak Defence submits that unattested parts of a Rule 92 *ter* statement are inadmissible and must remain excluded from evidentiary consideration, because they do not meet the attestation requirement of Rule 92 *ter* (A) (iii).¹⁰ The Čermak Defence further submits that if the Chamber were to admit into evidence an unattested part of a Rule 92 *ter* statement, it would effectively be circumventing the requirements of the Rule.¹¹ The Čermak Defence also submits that there are no video or audio recordings of Pašić's statements, which would allow the Chamber to assess the possible influence of the questioning on the witness's answers, and evaluate the reliability of the witness's previous inconsistent statement against his oral evidence.¹² The Čermak Defence additionally submits that several of Pašić's disavowed assertions lacked factual support or explanation.¹³ The Čermak Defence finally submits that earlier decisions on previous inconsistent statements, which were decided prior to the adoption of Rule 92 *ter*, were of limited applicability to the admission into evidence of unattested parts of Rule 92 *ter* statements.¹⁴

4. The Gotovina Defence submits that it would not normally cross-examine a witness regarding statements that the witness on direct examination says he had not made or no longer stands by.¹⁵ The Gotovina Defence adds that it may have information which would further discredit Pašić's written statement.¹⁶ The Gotovina Defence further submits that a number of the conclusions lacking foundation in Pašić's written statement may have been the result of the Prosecution investigator posing leading questions during the interview.¹⁷

III. APPLICABLE LAW

5. Rule 89 (C) provides that a Chamber may admit any relevant evidence which it deems to have probative value. Rule 92 *ter* sets out, in relevant parts, that a Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any

⁸ Prosecution's Submissions, paras 14-15.

⁹ Ibid.

¹⁰ Čermak Defence Submissions, paras 6, 13, 16.

¹¹ Čermak Defence Submissions, para. 13.

¹² Čermak Defence Submissions, paras 14-15.

¹³ Čermak Defence Submissions, para. 15.

¹⁴ Čermak Defence Submissions, paras 8, 12-13.

¹⁵ T. 22718.

¹⁶ T. 22878.

¹⁷ T. 22879.

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.

6. The Appeals Chamber has set out that a Trial Chamber may admit a witness's previous inconsistent statement into evidence for the purposes of assessing a witness's credibility.¹⁸ A Chamber may also admit a witness's previous inconsistent statement for the truth of its contents when it fulfils the criteria under the Rules of being relevant and sufficiently reliable to be accepted as probative.¹⁹ In determining whether a statement is reliable for the purpose of proving the truth of its contents, a Chamber may consider the content of the statement, the circumstances under which it arose, and the opportunity to cross-examine the person who made the statement.²⁰ Further, when admitting into evidence a witness's previous inconsistent statement, a Chamber must specify whether it is admitting the statement to impeach the witness's credibility, or for the truth of its contents.²¹

IV. DISCUSSION

7. The Chamber notes that where a witness does not attest to parts of a written statement in court, these parts do not meet the requirements for admission under Rule 92 *ter*. Over the course of the proceedings in this case, witnesses have on occasion altered or declined to attest to a part of their written statement prior to its admission under Rule 92 *ter*. Out of practical considerations, the Chamber has not always requested the tendering party to provide a redacted or corrected version of the statement. As a result of the Chamber's practical approach, certain Rule 92 *ter* statements admitted as exhibits may contain unattested parts. However, such unattested parts can be easily identified by reviewing the admitted Rule 92 *ter* statement in light of a witness's in-court attestation and corrections. The Chamber will not consider unattested parts as evidence for the truth of their contents, unless the Chamber has admitted such parts as previous inconsistent statements, as clarified below.

8. Where a witness does not attest to part of a written statement in court and distances himself from the content of that part, that part becomes a previous inconsistent statement. The

¹⁸ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, 1 February 2008 ("*Popović* Appeal Decision"), para. 32.

¹⁹ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 18-21, 25, 34; *Popović* Appeal Decision, para. 31.

²⁰ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

²¹ *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, paras 22-23; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on the Prosecution's Oral Motion Seeking the Admission into Evidence of Witness Nebojša Stojanović's Three Written Statements, 11 September 2008, para. 11; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Admission of Evidence Presented During Testimony of Aleksandar Stefanović, 23 March 2009, para. 5.

Chamber has previously held that Rules 92 *bis*, 92 *ter*, and 92 *quater* are *leges specialis* for the admission into evidence of witness statements taken for the purposes of Tribunal proceedings.²² As a consequence, such statements can generally not be admitted pursuant to the *lex generalis* Rule 89 (C). This previous holding does not apply to previous inconsistent statements. The Tribunal's case law cited above establishes that previous inconsistent statements are admissible under certain conditions. Given the nature of previous inconsistent statements, their admission into evidence cannot be governed by Rule 92 *ter*, which requires a clear in-court attestation. Rather, their admission is governed by Rule 89 (C) and the further requirements identified by the Tribunal's case law. In this regard, the Chamber considers that where a witness does not attest to part of a written statement in court, this raises concerns regarding the reliability of that part of the written statement.

9. The Chamber notes generally that a witness can distance himself from a part of a written statement in several ways. For instance, the witness may claim that the written statement does not accurately reflect what he had said during the interview. Alternatively, the witness may acknowledge that the written statement accurately reflects the interview, but claim that he does not believe that what he said during the interview reflects the truth. In both cases, the circumstances under which the statement was taken, the content of the unattested part of the statement and the witness's in-court testimony regarding the inconsistency may assist in the assessment of the reliability of the recording and the content of the statement.

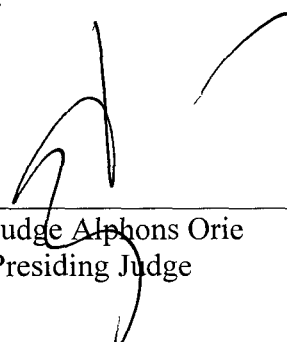
10. The Chamber further considers that, where a party seeks to have an unattested part of a Rule 92 *ter* statement admitted into evidence as a previous inconsistent statement, the witness must have been questioned regarding the inconsistency between his previous written statement and his oral testimony in court. If a calling party seeks to put a previous statement to and cross-examine its own witness, the Chamber must first determine whether to allow the calling party to cross-examine its witness, which may or may not be done by declaring the witness "hostile".²³ This requirement of seeking a prior determination of the Chamber, is not applicable where the Chamber or a party other than the calling party seeks to put a previous inconsistent statement to a witness. The witness's answers to questions regarding this inconsistency will assist the Chamber in assessing the relevance and probative value of the previous inconsistent statement. Further, as the witness is questioned on the inconsistencies in court, the other parties have an opportunity to cross-examine the witness and the Chamber may question him as well. Pursuant to the case law cited above, in the interests of procedural

²² See Reasons for the Addition of a Witness to the Prosecution's Witness List and Admission into Evidence of Two Documents, 27 February 2009, para. 7.

transparency and fairness, if the Chamber were to admit any unattested parts of a written statement, it would do so by a decision stating whether the unattested part is being admitted in order to assess the witness's credibility, or for the truth of its contents.

11. The Chamber finally notes that it is for the parties to tender the materials they seek to have admitted into evidence, and that none of the parties have explicitly tendered the unattested parts of the statement of Witness Pašić. The Chamber may consider admitting into evidence an unattested part of a written statement as a Chamber's exhibit. Having reviewed Witness Pašić's written statement and in-court testimony, the Chamber notes that some of the unattested parts contain opinions, unsubstantiated speculations, or factual assertions of a general nature for which the witness does not provide clear sources of knowledge. Witness Pašić explained that upon reviewing his written statement immediately prior to and during his trip to The Hague, he noticed that parts of the statement did not correspond to what he had told investigators during his interview, and testified that he had not properly reviewed the statement at the time of the interview.²⁴ The witness further stated that if he were to review the statements again, he might make further changes and that he was prone to forgetfulness because of his old age.²⁵ Consequently, considering both the substance and other indicia of reliability of the unattested parts of Witness Pašić's statement, the Chamber informs the parties that it is not inclined to admit into evidence any unattested parts of Witness Pašić's statement as a Chamber's exhibit.

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



Judge Alphons Orie
Presiding Judge

Dated this Thirtieth day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ *Popović* Appeal Decision, paras 26, 28, 30.

²⁴ See T. 22737, 22786, 22819, 22937; D1708 (Petar Pašić, supplemental information sheet, 6 October 2009), para. 5; D1709 (Petar Pašić, supplemental information sheet, 6 October 2009), p. 1.

²⁵ T. 22834, 22851, 22936.