

Y-06-90-T
D 12890 - O 12887
24 July 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: 24 July 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 24 July 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

**REASONS FOR THE DECISION ON THE ADMISSION OF TWO STATEMENTS
AND RELATED EXHIBITS OF WITNESS ZDRAVKO JANIĆ INTO EVIDENCE
PURSUANT TO RULE 92 TER**

Office of the Prosecutor

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Mr Stefan Waespi

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Counsel for Ivan Čermak

Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

1. On 8 July 2008, the Chamber decided that the video tapes and transcript of a 15 March 2005 suspect interview with Zdravko Janić (“Interview”) were not inadmissible under Rule 95 of the Rules of Procedure and Evidence.¹ In court, the witness gave the Rule 92 *ter* attestation for both the Interview and a statement given to the Prosecution on 13-14 January 2004 (“2004 Statement”).² The Chamber inquired if there were still objections to the admission of any of the statements.³ The Gotovina Defence answered in the affirmative, and the Chamber invited further submissions on the matter.⁴

2. On the same day, 8 July 2008, the Markač Defence submitted that the in-court testimony of Zdravko Janić showed that he had received unsound legal advice from his counsel at the time of the Interview in violation of his right to effective assistance of counsel, and that the Chamber should, in light of this material change in its understanding of the conditions under which the Interview was conducted, deem the Interview inadmissible under Rule 95.⁵ On 9 July 2008, the Gotovina Defence objected to the admission of the Interview on the grounds that the witness had not been given the opportunity to review the Interview, preferably with the assistance of counsel, in order to object to any potentially self-incriminating portions pursuant to Rule 90 (E).⁶

3. On 9 July 2008, the Prosecution responded to the Gotovina Submission, arguing that it would serve no purpose to retroactively warn the witness that he need not have answered questions, and that the witness had already testified to the truth of the Interview after being cautioned by the Chamber that he need not answer any question that might incriminate him.⁷ The Prosecution added that the witness has no right under Rule 90 (E) to be represented and no other justification to be represented by counsel, particularly when there was no risk of the witness being indicted by the Tribunal and no indication that he is a suspect in any other proceeding.⁸ On 9 July 2008, the Chamber admitted the Interview into evidence under Rule 92 *ter*, and stated that its reasons would be provided in writing.⁹

¹ Decision on Defence Objections to the Admissibility of Witness 81’s Suspect Interview under Rule 95, 8 July 2008 (“Rule 95 Decision”); T. 6079.

² T. 6076-6082.

³ T. 6083.

⁴ T. 6083-6084.

⁵ Defendant Mladen Markač’s Further Submissions in Response to Prosecution’s Submission of Rule 92 *ter* Statements of Witness 81, 8 July 2008 (“Markač Submission”), paras 3-5.

⁶ Defendant Ante Gotovina’s Further Submission Pursuant to the Trial Chamber’s Invitation of 8 July 2008 (“Gotovina Submission”), paras 4-8.

⁷ Prosecution’s Response to Gotovina’s Further Submissions Relating to the Admission of Rule 92 *ter* Statements of Witness 81, signed on 9 July 2008 and filed on 10 July 2008, para. 3.

⁸ *Ibid.*

⁹ T. 6088-6089; correction on 10 July 2008 at T. 6187.

4. On the stand, Zdravko Janić gave the necessary attestations required for the admission of the 2004 Statement under Rule 92 *ter*.¹⁰ When asked about the Interview, Zdravko Janić was cautioned by the Chamber as to his rights under Rule 90 (E).¹¹ The witness raised no objection based on a risk of self-incrimination. He attested to the truthfulness of the answers he gave in the Interview and stated that he would give the same answers if examined in court.¹² The fact that Zdravko Janić was not assisted by counsel at the time he attested to the truthfulness of the answers he had given during the Interview, pursuant to Rule 92 *ter*, is in itself no reason to deny its admission into evidence. To the extent that the Interview contained any statements incriminating Zdravko Janić, these were made at the time of the Interview, when the witness was represented by counsel and cautioned prior to questioning by the Prosecution that he had the right to remain silent and that any statement he made could be used in evidence, as required by Rule 42 (A).¹³ The main purpose of the right to assistance of counsel during suspect interviews is to ensure that the witness is aware of his or her rights and to protect him or her against improper questioning by the Prosecution. This right does not extend to persons, other than the suspect. However, ineffective assistance of counsel might compromise the quality of the interview as a source of reliable information. In carefully reviewing both the Interview and the transcript of the witness's appearance in court in the instant proceedings, the Chamber took into consideration that Zdravko Janić was assisted by Mr Anto Nobile, a counsel who had failed to file a power of attorney as required by Rule 44 (A), and had therefore not had his qualifications considered or approved by the Registrar.¹⁴ The Chamber also reviewed the way in which Mr Anto Nobile conducted himself during the interview. Having done so, the Chamber found that these factors did not have a negative effect on the probative value of the Interview. The Chamber therefore found that no problem arose under Rule 90 (E), and that all conditions for admission into evidence under Rule 92 *ter* had been met. The Chamber will cautiously bear in mind the nature of the Interview and the circumstances surrounding how it was given, when ultimately assessing its evidentiary weight in light of all the evidence adduced at trial.

5. The Chamber has the inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to

¹⁰ T. 6076-6078.

¹¹ T. 6080.

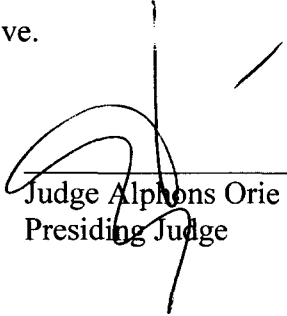
¹² T. 6079-6082.

¹³ Transcript of the Interview, pp. 1-2.

¹⁴ See Rule 95 Decision, para. 8.

prevent an injustice.¹⁵ The Markač Defence did not argue, and the Chamber did not find, that its decision of 8 July 2008 contained a clear error of reasoning. The unsound legal advice put forward by the Markač Defence as to whether the Interview could be used in the *Gotovina et al.* proceedings does not create any injustice in deeming the Interview admissible in these proceedings pursuant to Rule 95. The Chamber therefore rejected the invitation to reconsider its Rule 95 Decision.

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



Judge Alphons Orié
Presiding Judge

Dated this 24th day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ *Prosecutor v. Zdravko Tolimir*, Appeal Chamber, Decision on Zdravko Tolimir's Request for Reconsideration of Appeals Chamber's Decision of 28 March 2008, para. 8.