



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-PT

Date: 14 February 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 14 February 2008

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION
TO AMEND THE EXHIBIT LIST**

The Office of the Prosecutor

Mr. Alan Tieger
Mr. Stefan Waespi

Counsel for the Accused

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Steven Kay and Mr. Andrew Cayley for Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Z. Kuzmanović for Mladen Markač

TRIAL CHAMBER I (“Trial Chamber”) of the 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 (“Tribunal”) is seized of the Prosecution motion to amend the exhibit list, filed publicly with two confidential appendices and one confidential and *ex parte* appendix on 21 November 2007 (“Motion”).

I. PROCEDURAL BACKGROUND

1. On 21 November 2007, the Prosecution filed the Motion to which the Defence of Ivan Čermak (“Čermak”) responded on 30 November 2007.¹ On 7 December 2007, the Trial Chamber granted the request of the Defence of Ante Gotovina (“Gotovina”) for an extension of time to respond to 18 December 2007.² Additionally, the Trial Chamber granted the Prosecution’s request to extend the deadline for a reply until 25 December 2007.³ On 18 December 2007, Gotovina filed a response.⁴ The Defence of Mladen Markač did not respond. On 24 December 2007, the Prosecution filed a request for leave to reply and a reply to Čermak’s and Gotovina’s responses.⁵

II. SUBMISSIONS

1. Motion

2. The Prosecution requests leave to amend the exhibit list filed on 16 March 2007 and submits that the documents proposed be added are relevant to the issues in the case and will assist the Trial Chamber.⁶ The Prosecution divides the proposed new documents into three categories: Category 1 lists 77 documents that were in Prosecution’s evidence collection prior to March 2007, but were identified as relevant to this case during the course of further review, Category 2 lists 215 documents that came into the Prosecution’s possession after March 2007, Category 3 lists 60 United Nations Military Observer (“UNMO”) situation reports which, it is submitted, complement and complete the documents already on the exhibit list.⁷ The Prosecution also submits that eleven of the

¹ Response by the Defence for Ivan Čermak to the Prosecution motion to amend the exhibit list, filed confidentially on 30 November 2007 (“Čermak Response”).

² Decision on Defendant Ante Gotovina’s motion for extension of time to respond to Prosecution motion to amend the exhibit list, filed on 7 December 2007.

³ *Ibid.*

⁴ Defendant Ante Gotovina’s response to Prosecution’s motion to amend the exhibit list filed publicly on 18 December 2007 (“Gotovina Response”).

⁵ Prosecution’s motion for leave to reply and reply to Gotovina and Čermak’s response to the Prosecution’s motion to add exhibits filed confidentially on 24 December 2007, with confidential Annex (“Prosecution Reply”). Leave is granted for this reply.

⁶ Motion, para. 1.

⁷ Motion, para. 2 and Appendix A.

proposed new documents are covered by Rule 70 and are pending clearance from the providers.⁸ Further, as a result of the continuing assessment of the exhibit list and efforts to streamline its case and make it more efficient before the trial starts, the Prosecution has identified 130 documents that it no longer intends to introduce at trial and which it therefore seeks to remove from its exhibit list.⁹

3. The Prosecution states that the proposed amendments are in the interests of justice as they will provide the Trial Chamber with an increased understanding of relevant issues and contribute to the ascertainment of truth.¹⁰ Most of the documents which the Prosecution wishes to place on the exhibit list were obtained from the Government of Croatia after the filing of the Prosecution's exhibit list.¹¹ The Prosecution further argues that the proposed amendments do not have an adverse impact on the rights of the Accused. In light of the period before the commencement of the trial and the ongoing discussions with the Defence teams concerning documentary evidence, the Defence will have sufficient time to review all the documents.¹²

2. Čermak Response

4. Čermak objects to the amendments, submitting that the new documents have a volume of approximately 4 gigabytes of data which is a 10 percent increase on the total volume of 40 gigabytes of the documents filed in March 2007.¹³ Čermak states that contrary to the Prosecution's argument that the amendments will permit a clearer and ultimately more concise presentation of the case, it remains unclear how a 10 percent increase in the amount of data will make the presentation more succinct.¹⁴ According to Čermak, it is logical that the addition of the new documents will require the presentation to be more elaborate rather than more "concise".¹⁵

5. Čermak notes that approximately 128 out of 352 new documents have not been translated.¹⁶ According to Čermak, this is contrary to Article 21(4)(a) of the Statute as it prevents a thorough review of the new documents by the Defence until they have been provided with translations.¹⁷

6. Čermak also points out that the Defence has previously raised concerns in respect of the original quantity of documents proposed for trial.¹⁸ It is submitted that the amendments will

⁸ Motion, para. 3 and Appendix C.

⁹ Motion, para. 4 and Appendix B.

¹⁰ Motion, Para. 5.

¹¹ Motion, Para. 6.

¹² Motion, Para. 7.

¹³ Čermak Response, para. 2.

¹⁴ Čermak Response, para. 3.

¹⁵ Čermak Response, para. 3.

¹⁶ Čermak Response, para. 5.

¹⁷ Čermak Response, para. 5. fn 2.

¹⁸ Čermak Response, para. 6.

increase the time needed for case preparation and will inevitably increase the time needed to try the case.¹⁹

7. Čermak states that the Prosecution has been seized of this case since 1996, that the Accused have been indicted since 2001 and 2004 and that the Prosecution has had many years to prepare its trial materials.²⁰ The application to amend was filed 8 months after the filing of the original exhibit list and the planned start of the trial.²¹ Čermak submits that the vast amount of materials already served by the Prosecution as exhibits for trial, amounting to approximately 27,000 pages, have made this case extremely difficult to prepare.²² He stresses that this “paper assault” tactic of burdening the Defence with so much material has a serious drain upon resources and is extremely time consuming.²³ Čermak argues that the time for the Prosecution to prepare has been entirely at its leisure while the Defence and in particular Čermak have not had and will not have as much time for case preparation.²⁴

8. Čermak emphasises that if leave to amend is granted and the time to prepare is not increased accordingly, this will have an adverse impact on his rights since he will have inadequate time to consider, prepare and investigate the new evidence.²⁵ Čermak concludes that granting leave to increase the list of exhibits will cause functional problems in the trial process by requiring extra time to present the Prosecution case and consequently the Defence case.²⁶

3. Gotovina Response

9. Gotovina adopts Čermak’s arguments and also Gotovina notes that the Trial Chamber has previously asked the Prosecution to reduce the scope of its case.²⁷ It is therefore submitted that if the Prosecution were allowed to amend its exhibit list, the result would be a net increase in the amount of trial exhibits.²⁸

10. Gotovina also argues that the Prosecution’s grounds for expanding the number of documents are vague.²⁹ He suggests that the Prosecution be required to specify why each new proposed document is needed, and why it is not duplicative of documents already included on the

¹⁹ Čermak Response, para. 6.

²⁰ Čermak Response, para. 7.

²¹ Čermak Response, para. 7.

²² Čermak Response, para. 8.

²³ Čermak Response, para. 8.

²⁴ Čermak Response, para. 8.

²⁵ Čermak Response, para. 9.

²⁶ Čermak Response, para. 10.

²⁷ Gotovina Response, para. 2.

²⁸ Gotovina Response, para. 8.

²⁹ Gotovina Response, para. 3.

Prosecution's exhibit list.³⁰ Noting that a new Pre-Trial Judge has been assigned to the case and that three new Defence counsel have been added to this case within the last ninety days, Gotovina requests that the Trial Chamber adopt the procedures used in the *Prlić* case and establish guidelines for drawing up lists of witnesses and exhibits.³¹ In his view, this will ensure that the evidence is not unnecessarily duplicative and that the trial is not unnecessarily prolonged.³² It is submitted that this will also assist the parties and the Trial Chamber to better prepare for trial.³³ Gotovina also submits that guidelines similar to those in *Prlić* would significantly assist the Chamber in determining whether the new documents proposed by the Prosecution are truly necessary, or merely duplicative.³⁴ Gotovina therefore requests that the Trial Chamber delay its decision on the Motion until the Prosecution has submitted a list of witnesses and exhibits consistent with the guidelines in the *Prlić* case ("Gotovina Request").³⁵ After submission of such a list, Gotovina requests the Trial Chamber determine whether the proposed new documents are necessary, or needlessly duplicative.³⁶

4. Prosecution Reply

11. The Prosecution argues that the test for addition of documents to the exhibit list is whether the addition is in the interests of justice and not whether the documents are truly necessary or merely duplicative as submitted by Gotovina.³⁷ It submits that the motion satisfies this test.³⁸

12. The Prosecution also submits that Čermak's assertion that the addition of the documents will inevitably increase the time needed for preparation and trial is incorrect since relevant documents that shed light on issues sharpen rather than protract presentation.³⁹ The Prosecution notes that the proposed documents clarify issues already in dispute, which have already been identified through various ways, including the indictment, pre-trial briefs, and agreed facts discussions.⁴⁰ The addition therefore provides a basis for sharpened understanding, for potential agreement and for abbreviating

³⁰ Gotovina Response, para. 4.

³¹ *Prosecutor v. Prlić et al.*, Case No.IT-04-74-PT, Order on guidelines for drawing up the list of witnesses and exhibits, 30 November 2005 ("*Prlić* Order"); Gotovina Response, para. 5.

³² Gotovina Response, para. 4.

³³ Gotovina Response, para. 6.

³⁴ Gotovina Response, para. 7.

³⁵ Gotovina Response, para. 8.

³⁶ Gotovina Response, para. 8.

³⁷ Prosecution Reply, para. 3.

³⁸ Prosecution Reply, para. 3.

³⁹ Prosecution Reply, para. 4.

⁴⁰ Prosecution Reply, para. 8.

witness testimony on the issues involved.⁴¹ The Prosecution also submits that the amendments will aid the Trial Chamber's determination and the ascertainment of truth.⁴²

13. Further, the Prosecution states that Čermak's reference to the extent of increase in electronic storage is misconceived.⁴³ The number of gigabytes is related to the format of the documents, not the extent of work required to review them.⁴⁴ Since the documents provide a reliable basis and framework within which activities, omissions, obligations and responsibilities of the Accused may be assessed, amending the exhibit list at this stage does not adversely affect the Defence's ability to prepare for trial.⁴⁵

14. The Prosecution offers to continue providing translations to the Defence as soon as it receives them.⁴⁶ It asserts that the Defence also has translation resources and can assess and review untranslated documents.⁴⁷

15. The Prosecution submits that Gotovina's submission that the Prosecution should file a list of witnesses and exhibits in the form described is inapposite.⁴⁸ It is argued that Gotovina should file a further motion, to which the Prosecution would provide a full response opposing such application.⁴⁹ In any case, such a reformulation is not required because the earlier-provided descriptions of the documents and the documents themselves alert the parties to the relevance and probative value of the documents in the context of the issues in the case.⁵⁰ Further, the Prosecution attaches an appendix to its reply, which provides a detailed explanation of the relevance and probative value of the documents in Category 1 and the translated documents in Category 2.⁵¹ It also submits that the relevance of the documents in Category 3 is manifest.⁵²

III. DISCUSSION

1. Applicable law

16. Articles 20(1) and 21(4)(b) of the Statute provide that an accused is entitled to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence.

⁴¹ Prosecution Reply, para. 8.

⁴² Prosecution Reply, para. 8.

⁴³ Prosecution Reply, Para. 9.

⁴⁴ Prosecution Reply, para. 9.

⁴⁵ Prosecution Reply, para. 9.

⁴⁶ Prosecution Reply, para. 12.

⁴⁷ Prosecution Reply, para. 12.

⁴⁸ Prosecution Reply, para. 5.

⁴⁹ Prosecution Reply, para. 5.

⁵⁰ Prosecution Reply, para. 11.

⁵¹ Prosecution Reply, para. 10 and Confidential Appendix.

⁵² Prosecution Reply, para. 10.

According to Rule 65 *ter*(E)(iii) of the Rules, the Prosecution is required to file the list of exhibits it intends to offer and to serve on the defence copies of the exhibits so listed. However, the Prosecution is not strictly bound by this initial filing.⁵³ The Trial Chamber has discretionary powers to grant a motion requesting amendment of the exhibit list, if it is satisfied that to do so would be in the “interests of justice”.⁵⁴ This standard has been applied in respect of requests for amendment before the commencement of the trial.⁵⁵

17. The Trial Chamber has taken into consideration the following factors when assessing the Motion:

- i) whether good cause for amending the exhibit list has been shown, taking into consideration the complexity of the case, on-going investigations, translation of documents and other materials,⁵⁶
- ii) whether the proposed evidence is *prima facie* relevant and of probative value to the charges against an accused,⁵⁷
- iii) whether the amendments will infringe the right of the accused to a fair and expeditious trial and the right to have adequate time and facilities for the preparation of his defence, bearing in mind the Prosecution’s duty to present the available evidence to prove its case.⁵⁸

18. In exercising its discretionary powers within the context of complex multi-accused trials in which a considerable amount of evidence is presented by the Prosecution, the Trial Chamber must maintain a certain level of flexibility.⁵⁹ The Prosecution requests two types of amendments to its exhibit list: the withdrawal of documents and the addition of documents.

2. Withdrawal of documents

19. The Prosecution initially presented the 130 documents now sought to be removed from the exhibit list as potential evidence. It is for the Prosecution to determine whether it still considers that it needs to present these documents. Except for the time that may have been used by the Defence to

⁵³ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on admissibility of Borovčanin interview and the amendment of the Rule 65 *ter* exhibit list, 25 October 2007 (“*Popović Decision*”), para. 18.

⁵⁴ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on motion for leave to amend the Prosecution’s witness and exhibit lists, 9 July 2007 (“*Delić Decision*”), p. 6.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* and *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s motions for leave to amend Rule 65 *ter* witness list and Rule 65 *ter* exhibit list, 6 December 2006 (“*Second Popović Decision*”), p. 7, with further references.

⁵⁷ *Delić Decision*, p. 6, and *Second Popović Decision*, p. 6.

⁵⁸ *Second Popović Decision*, p. 6.

⁵⁹ *Popović Decision*, para. 18.

study the material as potential exhibits, the Trial Chamber does not consider the withdrawal of the documents to be prejudicial to the Defence. The Trial Chamber finds that it is in the interest of the Defence to be put on notice as to which material may be adduced in evidence in order that it may prepare; this is a primary purpose of the Prosecution's exhibit list.⁶⁰

3. Addition of documents

20. The Trial Chamber considers that the Prosecution has shown good cause with respect to the material that came into its possession after the submission of the exhibit list on 16 March 2007.

21. With respect to the material which the Prosecution has identified as relevant "during the course of further review",⁶¹ the Trial Chamber considers that good cause has not been shown. The trial was set to start a year ago and the Prosecution should have been more diligent in preparing its exhibit list. However, the Trial Chamber will consider whether it is nevertheless in the interests of justice to grant the Prosecution's request in this respect.

22. Mindful of the fact that the primary purpose of the exhibit list is to give notice to the Defence for its preparations, the Trial Chamber considers that it need not assess the relevance of the documents on the Rule 65 *ter* exhibit list when it is submitted.⁶² However, if a party at a later stage seeks to amend the exhibit list, the Trial Chamber must review whether the documents sought to be added are of sufficient relevance and probative value.⁶³ In the present case, the Trial Chamber is satisfied *prima facie* that the Prosecution has demonstrated this by virtue of the appendix to its reply and its other submissions in this respect.

23. However, the Trial Chamber does consider that there will be an additional burden upon the Defence if the proposed amendments are granted. In this context, Čermak has raised an argument concerning the number of gigabytes which the material encompasses. The Trial Chamber considers that this is not a good instrument to assess the work required to review the material, if only for the reason that the number of gigabytes required depends on the technical format used. The Trial Chamber has therefore looked at other characteristics of the proposed material, including the importance of the material for the Prosecution, the quantity of the material and the time required for the Defence to review the material.

⁶⁰ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Confidential decision on Prosecution's sixth and seventh motions for leave to add exhibits to its first amended exhibit list, 14 November 2007 ("*Boškoski and Tarčulovski* Decision"), paras 5, 12, 16.

⁶¹ Motion, para. 2.

⁶² *Boškoski and Tarčulovski* Decision para. 5; *Delić* Decision pp 6-7. Emphasis added.

⁶³ *Boškoski and Tarčulovski* Decision, para. 5.

24. The Trial Chamber notes the Prosecution's submission that it couriered a DVD containing all the proposed added exhibits to the Defence on 9 November 2007,⁶⁴ but recalls that it was only in November 2007 that the new Defence counsel had effectively been appointed. The Trial Chamber therefore considers that the proposed amendments, bar those for which the Trial Chamber has found there is good cause, are on the verge of what may be considered permissible at this point in the proceedings. However, balancing, on the one hand, the Prosecution's duty to present available evidence, against, on the other hand, the rights of the accused to adequate time and facilities for preparation and – importantly – to be tried without undue delay, the Trial Chamber finds that the amendments may nevertheless be considered as being in the interests of justice.

25. The Trial Chamber disagrees with Gotovina's submission that procedures, guidelines and charts similar to those used in *Prlić* in relation to exhibits and witnesses should be employed. The Trial Chamber is however open to discuss with the Parties the sequence according to which the Prosecution will seek to introduce the documents into evidence at trial. To this end, practical ways of notice to the Defence of which exhibits will be used with which witness may be discussed. The Trial Chamber considers that the *Prlić* approach is impractical and does not provide the ultimate answer to this question.

26. The Trial Chamber notes Čermak's argument that approximately 128 out of 352 new exhibits have not yet been translated. The Trial Chamber acknowledges the concerns of the Defence in this respect but also notes that at the recent status conference the Prosecution stated that it is working hard to resolve the problems related to translations.⁶⁵ If, at trial, the Defence finds that it would need more time to review specific documents due to lack of translations, the Trial Chamber invites the Defence to address the Trial Chamber which will lend its assistance to resolve the matter without delay.

27. In conclusion, the Trial Chamber, in the exercise of its discretion, finds that granting the Motion will not violate the rights of the Accused to a fair and expeditious trial and to have adequate time and facilities to prepare.


⁶⁴ Prosecution Reply, para. 7.

⁶⁵ Status Conference, 18 January 2008, T. 370-371.

IV. DISPOSITION

28. Pursuant to Articles 20(1) and 21(4)(b) of the Statute and Rule 65 *ter* of the Rules, the Trial Chamber **GRANTS** the Motion, **DENIES** the Gotovina Request, and **ORDERS** the Prosecution to file its amended exhibit list within one week of the filing of this decision.

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



Judge Alphons Orié
Presiding

Dated this fourteenth day of February 2008

At The Hague

The Netherlands

[Seal of the Tribunal]