



**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: 8 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: 8 July 2008

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON DEFENCE OBJECTIONS TO THE ADMISSIBILITY OF WITNESS
81'S SUSPECT INTERVIEW UNDER RULE 95**

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

Procedural History

1. On 17 June 2008, the Prosecution filed a submission seeking admission of two statements of Witness 81 pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”). One of the proposed exhibits is a 13-14 January 2004 statement. The other consists of video tapes and transcript of a 15 March 2005 interview with the witness (“Interview”).¹
2. On 19 June 2008, the Čermak Defence filed its response not objecting to the Prosecution’s Submission.²
3. On 25 June 2008, the Gotovina Defence filed its response objecting to the admission of the Interview but not objecting to the admission of the 13-14 January 2004 statement of Witness 81.³ The Gotovina Defence argued that Witness 81 did not, during the Interview in which he was a suspect, have effective assistance of counsel.⁴ Witness 81’s counsel during the Interview was Mr Anto Nobile, who failed to file a power of attorney with the Registry.⁵ According to the Gotovina Defence, the lack of effective assistance of counsel at the Interview tainted it and rendered it inadmissible.⁶
4. The Markač Defence filed its response to the Prosecution’s submission on 26 June 2008, also objecting to the admission of the Interview.⁷ The Markač Defence, like the Gotovina Defence, argued that Witness 81 did not have effective assistance of counsel during the Interview.⁸ The Markač Defence argued that the tainted Interview is inadmissible pursuant to Rule 95.⁹
5. On 26 June 2008, the Prosecution sought leave to respond to the Gotovina and Markač Responses.¹⁰ On 30 June 2008, the Chamber granted the Prosecution leave to reply and the Defence leave to respond to the reply.¹¹ The Prosecution filed its reply to the Defence

¹ Prosecution’s Submission of Rule 92 *ter* Statements – Witness 81, 17 June 2008, para. 6.

² Ivan Čermak’s Response to Prosecution’s Submission of Rule 92 *ter* Statements (Witness 81), 19 June 2008, para. 2.

³ Defendant Ante Gotovina’s Response in Opposition to One Rule 92 *ter* Statement for Witness 81, 25 June 2008 (“Gotovina Response”), paras 2-3, 10.

⁴ Gotovina Response, paras 3, 7.

⁵ Gotovina Response, para. 7.

⁶ Gotovina Response, paras 8-10.

⁷ Defendant Mladen Markač’s Response to Prosecution’s Submission of Rule 92 *ter* Statements (Witness 81), 26 June 2008 (“Markač Response”), paras 2-3, 11.

⁸ Markač Response, paras 3, 7-10.

⁹ Markač Response, para. 10.

¹⁰ Prosecution’s Application to Reply to Defence Responses to Prosecution’s Submission of Rule 92 *ter* Statements of Witness 81, 26 June 2008.

¹¹ T. 5421-5422.

responses on 1 July 2008.¹² The Prosecution argued that the Interview was probative, relevant, reliable, and admissible.¹³ It further argued that Witness 81 exercised his right to be represented by counsel during his suspect interview, and that his counsel's failure to file a power of attorney with the Registry had no impact on the admissibility of the Interview.¹⁴ According to the Prosecution, even if the right of Witness 81 to be represented by counsel had been violated, it would not render his statement inadmissible in the present trial.¹⁵

6. On 2 July 2008, the Gotovina and Markač Defence both filed surreplies to the Prosecution's Reply.¹⁶ The Gotovina Defence argued that the Interview was inadmissible under Rule 95 as the witness was represented by an attorney who was not accredited by the Registrar and who had conducted himself in a questionable manner in other proceedings before the Tribunal.¹⁷ The Gotovina Defence specifically referenced an allegation raised in *Prosecutor v. Kordić and Čerkez*, in which a letter attempting to influence the testimony of a witness was said to have originated from Mr Nobilo.¹⁸ The Markač Defence argued that in light of the allegations of improper conduct against Mr Nobilo, there was a substantial possibility that the Registry would not have accredited him, had it been given the opportunity to make a determination as to his suitability to act as counsel.¹⁹ The Markač Defence reiterated that the Interview was obtained by methods which cast substantial doubt on the reliability and probative value of the Interview, so as to render it inadmissible under Rule 95.²⁰

Discussion

7. The Chamber is not presently considering whether the contested evidence should be admitted into evidence. Rather, the Chamber is solely making a determination as to whether the Interview is inadmissible under Rule 95. This Rule provides that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

¹² Prosecution's Reply to Defence Responses to Prosecution's Submission of Rule 92 *ter* Statements of Witness 81, 1 July 2008 ("Prosecution Reply").

¹³ Prosecution Reply, paras 1-2.

¹⁴ Prosecution Reply, paras 1, 3-5, 7.

¹⁵ Prosecution Reply, para. 7.

¹⁶ Defendant Ante Gotovina's Surreply to Prosecution's Reply to Defence Responses to Prosecution's Submission of Rule 92 *ter* Statement of Witness 81, 2 July 2008 ("Gotovina Surreply"); Defendant Mladen Markač's Sur-Reply to Prosecution's Reply to Defence Responses to Prosecution's Submission of Rule 92 *ter* Statements of Witness 81, 2 July 2008 ("Markač Surreply").

¹⁷ Gotovina Surreply, paras 1-2, 5-6.

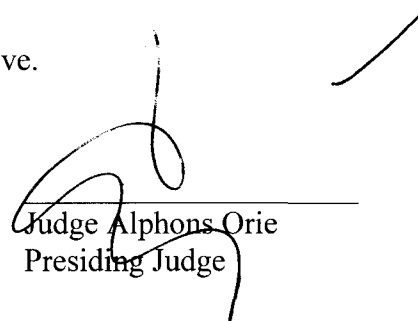
¹⁸ Gotovina Surreply, para. 5.

¹⁹ Markač Surreply, para. 3.

8. It is not disputed between the parties that Mr Nobile failed to file a power of attorney as required by Rule 44 (A). The Defence made allegations, including the one raised in *Prosecutor v. Kordić and Čerkez*,²¹ of professional misconduct by Mr Nobile, but provided no concrete evidence in support of those allegations. The Defence has advanced no argument with regard to Mr Nobile's performance as counsel of Witness 81 during the Interview. Having carefully reviewed both the transcript and the video of the Interview, and considering Mr Nobile's failure to file a power of attorney under Rule 44 (A), the Chamber could not find that the Interview was obtained by methods which cast substantial doubt on its reliability, or that its admission would be antithetical to, and would seriously damage, the integrity of the proceedings.

9. For the foregoing reasons, and pursuant to Rule 95, the Chamber **DENIES** the objections of the Defence insofar as they relate to Rule 95. The Chamber will decide upon the admission of the material covered by the Prosecution motion of 17 June 2008 at the time of Witness 81's testimony, as foreseen by Rule 92 *ter*.

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



Judge Alphons Orie
Presiding Judge

Dated this eighth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁰ Markač Surreply, paras 2, 5-6.

²¹ *Prosecutor v. Kordić and Čerkez*, Trial Chamber Judgement (26 February 2001), para. 627.