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24 April 2009

22145

UNITED NATIONS	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:	24 April 2009
		Original:	English

IN TRIAL CHAMBER I

Before:	**Judge Alphons Orie, Presiding** **Judge Uldis Kinis** **Judge Elizabeth Gwaunza**
Acting Registrar:	**Mr John Hocking**
Decision of:	**24 April 2009**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON PROSECUTION MOTION TO RECALL MARKO RAJČIĆ

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

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PROCEDURAL HISTORY

1. From 18 to 23 February 2009, witness Marko Rajčić, chief of the HV artillery in the Split Military District during Operation Storm, testified before this Chamber as a Prosecution witness. On 2 March 2009, during the testimony of witness Dušan Sinobad, the Gotovina Defence tendered the Jagoda List of Targets of the TS Artillery Group ("Jagoda Target List").[1] On 3 March 2009, the Prosecution objected to the admission of the Jagoda Target List, stating that the document lacked authenticity and that it should have been tendered through witness Rajčić.[2] On 4 March 2009, the Chamber admitted into evidence the Jagoda Target List under exhibit number D1447.[3] On 5 March 2009, the Prosecution made an oral application to the Chamber to recall Mr Rajčić and to issue a subpoena for him to re-appear before the Chamber.[4] Furthermore, the Prosecution requested the Chamber to instruct the Defence to refrain from contacting Mr Rajčić at least until the Chamber had reached a decision on the Prosecution's request to recall him.[5] On the same day, the Gotovina Defence made an oral submission to call as a witness the Prosecution investigator who had contacted Mr Rajčić subsequent to the completion of his testimony on 23 February 2009.[6]

2. On 6 March 2009, the Chamber instructed the parties by way of an informal communication to refrain from contacting Mr Rajčić until further notice was given by the Chamber. On 26 March 2009, the Gotovina Defence requested the Chamber by way of an informal communication to lift its instructions to the parties to refrain from contacting Mr Rajčić.[7] On 27 March 2009, the Chamber filed a notification, requesting the Prosecution to respond to the Gotovina Defence's request.[8] In its Notification, the Chamber put on the record its instructions of 6 March 2009 and the Gotovina Defence's request of 26 March 2009.[9] On 2 April 2009, the Prosecution filed a response to the Gotovina Defence's request of 26 March 2009.[10] On that same day, the Gotovina Defence filed a request to reply to the Prosecution

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[1] T. 16980.
[2] T. 17002-17004.
[3] T. 17140.
[4] T. 17184.
[5] Ibid.
[6] T. 17186.
[7] See Notification to the Parties in Relation to the Trial Chamber's Instructions to the Parties on 6 March 2009 and Request for Prosecution to Respond, 27 March 2009 ("Notification"), Annex A.
[8] Notification, para. 4.
[9] Ibid., para. 5.
[10] Prosecution Response to Trial Chamber's Request for Prosecution to Respond to the Gotovina Defence E-mail Sent to the Chambers on 26th March 2009 in Relation to the Trial Chamber's Instructions to the Parties on 6 March 2009, 2 April 2009 ("Prosecution Response").

Response.[11] On 3 April 2009, the Chamber granted the Request to Reply and heard the reply orally in court.[12]

SUBMISSIONS

3. The Prosecution stated that pursuant to Rule 90 (H) (ii) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Defence was under an obligation to put the Jagoda Target List to Mr Rajčić during his testimony.[13] It stated that it was improper for the Defence not to do so and to later tender it by way of a bar table motion or through another witness unable to comment on the document.[14] The Prosecution further stated that the document lacked *prima facie* authenticity.[15] The Prosecution argued that significant information was missing from the document and that the document did not contain any information indicating where, when, and by whom it was created.[16] The Prosecution argued that the document should have been put to, and authenticated by Mr Rajčić who, according to them, could have testified to its authenticity and to whether in fact the document was used during Operation Storm.[17]

4. The Gotovina Defence stated that it was "not certain if [...] [it] even object[ed] to the recall of Mr Rajčić" but noted that during Mr Rajčić's testimony, he had given evidence on the operational level of firing, that is, the actual targets fired upon during Operation Storm, and not on the tactical level of firing, namely, proposed target lists, thereby suggesting that Mr Rajčić would not be able to comment on the Jagoda Target List.[18] The Gotovina Defence further argued that the Jagoda Target List was prepared by Mr Kardum, making it unclear as to whether Mr Rajčić has any personal knowledge of the document and whether he would be able to comment on it.[19] The Gotovina Defence informed the Chamber that the Prosecution was made aware on 11 December 2008 that the Jagoda Target List was in the Gotovina Defence's possession.[20]

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[11] Gotovina Defence Request to Reply to Prosecution Response to Trial Chamber's Request for Prosecution to Respond to the Gotovina Defence Email of 26 March 2009, 2 April 2009 ("Request to Reply").
[12] T. 17627-17632.
[13] T. 17004-17005, 17016.
[14] T. 17004.
[15] T. 17002-17003.
[16] Ibid.
[17] T. 17003-17005, 17012-17013, 17016-17017.
[18] T. 17006-17007, 17009, 17017, 17193.
[19] T. 17009, 17013-17014, 17193.
[20] T. 17007-17008, 17011.

5. The Gotovina Defence submitted that if Mr Rajčić were to be recalled, the Gotovina Defence would seek to call for cross-examination the investigator who on behalf of the Prosecution contacted Mr Rajčić subsequent to the completion of his testimony.[21] The Prosecution stated that the investigator who had made contact with Mr Rajčić exclusively addressed the practical and logistical aspects of his potential recalling and nothing in relation to the substance of his potential re-appearance before this Chamber.[22]

6. The Gotovina Defence requested the Chamber to lift its instructions to the parties to refrain from contacting Mr Rajčić of 6 March 2009, arguing that its inability to contact him prevents it from properly preparing its Defence case.[23]

7. On 3 April 2009, the Gotovina Defence further informed the Chamber of its intention to add Mr Rajčić to the Gotovina Defence's Rule 65 *ter* witness list.[24] The Gotovina Defence stated that depending on the developments in the defence case, it may call Mr Rajčić to give further testimony before the Chamber.[25]

8. The Prosecution further requested the Chamber to instruct the Gotovina Defence to refrain from raising matters of substance by way of e-mails to the Chamber's legal staff, as it had done on 26 March 2009 when requesting the Chamber to lift its instructions to the parties to refrain from contacting Mr Rajčić.[26]

APPLICABLE LAW

9. Pursuant to Rule 89 (B) of the Rules, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

10. In determining whether there are sufficient grounds to recall a witness, the Chamber needs to consider whether the requesting party has demonstrated good cause to recall the witness.[27] In assessing good cause, a Chamber shall consider the purpose for recalling the witness as well as the applicant's justification for not eliciting the relevant evidence from the

[21] T. 17186.
[22] T. 17185-17186.
[23] Notification, Annex A; T. 17628.
[24] T. 17630.
[25] T. 17630-17631.
[26] Prosecution Response, paras 4-6; T. 17631-17632.
[27] *Prosecutor v. Bagosora et al.*, Case no. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.

witness when he originally testified.[28] Concerns of judicial economy demand that the recalling of a witness should not be granted lightly and only where the evidence is of significant probative value and not cumulative in nature.[29]

DISCUSSION

11. In assessing whether the Prosecution has shown good cause to recall Mr Rajčić in relation to the Jagoda Target List, the Chamber notes that at the time of Mr Rajčić's testimony in February 2009, the Prosecution was not in possession of the Jagoda Target List. Although the Prosecution was informed by the Gotovina Defence in December 2008 that the Gotovina Defence was in possession of the document, the Prosecution did not, on the basis that the document was seemingly described as a "code map of targets for the Benkovac-Obrovac-Gračac area", further pursue ways to obtain the document and did not include it in its artillery document request filed on 22 January 2009.[30] Due to the inaccurate description of the document, the Chamber accepts that the Prosecution was not in a position to adequately assess the relevance of the Jagoda Target List, which, at the earliest, only became apparent to the Prosecution once the document was disclosed to it at the conclusion of witness Sinobad's examination-in-chief on 2 March 2009.

12. Taking into account Mr Rajčić's position and functions during Operation Storm, the Chamber acknowledges the possibility that Mr Rajčić might be in a position to assist the Chamber in further contextualizing the Jagoda Target List.

13. Based on the aforementioned and taking into consideration the Gotovina Defence's position in relation to the proposed recalling of Mr Rajčić, the Chamber finds that the Prosecution has shown good cause and deems it appropriate to grant the parties the opportunity to examine Mr Rajčić on the Jagoda Target List. However, considering judicial economy and the Gotovina Defence's expressed intention to call Mr Rajčić as a Defence witness, the Chamber recognizes that the scope of recalling Mr Rajčić should not be limited to the Jagoda Target List.

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[28] Ibid.
[29] Ibid.
[30] T. 17007-17008, 17011-17012; Prosecution's Motion Seeking the Production of Documents Obtained by the Gotovina Defence, 22 January 2009, para. 12 in Annex A.

14. On a related note and further to the parties' motions in relation to the War Diary of Artillery Group TS-4 ("War Diary"),[31] the Chamber acknowledges the Gotovina Defence's submissions that the War Diary goes to proof of the alleged acts and conduct of Mr Gotovina and therefore should have been tendered through a witness, allowing the Defence to properly test and contextualise the evidence through cross-examination.[32] Based on the Chamber's above reasoning, the Chamber grants the parties the opportunity, during the recall of Mr Rajčić, to also examine him on the War Diary.

15. The Chamber further grants the Prosecution and the Defence the opportunity to examine Mr Rajčić on issues arising from material disclosed to them subsequent to the completion of Mr Rajčić's testimony on 23 February 2009. In this regard, the Defence should bear in mind that Rule 90 (H) (i) of the Rules provides sufficient latitude, during cross-examination, to move into matters normally dealt with during an examination-in-chief. Hence, any party request for further examination of a witness who has already testified before this Chamber shall be dealt with by way of seeking leave to recall that witness and not by adding him or her to the requesting party's witness list.

16. In relation to the Gotovina Defence's request to the Chamber to lift its instructions to the parties to refrain from contacting Mr Rajčić until further notice is given, the Chamber notes the practice of the Tribunal to bar the parties from contacting a witness once his or her testimony has begun.[33] Considering that Mr Rajčić's re-appearance before this Chamber is tantamount to a continuation of his previous testimony, the Chamber reiterates its instructions to the parties to refrain from contacting Mr Rajčić until after his re-appearance before the Chamber. The rationale of this instruction is to avoid the risk of affecting or calling into question the integrity of the witness's pending testimony.[34]

17. The parties have not made any specifications in their submissions with regard to the timing of Mr Rajčić's recalling. Considering that a recall is procedurally a temporary re-opening of the Prosecution's case, the Chamber finds it appropriate to hear Mr Rajčić's further testimony before the opening of the Defence cases. This would also allow the parties

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[31] Rule 65 *ter* no. 7160; see Prosecution's Motion To Admit War Diary of Artillery Group TS-4 into Evidence, 10 March 2009; Defendant Ante Gotovina's Submission Regarding Rule 65 *ter* 7160 War Diary of Artillery Group TS-4, 2 April 2009 ("War Diary Gotovina Response").
[32] War Diary Gotovina Response, paras 8, 10, 15.
[33] *Prosecutor v. Kupreškić et al.*, Case no. IT-95-16-T, Decision on Communication between the Parties and their Witnesses, 21 September 1998, p. 4; *Prosecutor v. Kordić and Čerkez*, Case no. IT-95-14/2-PT, Decision on Prosecution Motion on Trial Procedure, 19 March 1999, p. 5; *Prosecution v. Delić*, Case no. IT-04-83-T, Decision on Defence Motion to Recall Witness, 4 April 2008 ("Delić 2008 Decision"), para. 7.
[34] *Cf.* Delić 2008 Decision, para. 7.

to contact Mr Rajčić during the presentation of the Defence cases. With regard to any witnesses or documents that the Defence cannot include in their Rule 65 *ter* witness and/or exhibit lists due their inability to consult with Mr Rajčić, the Chamber reminds the Defence of the possibility to request amendments of the abovementioned lists.

19. In relation to the Gotovina Defence's request to call the investigator who on behalf of the Prosecution contacted Mr Rajčić subsequent to the conclusion of his testimony, the Chamber defers its decision on this request until after it has heard from Mr Rajčić on the matter.

20. In relation to the Prosecution's request to instruct the Gotovina Defence to refrain from raising matters of substance by way of e-mails to the Chamber's legal staff, the Chamber finds that it has given sufficient guidance to the parties in the past[35] and trusts that the parties will act with the necessary prudence in the future with regard to the different modes of communicating with the Chamber and its legal staff.

DISPOSITION

21. For the foregoing reasons and pursuant to Rule 89 (B) of the Rules, the Chamber

GRANTS the Prosecution's request to recall witness Rajčić in respect of the Jagoda Target List;

ALLOWS the parties to also examine witness Rajčić with regard to the War Diary;

ALLOWS the parties to also examine witness Rajčić on any additional information disclosed to them subsequent to the initial completion of witness Rajčić's testimony;

DEFERS its decision on the Gotovina Defence's request to call and hear the testimony of the investigator who on behalf of the Prosecution and subsequent to the initial completion of witness Rajčić's testimony on 23 February 2009, contacted Mr Rajčić in relation to his potential re-appearance before this Chamber;

DENIES the Gotovina Defence's request to lift its instructions to the parties to refrain from contacting Mr Rajčić;

REITERATES its instructions to the parties to refrain from contacting Mr Rajčić until after his re-appearance before this Chamber;

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[35] T. 10826, 17091, 17630.

INFORMS the parties that Mr Rajčić's re-appearance before this Chamber will be scheduled for 25 May 2009.

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

Judge Alphons Orie
Presiding Judge

Dated this 24th day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]