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16 JUNE 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: 16 June 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 16 June 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO ADD A WITNESS TO ITS RULE 65
TER WITNESS LIST AND TO ADD THREE ASSOCIATED DOCUMENTS TO ITS
RULE 65 TER EXHIBIT LIST**

Office of the Prosecutor

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Counsel for Ante Gotovina

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

1. On 15 April 2008, the Prosecution filed a motion requesting leave to add a witness to its Rule 65 *ter* witness list and to add three documents – the witness’s handwritten notes contemporaneous to the shelling, an aerial photograph of the area from which the witness made observations, and a magazine article containing some of the witness’s statements – to its Rule 65 *ter* exhibit list.¹ The Prosecution submits that adding the witness would be in the interests of justice, that it would help the Chamber to decide issues related to the shelling of Knin, and that the Defence would not be prejudiced by the addition considering the early stage of the trial and the Prosecution’s intention not to call the witness until at least July.² The Prosecution also submits that it will request no additional time to present this witness’s evidence.³ According to the Prosecution, the witness would be able to provide evidence related to the 4 – 5 August 1995 shelling of Knin, incidents of burning and looting, and other events following Operation Storm including meetings with two of the Accused.⁴ When asserting good cause, the Prosecution submits that it was aware of the witness’s existence at an early stage of its investigation, but did not learn of certain evidence that he could provide until November 2007.⁵ The Prosecution received the proposed exhibits during the witness’s 2008 interview.⁶

2. On 28 April 2008, the Gotovina Defence filed its Response opposing the Motion.⁷ One objection describes the prejudice to the Accused that results from inadequate time to prepare based on late notice.⁸ The Defence also argues that the Prosecution has not shown good cause why the addition of the witness or the exhibits was not sought earlier, and that granting the Prosecution’s request would be contrary to the interests of justice.⁹ It submits that the Prosecution’s late filing of its motion prevents the Defence from cross-examining witnesses that have already testified regarding the additional witness’s statements and

¹ Prosecution’s Motion to Add a Witness to Its Rule 65 *ter* Witness List and to Add Three Associated Documents to Its Rule 65 *ter* Exhibit List, 15 April 2008 (“Motion”), paras 1, 8.

² Motion, paras 2, 7.

³ Motion, para. 2.

⁴ Motion, paras 3-5.

⁵ Motion, paras 6, 8.

⁶ Motion, para. 1.

⁷ Defendant Ante Gotovina’s Response to Prosecution’s Motion to Add a Witness to Its Rule 65 *ter* Witness List and to Add Three Associated Documents to Its Rule 65 *ter* Exhibit List, 28 April 2008 (“Response”), para. 1.

⁸ Response, paras 2-4.

⁹ Response, paras 5-7.

associated exhibits.¹⁰ Also on 28 April, the Markač Defence filed a Joinder to the Gotovina Defence's response.¹¹

3. The Chamber may grant a motion to amend the witness list or the exhibit list if satisfied that this is in the interests of justice.¹² In this respect, the Chamber must balance the Prosecution's duty to present the available evidence to prove its case with the right of the Accused to a fair and expeditious trial and the right to have adequate time and facilities for the preparation of their defence.¹³ The Chamber must consider whether the proposed evidence is *prima facie* relevant and has probative value.¹⁴ Further, the Prosecution must show good cause why it did not seek to add the witnesses or exhibits to the list at an earlier stage.¹⁵ Good cause may exist where witnesses have only recently become available to give evidence, or where the relevance of the evidence has only recently become apparent.¹⁶

4. The proposed witness's testimony and exhibits sought to be added by the Prosecution relate to the shelling of Knin, incidents of burning and looting, and other events following Operation Storm. There is no question that such an eyewitness could offer, in conjunction with his handwritten notes of events as recorded at the time and the other proposed additional exhibits, evidence that is *prima facie* relevant and probative.

5. The proposed additional witness and exhibits may offer greater detail than other witnesses could, but there is nothing surprising in the content or character of the proposed evidence. The proposed evidence mainly relates to the shelling of Knin on 4 and 5 August 1995 and events surrounding Operation Storm. Many Prosecution witnesses will testify about

¹⁰ Response, para. 7.

¹¹ Defendant Mladen Markač's Joinder to Ante Gotovina's Response to Prosecution's Motion to Add a Witness to Its Rule 65 *ter* Witness List and to Add Three Associated Documents to Its Rule 65 *ter* Exhibit List, 28 April 2008.

¹² Rule 73 *bis* (F) of the Rules of Procedure and Evidence ("Rules"); *Prosecutor v. Dragomir Milošević*, Decision on Prosecution's Third Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 23 April 2007, p. 3; Decision on Prosecution's Motion to Amend the Exhibit List, 14 February 2008 ("First *Gotovina* Decision"), para. 16; Decision on Second Motion to Amend the Exhibit List, 15 May 2008 ("Second *Gotovina* Decision"), para. 3.

¹³ *Prosecutor v. Rasim Delić*, Decision on Motion for Leave to Amend the Prosecution's Witness and Exhibit Lists, 9 July 2007, p. 6; Second *Popović* Decision, para. 18; First *Gotovina* Decision, para. 17 (iii); Second *Gotovina* Decision, para. 3.

¹⁴ Rule 89 (C) of the Rules; *Prosecutor v. Mrkšić et al.*, Decision on Prosecution Motion to Amend Its Rule 65 *ter* List, 6 June 2006 ("Mrkšić Decision"), para. 2; *Prosecutor v. Popović et al.*, Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006 ("First *Popović* Decision"), p. 7; *Prosecutor v. Popović et al.*, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, 25 October 2007 ("Second *Popović* Decision"), para. 18; First *Gotovina* Decision, para. 17 (ii); Second *Gotovina* Decision, para. 3.

¹⁵ First *Popović* Decision, p. 7, Second *Popović* Decision, para. 18; First *Gotovina* decision, para. 17 (i); Second *Gotovina* Decision, para. 3.

these events or have already so testified. The proposed additions are not likely to require extensive additional investigation or preparation. Although it is possible that the Defence may have had additional cross-examination questions for the four witnesses whose testimony concluded prior to 15 April 2008, related to the proposed additional witness or exhibits, the Defence does not specify any questions that could have been asked in relation to the proposed additional evidence, and the Chamber does not otherwise see that the Defence suffers any concrete disadvantage from the subsequent Prosecution Motion. Considering that the request for the additions came on 15 April 2008 and that the Prosecution will not be calling the witness to testify until at least July, and considering all of the aforementioned reasons, the addition of the witness and the exhibits will not unduly burden the Defence in their preparation of the case.

6. In the present case the Prosecution could not have properly assessed the potential value of the witness's evidence to its case accurately prior to November 2007 when it learned about the witness's contemporaneous notes. Although the aerial photo and the article may have been known to the Prosecution for some time, any assessment of the value of that evidence would have been incomplete without knowledge of the witness's notes. The relevance of the proposed evidence to the Prosecution's case became clear between the time the Prosecution learned of the existence of the witness's notes and when it finalized the witness's statement on 5 February 2008, at which time it had only just received the witness's notes. The Chamber accepts that the explanation offered in the Motion that the Prosecution was unaware of the existence of the witness's notes until at least November 2007, and therefore of the relevance of his testimony and that of the proposed exhibits, satisfies the requirement that good cause be shown.

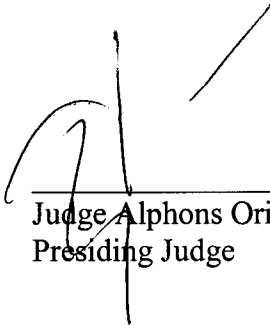
7. The Chamber recognizes that contemporaneous notes often provide greater detail about the events they are used to record and may facilitate verification of, and accuracy in, a witness's testimony. As the Prosecution will be including this witness and these exhibits within its currently allotted time and on the basis of the foregoing, the Chamber finds that it is in the interests of justice to add the proposed witness and exhibits and hereby:

GRANTS the Prosecution leave to add Witness 173 to the Prosecution's Revised Witness List and to add the three associated exhibits to the Prosecution's Rule 65 *ter* exhibit list. The Chamber further:

¹⁶ *Prosecutor v. Slobodan Milošević*, Decision on Prosecution's Fourth Omnibus Motion for Leave to Amend the Witness List and Request for Protective Measures, 21 November 2003, p. 4.

ORDERS the Prosecution to file addenda to its witness and exhibit lists within one week of the filing of this decision.

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



Judge Alphons Orié
Presiding Judge

Dated this 16th day of June 2008
At The Hague
The Netherlands

[Seal of the Tribunal]