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27 May 2008



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:

27 May 2008

Original:

English

IN TRIAL CHAMBER I

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

**Registrar:** Mr Hans Holthuis

**Decision of:** 27 May 2008

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

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REASONS FOR THE DECISION ON THE PROSECUTION'S MOTION TO AMEND  
ITS WITNESS LIST

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## I. Procedural history and preliminary matters

1. At the status conference of 18 January 2008, Judge Orić, who at that time was the Pre-Trial Judge in this case, invited the Prosecution to revise its witness list and to submit a new one, on the basis of which it could present its case in around 200 hours.<sup>1</sup> As a result, on 4 February 2008, the Prosecution filed a confidential motion to amend its witness list, proposing to call 112 *viva voce* witnesses in 209.5 hours.<sup>2</sup> The Gotovina Defence responded to the Motion, also confidentially, on 18 February 2008.<sup>3</sup> On the same day, in another confidential filing, the Gotovina Defence sought leave to correct its Response by attaching certain documents to it which were intended to be filed with its Response.<sup>4</sup> On 25 February 2008, the Prosecution filed a confidential request for leave to reply to the Response and its reply.<sup>5</sup> No filings were received from the Čermak or Markač Defence on this matter.

2. On 28 February 2008, the Chamber, as it was composed at that time,<sup>6</sup> decided to grant the Prosecution's request for leave to reply and informed the parties accordingly, through an informal communication.

3. Considering the nature of the request by the Gotovina Defence to correct its Response, the Chamber decides to grant that request.

4. At the pre-trial conference held on 10 March 2008, the Chamber rendered its oral decision granting the Motion and thereby adopting the Prosecution's proposed number of witnesses and estimated time to present its case.<sup>7</sup> The Chamber announced that its written reasons would follow.

## II. Submissions

5. In the Motion, the Prosecution proposed to withdraw 31 witnesses from its original witness list and sought to add nine new witnesses.<sup>8</sup> The Prosecution indicated that, as a result

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<sup>1</sup> T. 364.

<sup>2</sup> Prosecution Motion to Amend Its Witness List, 4 February 2008 ("Motion"), paras 1-2.

<sup>3</sup> Defendant Ante Gotovina's Response to Prosecution Motion to Amend Its Witness List, 18 February 2008 ("Response").

<sup>4</sup> Defendant Ante Gotovina's Motion for Leave to File *nunc pro tunc* His Corrected Version of His Response to Prosecution Motion to Amend Its Witness List, 18 February 2008.

<sup>5</sup> Prosecution's Request for Leave to Reply and Reply to Gotovina's Response to the Prosecution Motion to Amend Its Witness List, 25 February 2008 ("Reply").

<sup>6</sup> At that time, the Chamber assigned to this case was composed of Judge Orić, Judge Van den Wyngaert, and Judge Moloto. The current composition of this Chamber became effective on 10 March 2008. See Order Composing a Trial Bench, 4 March 2008. See also T. 403.

<sup>7</sup> T. 403-404.

<sup>8</sup> Motion, para. 3.

of its further investigations, it obtained additional documentation and witness statements.<sup>9</sup> The latter were acquired after the filing of the Prosecution's original witness list on 16 March 2007.<sup>10</sup> In an annex to the Motion, the Prosecution provided new time estimates for the testimony of each witness.<sup>11</sup> The Prosecution submitted that the witnesses that it no longer intended to call had been expected to testify on facts which the Prosecution would no longer seek to prove or for which it has found better evidence.<sup>12</sup> The Prosecution argued that allowing it to add nine new witnesses to the list would ensure that the Chamber hears the best available evidence.<sup>13</sup> It further argued that it would be in the interests of justice to add those witnesses to its list since the evidence they are expected to give is important, relevant and probative of allegations made in the Indictment.<sup>14</sup> According to the Prosecution, the right of the Accused to have adequate time and facilities to prepare their defence would not be jeopardized, as the Defence would have more than two months to prepare for the cross-examination of the new witnesses.<sup>15</sup> The Prosecution submitted that it had reduced the expected length of the testimony of several witnesses because part of its evidence was to be presented pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence, and also because it had reassessed the number of hours required for *viva voce* testimonies.<sup>16</sup>

6. In its Response, the Gotovina Defence argued that instead of substantially reducing its number of witnesses, as Judge Orić had invited it to do, the Prosecution had converted all of its *viva voce* witnesses into Rule 92 *ter* witnesses.<sup>17</sup> The Gotovina Defence submitted that the Chamber should disallow the Prosecution to tender evidence going to proof of acts and conduct of the Accused pursuant to Rule 92 *ter*.<sup>18</sup> It also submitted that the Prosecution should be denied leave to convert all of its witnesses into Rule 92 *ter* witnesses.<sup>19</sup> The Gotovina Defence objected to the withdrawal of one witness (Witness A)<sup>20</sup> who, according to the Gotovina Defence, had told the Prosecution that allegations of indiscriminate shelling by the Croatian Army were unsupported by the facts.<sup>21</sup> It objected further to the addition of

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<sup>9</sup> *Ibid.*, para. 9.

<sup>10</sup> *Ibid.*, para. 10.

<sup>11</sup> *Ibid.*, para. 3; Appendix A to the Motion.

<sup>12</sup> *Ibid.*, para. 5.

<sup>13</sup> *Ibid.*, para. 4.

<sup>14</sup> *Ibid.*, para. 7.

<sup>15</sup> *Ibid.*, para. 8.

<sup>16</sup> *Ibid.*, para. 6.

<sup>17</sup> Response, paras 1-2.

<sup>18</sup> *Ibid.*, para. 3.

<sup>19</sup> *Ibid.*, para. 12.

<sup>20</sup> Witness A referred to in this decision is the witness listed under number 121 on the Prosecution's original witness list filed on 16 March 2007.

<sup>21</sup> Response, para. 7.

another witness (Witness B)<sup>22</sup> who, according to the Gotovina Defence, was a subordinate to Witness A and is expected to give evidence contradicting Witness A's expected testimony.<sup>23</sup> The Gotovina Defence submitted that by doing so, the Prosecution would violate the best evidence rule as Witness A would be able to provide better evidence than Witness B.<sup>24</sup> It further submitted that it would be against the interests of justice to allow the Prosecution to withdraw Witness A from its witness list and to add Witness B.<sup>25</sup> The Gotovina Defence did not object to the Prosecution's proposal to add the remaining eight witnesses, or to remove 30 other witnesses from its witness list.

7. In its Reply, the Prosecution clarified that it intends to present oral evidence on the acts and conduct of the Accused relating to live issues in the case and that, in any case, Rule 92 *ter* allows for introduction of evidence on the acts and conduct of the Accused.<sup>26</sup> The Prosecution added that at the Tribunal, the best evidence rule reflects the principle that Trial Chambers will rely on the best evidence available to determine the relevant issues in a case, while retaining wide discretion in relation to the admission of evidence.<sup>27</sup> The Prosecution submitted that it would be impracticable and unfair to permit a party to interfere in the witness selection of the other party, and that even a limited intervention could affect the overall coherence of the other party's case.<sup>28</sup> According to the Prosecution, when comparing the evidence expected from Witnesses A and B, the Gotovina Defence focused on only one issue common to their expected testimonies and ignored other parts of their expected evidence.<sup>29</sup> The Prosecution argued that, assuming the best evidence rule applied, Witness B would provide better evidence on that issue than Witness A.<sup>30</sup> The Prosecution concluded that the proper way for the Defence to present its view is during cross-examination and in its own case rather than by trying to have the Prosecution change its witness list.<sup>31</sup>

### III. Discussion

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<sup>22</sup> Witness B referred to in this decision is the witness listed under number 168 on the Prosecution's Revised Witness List which is Appendix A to the Motion.

<sup>23</sup> Response, paras 4-9.

<sup>24</sup> *Ibid.*, paras 4, 9-11.

<sup>25</sup> *Ibid.*, paras 10, 12.

<sup>26</sup> Reply, paras 2-3.

<sup>27</sup> *Ibid.*, para. 5.

<sup>28</sup> *Ibid.*, paras 6-7, 11.

<sup>29</sup> *Ibid.*, paras 8-10.

<sup>30</sup> *Ibid.*, paras 12-17.

<sup>31</sup> *Ibid.*, para. 17.

8. The Trial Chamber may grant a motion for an amendment to the witness list if satisfied that this is in the interests of justice.<sup>32</sup> When reaching its decision, the Chamber took the following into consideration: the general requirements for admissibility under Rule 89 (C), according to which evidence must be relevant and have probative value; the requirement of Rule 89 (D) that the probative value of the proposed evidence must not be outweighed by the need to ensure a fair trial; the burden placed on the Defence by the late addition of witnesses; the stage of the trial - the more advanced the stage of the proceedings, the greater the risk of jeopardizing the rights of the Accused; whether the Prosecution had shown good cause why it did not seek to add the witnesses to the list at an earlier stage; and the principle that it is for each party to decide which witnesses to call in support of its case.<sup>33</sup>

9. The evidence which is expected from the nine persons the Prosecution wishes to add to its witness list concerns the alleged meeting between Franjo Tuđman, Ante Gotovina, Mladen Markač and other alleged members of the joint criminal enterprise, the alleged attack by the Croatian Army artillery on Gračac, Drniš, Knin, Benkovac and other parts of the Krajina region, the role of the military and civilian police during the indictment period, and the alleged command and control exercised by Ante Gotovina.<sup>34</sup> None of the Defence teams challenged the newly proposed witnesses on the grounds that their expected evidence is not relevant or that it lacks probative value. The Chamber found that, for the purposes of this decision, the expected evidence is relevant and has probative value.

10. Bearing in mind the relatively early stage of the proceedings in which the Motion was filed, and that the Defence would have sufficient time to prepare for the cross-examination of the nine witnesses, the Chamber found that allowing the Prosecution to call those witnesses would not jeopardize the rights of the Accused.

11. With regard to the requested replacement of Witness A by Witness B and the argument by the Gotovina Defence that it would violate the best evidence rule, the

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<sup>32</sup> *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution Motion to Amend Rule 65 *ter* Witness List, 27 February 2008, p. 5; *Prosecutor v. Bošković and Tarčulovski*, Decision on Motion for Leave to Amend Its Original Rule 65 *ter* Witness List dated 7 November 2005 with Annexes A and B, 5 May 2006, para. 4.

<sup>33</sup> These factors were relied upon by other Trial Chambers in the following cases: *Prosecutor v. Stanišić and Simatović*, Decision on Prosecution Motion to Amend Rule 65 *ter* Witness List, 27 February 2008, p. 5; *Prosecutor v. Haradinaj et al.*, Decision on the Prosecution's Request to Add Two Witnesses to Its Witness List and to Substitute One Witness for Another, 1 November 2007, para. 4; *Prosecutor v. Milutinović et al.*, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shuan Byrnes, 12 March 2007, para. 18; *Prosecutor v. Mrkšić et al.*, Decision on Prosecution Motion to Amend Its Rule 65 *ter* List, 6 June 2006, para. 6; *Prosecutor v. Slobodan Milošević*, Decision on Prosecution's Request to Call Witness C-063, 18 February 2004, p. 2.

<sup>34</sup> Motion, para. 7.

Prosecution is correct that Trial Chambers at the Tribunal have interpreted the best evidence rule to mean that they will rely on the best available evidence. However, those Trial Chambers have also directed the parties to keep this rule in mind when submitting evidence.<sup>35</sup> This Chamber shares that position. The Chamber was not convinced by the Gotovina Defence's submission that the evidence expected from Witness A is better than that of Witness B. Neither of the two can be considered to give the better evidence. Witness A may be better placed to testify about the information he received and how he used, or did not use, that information when he drafted, reviewed, or adopted his own reports or those of others. Witness B on the other hand, may be better placed to testify to his observations on the ground, how they were reported to superiors, and how the observations were reflected in reports drafted or adopted by others. Therefore, the former may be in a position to provide "better" evidence on the reporting procedures, whereas the latter however may be able to provide "better" evidence on what was happening on the ground. For this reason, the best evidence rule, even if applicable, would not bar the replacement of Witness A by Witness B. Considering that the Defence will have the opportunity to cross-examine Witness B, and that it may call its own evidence, including Witness A, the Chamber found no reason to preclude the Prosecution from withdrawing Witness A and from calling Witness B.

12. The Prosecution explained that the addition of the witnesses to the witness list is a result of further investigations and the obtaining of additional relevant documentation. Eight of the nine witnesses that the Prosecution would like to add provided their first statements after the filing of the original witness list on 16 March 2007 and the ninth provided a second statement based on documents obtained after that date. On this basis, the requirement that the Prosecution show good cause why it did not seek to amend its witness list at an earlier stage was satisfied in part. Although a more comprehensive explanation for the amendment would have been welcome, lack thereof did not affect the result of the Chamber's decision on the Motion.

13. It is for each party to decide what evidence to present in support of its case. This principle is particularly important in view of the limited time allocated to the parties to present their cases. The Defence may challenge the Prosecution's evidence during cross examination

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<sup>35</sup> See e.g. *Prosecutor v. Delić*, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 24 July 2007, para. 31; *Prosecutor v. Martić*, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 7; *Prosecutor v. Halilović*, Guidelines on the Standards Governing the Admission of Evidence, 16 February 2005, para. 8; *Prosecutor v. Orić*, Order concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, 21 October 2004, section III, para. viii.

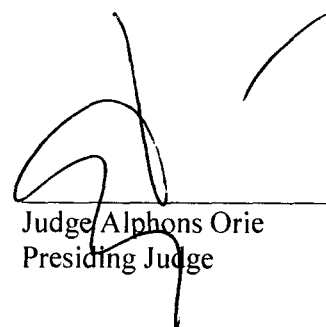
or in the Defence case. Moreover, under Rule 98, the Chamber has the power to order the production of additional evidence if it is not satisfied with the evidence presented on a certain matter. Sufficient procedural safeguards therefore exist to counterbalance the discretion of a party to select the evidence it presents.

14. With respect to the Gotovina Defence's request to disallow the Prosecution from tendering, pursuant to Rule 92 *ter*, evidence going to proof of acts and conduct of the Accused, the Chamber acknowledges and welcomes the Prosecution's intention to elicit oral evidence on such matters to the extent that they relate to live issues in this trial.

15. Finally, bearing in mind that there was no objection to the Prosecution's request to withdraw a number of witnesses from its list and the aforementioned principle that it is up to a party to select the evidence it intends to present, the Chamber found no reason to deny that request.

16. It is for these reasons that the Chamber found that it is in the interests of justice to amend the witness list and therefore **GRANTED** the Prosecution Motion.

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



Judge Alphons Orie  
Presiding Judge

Dated this 27th day of May 2008  
At The Hague  
The Netherlands

[Seal of the Tribunal]