

IT-06-90-T
D 22064 - D 22058
17 April 2009

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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: 17 April 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Order of: 17 April 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**REASONS FOR THE ADMISSION INTO EVIDENCE OF THE INTERVIEWS OF
THE ACCUSED IVAN ČERMAK AND MLADEN MARKAČ AND ASSOCIATED
EXHIBITS**

Office of the Prosecutor

Mr Alan Tieger
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Counsel for Ante Gotovina

Mr Luka Mišetić
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Mr Steven Kay, QC
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Ms Gillian Higgins

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

Procedural history

1. On 11 February 2009, the Prosecution filed a motion requesting the admission into evidence of the audio/video recordings and transcripts of three interviews with Mr Čermak and three interviews with Mr Markač, as well as five documents associated with Mr Čermak's interviews and four documents associated with Mr Markač's interviews.¹ On 13 February 2009, the Chamber urged the Prosecution to review its submission and select those passages from the interviews that it considered to be of greatest assistance to the Chamber.² As a result, on 20 February 2009, the Prosecution filed a further submission, effectively withdrawing 429 pages from the tendered interviews and providing supplementary explanations as to the relevance and probative value of those portions that remained.³ In addition, the Prosecution stated that it would not object to any re-inclusion requests of the Čermak or Markač Defence on the basis that in their view some excluded portions contained exculpatory material.⁴

2. On 24 February 2009, after having considered the volume of the submissions, as well as the fact that the Further Submissions were filed nine days into the 14-day period within which a response is to be filed as provided for by Rule 126 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Chamber granted the Defence until 2 March 2009 to respond to the Motion and the Further Submissions.⁵

3. On 27 February 2009, the Čermak Defence responded to the Motion and the Further Submissions not objecting to the admission into evidence of the three Čermak interviews, but requesting the re-inclusion of certain pages that were withdrawn by the Further Submissions, as in the view of the Čermak Defence these contained exculpatory information.⁶

4. Also on 27 February 2009, the Gotovina Defence responded, objecting to the admission into evidence of the three Čermak interviews to the extent that they relate to Mr Gotovina, and drawing the attention of the Chamber to incidents of 'coaching' by Mr

¹ Prosecution Motion for Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač and Associated Exhibits, 11 February 2009 ("Motion"), paras 1, 13.

² T. 15988.

³ Prosecution's Further Submissions on the Prosecution's Motion for the Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač, 20 February 2009 ("Further Submissions"), paras 1, 16.

⁴ *Ibid.*, para. 4.

⁵ T. 16727-16729.

⁶ Ivan Čermak's Response to Prosecution's Motion for the Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač and Further Submissions by the Prosecutor thereon, 27 February 2009, paras 3-4.

Čermak's counsel during his 2004 interview.⁷ That same day, the Gotovina Defence filed a notice of resubmission,⁸ indicating that it had inadvertently attached an incorrect appendix to its response and filed a rectified version of the Gotovina Response.

5. On 2 March 2009, the Markač Defence responded to the Motion and the Further Submissions, requesting that they be denied.⁹

6. Also on 2 March 2009, the Prosecution requested leave to reply to the Gotovina Response in order to, *inter alia*, address the issue of verbal exchanges between Mr Čermak and his lawyers, and the Gotovina Defence's mischaracterization of those exchanges as 'coaching'.¹⁰ On the same day, the Gotovina Defence responded to the Prosecution Request and requested leave to surreply should the Prosecution Request be granted.¹¹ Finally on that day, the Chamber decided to grant the Prosecution Request and informed the parties accordingly through an informal communication. On 3 March 2009, the Prosecution's reply was heard orally in court, after which the Chamber granted the Gotovina Request and heard the Gotovina Defence's surreply.¹² That same day, after having requested leave to do so, the Čermak Defence made further oral submissions.¹³ The Markač Defence was granted additional time until 4 March 2009 to file a further written submission on the matter.¹⁴

7. On 4 March 2009, the Markač Defence filed a further written submission, further opposing the Motion and the Further Submissions and providing the Chamber with a "preliminary analysis" of the Markač interviews in terms of their relevance and translation defects.¹⁵

⁷ Defendant Ante Gotovina's Response to Prosecution's Further Submissions on the Prosecution Motion for the Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač, 27 February 2009 ("Gotovina Response"), paras 2-3, 26.

⁸ Notice of Resubmission of Defendant Ante Gotovina's Response to Prosecution's Further Submissions on the Prosecution Motion for the Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač, 27 February 2009.

⁹ Defendant Mladen Markač's Response to Prosecution's Further Submissions on the Prosecution Motion for Admission into Evidence of the Statements of the Accused Ivan Čermak and Mladen Markač, 2 March 2009, para. 3.

¹⁰ Prosecution's Request for Leave to Reply to Gotovina's Response to the Prosecution's Motion for the Admission into Evidence of the Statements of Čermak and Markač, 2 March 2009 ("Prosecution Request"), para. 1.

¹¹ Defendant Ante Gotovina's Response to Prosecution's Request to Reply to Defendant Ante Gotovina's Response to Prosecution's Motion for the Admission into Evidence of the Statements of the Accused Čermak and Markač, 2 March 2009 ("Gotovina Request"), para. 2.

¹² T. 17045-17066.

¹³ T. 17068.

¹⁴ T. 17066-17068.

¹⁵ Defendant Mladen Markač's Further Response to Prosecution's Further Submissions on the Prosecution Motion for Admission into Evidence of Statements of the Accused Ivan Čermak and Mladen Markač, 4 March 2009 ("Markač Further Response"), paras 4, 6-9, Annex A.

8. On 5 March 2009, the Chamber granted the Motion, as amended by the Further Submissions, in its entirety with reasons to follow and also admitted into evidence those portions that the Čermak and Markač Defence had identified in their submissions as containing exculpatory information or being necessary for purposes of completeness.¹⁶ Accordingly, the following Rule 65 *ter* numbers were admitted into evidence: 540, 933 (excluding pages 35-40), 934, 936 (excluding pages 1-40, 50-73, 78-80), 937 (excluding pages 1-36, 38-45), 1048 (excluding pages 1-8, 137, 139, 151-160, 162-164, 166-178, 181-182, 184-195), 1773, 1968, 2197, 2294, 2339 (excluding pages 1-12), 2645, 2781 (excluding pages 1-6), 2782 (excluding pages 20-24, 37-41, 50-59, 62-67), 2789 (excluding pages 20-34, 42-43), 2791 (excluding pages 1-12, 15-25), 2792 (excluding pages 1-10, 39-41, 45-48), 2855-2860, 2917, 3176, 4331, as well as exhibit P2355. The Chamber further instructed the Prosecution to upload revised versions of the interview transcripts.¹⁷

9. On 17 March 2009, after having reorganised and revised the interview transcripts, the Prosecution informally notified the Chamber and the Defence that corrected and consolidated versions of interview transcripts had been uploaded under the following Rule 65 *ter* numbers: 2855 (comprising Rule 65 *ter* numbers 2855-2860), 2914 (comprising Rule 65 *ter* number 2917), 7237 (comprising Rule 65 *ter* numbers 2339, 2789, 2791-2792), 7238 (comprising Rule 65 *ter* numbers 933-934, 936-937), 7239 (comprising Rule 65 *ter* numbers 2781-2782), and 7240 (comprising Rule 65 *ter* number 1048).

Discussion

10. Pursuant to Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Rule 89 (D) of the Rules states that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

11. The three interviews with Mr Čermak were conducted in 1998, 2001, and 2004. The interviews with Mr Markač were conducted in 2002, 2003, and 2004. The associated documents are referred to in the interviews and consist of orders, letters, and newspaper articles dealing with the Accused.

12. The relevance of the interviews and the associated documents was not disputed except on one point. The Markač Defence pointed to certain portions of the Markač

¹⁶ T. 17172-17173.

¹⁷ T. 17173.

interviews as being irrelevant and submitted that they therefore be excluded.¹⁸ Some of these portions had been withdrawn already by the Further Submissions. Accordingly, only 15 pages of, according to the Markač Defence, irrelevant material are contained in the interview transcripts. For practical reasons and in accordance with its practice in past decisions,¹⁹ the Chamber refrained from any further redacting of the interview transcripts. If no relevance can be established for certain portions of the interviews, the Chamber will simply disregard such portions. Accordingly and for the purpose of admission into evidence, the Chamber decided to deal with the interviews, as redacted by the Prosecution, as a whole, and not on a page-by-page basis. The Chamber found the interviews of the two Accused, as well as the associated documents, relevant under Rule 89 (C) of the Rules.

13. The probative value of the associated documents was not challenged and the Chamber found the associated documents to have probative value under Rule 89 (C) of the Rules. Regarding the probative value of the interviews, the Gotovina Defence argued that Mr Čermak was ‘coached’²⁰ during his 2004 interview.²¹ During the interview there were indeed numerous instances where Mr Čermak’s lawyers Mr Prodanović and Ms Sloković intervened before Mr Čermak had formulated his answers.²² The Chamber noted that counsel’s attempts to prompt in the 2004 interview, which it considers inappropriate, did not always have such an effect that Mr Čermak would simply repeat what was suggested to him. Mr Čermak, in his 2004 interview, in fact showed, on the whole, to be in control of his answers and at times even ignored or resisted the attempts at prompting.²³ The Chamber considered whether to redact the passages where Mr Čermak’s answers appeared to be the result of prompting, in order to demonstrate the inappropriateness of such prompting. It however found that it would be better assisted if the identified portions were included, transcribed, and not redacted, as it would then be in a position to carefully consider any effects the prompting may have had in other parts of the interview. The Chamber also found that the prompting or interventions by Mr Dondo in the 1998 Čermak interview, Mr Prodanović in the 2001 Čermak interview, and Mr Šeparović in the 2004 Markač interview, while not specifically highlighted by the parties, could also give rise to similar concerns, and decided to treat those portions similarly, with

¹⁸ Markač Further Response, para. 7, Annex A.

¹⁹ Cf. Chamber’s Decision on the Admission of the Videos P842, P846, P848, and P854 at T. 12139-12141; or Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008, para. 24.

²⁰ The Chamber prefers the term ‘prompting’ rather than ‘coaching’ and has used the former in the remainder of its reasons.

²¹ Gotovina Response, paras 2, 7-9, Annex A.

²² See e.g. Rule 65 *ter* no. 7240, pp. 9-10, 21, 28 in connection with Appendix A to the Gotovina Response.

extreme caution. Accordingly, while the prompting gave rise to calling into question the probative value of some portions of the interviews, it was not of such a nature as to warrant the exclusion of the interviews from evidence. The Chamber found that the interviews have probative value under Rule 89 (C) of the Rules.

14. In its response, the Gotovina Defence further asserted that the admission of the portions of the interviews relating to Mr Gotovina would violate the right to cross-examination under Article 21 (4) (e) of the Tribunal's Statute and argued that the probative value of the interviews would be substantially outweighed by the need to ensure a fair trial as foreseen in Rule 89 (D) of the Rules.²⁴ As authority, the Gotovina Defence relied on the Appeals Chamber's decision in *Prlić et al.* of 23 November 2007, which acknowledged the discretion of a Trial Chamber in admitting interviews of an accused.²⁵ The Tribunal's jurisprudence holds that the right to cross-examination is not absolute and that as a matter of principle nothing bars the *admission* of statements of an accused that are not tested through cross-examination.²⁶ The Gotovina Defence therefore argued that such material could not be relied upon in convicting an accused without further corroboration.²⁷ A decision on admissibility is separate from the question of what weight, if any, is to be given to certain evidence or whether a Chamber will rely on it for a potential conviction.²⁸ The Chamber, after having carefully balanced the competing interests of Article 21 (4) (e) of the Tribunal's Statute on the one hand and the ascertainment of truth on the other hand, and having kept in mind Rule 89 (B) of the Rules, found that the admission into evidence of the interviews of the Mr Čermak did not violate Mr Gotovina's right to cross-examination and found that the interviews' probative value was not outweighed by the need to ensure a fair trial pursuant to Rule 89 (D) of the Rules.

Disposition

15. For the foregoing reasons and pursuant to Rule 89 (C) of the Rules, the Chamber granted the Motion, as amended by the Further Submissions, in its entirety and further

²³ See e.g. Rule 65 *ter* no. 7240, pp. 9-10, 28 in connection with Appendix A to the Gotovina Response.

²⁴ Gotovina Response, para. 2.

²⁵ *Ibid.*, paras 5-6 quoting *Prosecutor v. Prlić et al.*, Appeals Chamber, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("Prlić Appeals Chamber Decision"), paras 32, 40, 54.

²⁶ Prlić Appeals Chamber Decision, paras 40, 52-53, 55, *Prosecutor v. Popović et al.*, Appeals Chamber, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, paras 50-51.

²⁷ Gotovina Response, para. 10.

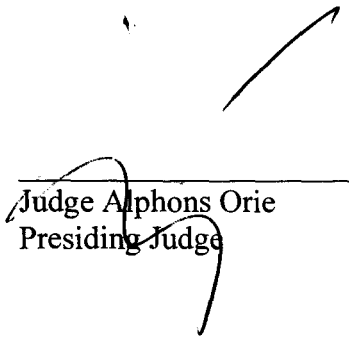
²⁸ Prlić Appeals Chamber Decision, paras 57, 61-62.

ORDERS the Prosecution to upload a revised version of Rule 65 *ter* number 7240, which includes the prompting portions that were not transcribed or translated but identified by the Gotovina Defence in its response;²⁹

REQUESTS the Registrar to assign exhibit numbers to the following Rule 65 *ter* numbers: 540, 1773, 1968, 2197, 2294, 2645, 2855, 2914, 3176, 4331, 7237, 7238, 7239, and 7240, and inform the Chamber and the parties of the numbers so assigned;

REITERATES its desire to have fully and accurately translated and transcribed transcripts in evidence and again **INVITES** the parties to closely scrutinize the interviews of the Accused for mistakes or omissions and make a joint filing setting out any agreed upon translation and transcription corrections within thirty days of this filing.

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



Judge Alphons Orie
Presiding Judge

Dated this seventeenth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁹ Appendix A to the Gotovina Response.