

IT-06-90-T
D 25212 - D 25209
17 July 2009

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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: 17 July 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Kinis
Judge Elizabeth Gwaunza
Registrar: Mr John Hocking
Decision of: 17 July 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ČERMAK'S DEFENCE MOTION TO ADD A WITNESS TO ITS
RULE 65 TER (G) WITNESS LIST

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PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 19 June 2009, the Čermak Defence filed a motion requesting leave to add a witness to its Rule 65*ter* (G) witness list.¹ On 3 July 2009, the Prosecution filed its response, not objecting to the Motion.² Neither the Gotovina Defence nor the Markač Defence made submissions in relation to the Motion.

2. According to the Motion, the need to add the witness to the Rule 65 *ter* witness list arose as a result of further investigations by the Defence.³ The Čermak Defence argues that, at the Pre-Defence Conference on 27 May 2009, it informed the Chamber of the need for further investigations, which could not have been conducted at an earlier stage due to the late appointment of Mr Čermak's counsel, the practical problems that initially confronted the present defence team, the early start of the trial, and the size of the Prosecution's case.⁴ The Čermak Defence submits that adding Witness IC-43 would be in the interests of justice and would allow the Chamber to hear the best available evidence to determine issues in this case.⁵ The Čermak Defence further submits that the evidence to be obtained is relevant and of probative value because it directly concerns central issues of the allegations in the Indictment and is material to Mr Čermak's defence case.⁶ Finally, the Čermak Defence argues that the addition of this witness would not cause an unreasonable delay of the proceedings or place any burden on the parties at this stage of the proceedings since the start of the Čermak Defence's case has not been scheduled yet and the parties would have sufficient time to prepare for cross-examination and conduct further investigations.⁷

APPLICABLE LAW

3. Pursuant to Rule 73 *ter* (D) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Defence may, after commencement of the defence case, file a motion to vary the decision as to which witnesses may be called. The Chamber may grant any motion for an amendment to the Defence's Rule 65 *ter* witness list if satisfied that it is in the interests of

¹ Ivan Čermak's Defence Motion to Add a Witness to its Rule 65 *ter* (G) Witness List, 19 June 2009 ("Motion"), paras 1, 18.

² Prosecution's Response to Ivan Čermak's Defence Motion to Add a Witness to Its Rule 65 *ter* (G) Witness List, 3 July 2009 ("Response"), para. 2.

³ Motion, para. 12.

⁴ Motion, paras 5-12.

⁵ Motion, paras 2, 13.

⁶ Ibid.

⁷ Motion, paras 2, 17.

justice.⁸ In this respect, the Chamber must balance the accused's right to present the available evidence during its defence case with the right of the Prosecution and the co-accused to have adequate time and facilities to prepare their case.⁹ When reaching its conclusion, the Chamber must consider whether the proposed evidence is *prima facie* relevant and of probative value.¹⁰ The Chamber must further consider whether the Defence has shown good cause why it did not seek to add the witness to the list at an earlier stage of the proceedings.¹¹ 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.¹² The Chamber will further consider the burden placed on the Defence by the late addition of a witness to the Rule 65 *ter* (G) witness list.¹³

DISCUSSION

4. The evidence which is expected from the Witness IC-43 relates to the role, structure, and chain of command of the civilian police, the functioning of police administrations, and efforts undertaken to suppress crimes in the "liberated areas". The proposed witness would give evidence on the steps undertaken by him to ensure the security in Sector South. He would also provide evidence on Mr Čermak's role in respect of policing matters, his authority in the region, documents issued by Mr Čermak, and would, according to the Čermak Defence, contradict the presentation of facts by the Prosecution.¹⁴ The Chamber therefore considers Witness IC-43's evidence *prima facie* relevant and of probative value.

5. The Chamber considers that it is not due to a lack of due diligence on the part of the Čermak Defence that the request was not made at an earlier stage of the proceedings. The Chamber notes that the proposed witness agreed to be called as a witness and was in a

⁸ Reasons for the Decision on the Prosecution's Motion to Amend Its Witness List, 27 May 2008 ("27 May 2008 Decision"), para. 8; 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, 16 June 2008 ("16 June 2008 Decision"), para. 3; *Prosecutor v. Lukić and Lukić*, Decision on Defence Motions to Amend the Witness List, 3 February 2009 ("Lukić Decision"), para. 14; Reasons for the Addition of a Witness to the Prosecution's Witness List and Admission Into Evidence of Two Documents, 27 February 2009 ("27 February 2009 Decision"), para. 5.

⁹ *Prosecutor v. Popović et al.*, Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quarter*, 18 December 2008 ("Povović Decision"), para. 36; Lukić Decision, para. 15.

¹⁰ 27 May 2008 Decision, para. 8; 16 June 2008 Decision, para. 3; Lukić Decision, para. 15; Decision on Prosecution's Motion to Add a Witness to Its Rule 65 *ter* Witness List and to Add Four Witness-Related Documents to Its Rule 65 *ter* Exhibit List, 6 February 2009 ("6 February 2009 Decision"), para. 10; 27 February 2009 Decision, para. 5.

¹¹ 27 May 2008 Decision, para. 8; 16 June 2008 Decision, para. 3; Povović Decision, para. 36; Lukić Decision, para. 15; 6 February 2009 Decision, para. 10.

¹² 16 June 2008 Decision, para. 3; 6 February 2009 Decision, para. 10.

¹³ 27 May 2008 Decision, para. 8; 6 February 2009 Decision, para. 10; 27 February 2009 Decision, para. 5.

¹⁴ Motion, paras 14-15, Annex A.

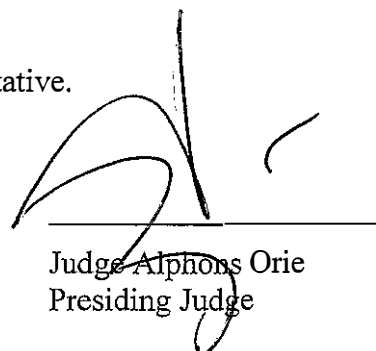
position to provide a witness statement after 4 May 2009, when the Defence filed its Rule 65 *ter* witness lists.¹⁵ At the Pre-Defence Conference of 27 May 2009, the Čermak Defence informed the Chamber of its intention to add three important witnesses to its witness list but that they had not yet been able to reach a final agreement with the envisaged witnesses and that further investigations were being conducted in relation to those three witnesses.¹⁶ The Chamber is satisfied that the relevance of the expected evidence from Witness IC-43 only recently became apparent to the Čermak Defence and that, considering the significant impact a witness statement might have on a party's decision on whether or not to request leave to amend its witness list, the Čermak Defence has shown good cause to add the proposed witness to its witness list at this stage of the proceedings.

6. The Chamber considers that none of the parties raised any objection to adding the witness at this stage. Moreover, since the Čermak Defence's case is not expected to commence until September 2009, the proposed witness will not be called to testify until that time at the earliest. The Chamber is therefore satisfied that the addition of Witness IC-43 to the Čermak Defence's witness list places a very limited burden on the Parties at this stage of the proceedings and will leave the parties adequate time and facilities to prepare their case.

7. On the basis of the foregoing, the Chamber finds that it is in the interests of justice to add the proposed witness to the Čermak Defence's Rule 65 *ter* (G) witness list and hereby:

GRANTS the Čermak Defence leave to add Witness IC-43 to its Rule 65 *ter* (G) witness list and further **ORDERS** the Čermak Defence to file an addendum to its Rule 65 *ter* (G) witness list 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 seventeenth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Motion, para. 12.

¹⁶ Motion, para. 11; T. 17732-17733.