

IT-06-90-T
D 31618 - D 31615
15 January 2010

31618 YB.



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: 15 January 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Reasons of: 15 January 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

REASONS FOR GRANTING MARKAČ DEFENCE'S MOTION TO ADD WITNESS MM-28 (RENAMED FROM MM-26) TO ITS RULE 65 *TER* (G) WITNESS LIST

Office of the Prosecutor

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 11 November 2009, the Markač Defence filed a motion requesting leave to add Witness MM-26 and Witness MM-27 to its witness list under Rule 65 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 25 November 2009, the Prosecution responded to the Motion, objecting to the addition of Witness MM-27, but not to that of Witness MM-26.² Neither the Gotovina Defence nor the Čermak Defence responded to the Motion. On 4 December 2009, the Markač Defence requested leave to reply to the Response, and replied regarding the addition of Witness MM-27.³ On 7 December 2009, the Chamber granted the Motion, in part, to add Witness MM-26, who was renamed MM-28, to the Markač Defence Rule 65 *ter* witness list, with reasons to follow.⁴ On 11 December 2009, the Prosecution made a submission in relation to the Reply.⁵ On 18 December 2009, the Markač Defence withdrew all its requests pertaining to the addition of Witness MM-27 to its Rule 65 *ter* witness list.⁶

SUBMISSIONS OF THE PARTIES

2. The Markač Defence submitted that the wish to add Witness MM-28 to its Rule 65 *ter* witness list arose as a result of further investigations.⁷ The Markač Defence also submitted that adding Witness MM-28 to its Rule 65 *ter* witness list would be in the interests of justice as her evidence would be relevant and probative, and would allow the Chamber to hear the best available evidence to determine issues in this case.⁸ According to the Markač Defence, Witness MM-28 would be able to testify on the subject of Croatia's laws on abandoned property in the Krajina during the time of the indictment.⁹ The Markač Defence submitted that it had good cause to add the witness to the list, since she agreed to testify and was in a position to provide a witness statement only after the filing of the original Rule 65 *ter* list on 4 May 2009. After the filing of the list the Markač Defence alerted, at the Pre-Defence

¹ Defendant Mladen Markač's Motion to Amend the Rule 65 *ter* (G) Witness List, 11 November 2009 ("Motion"), paras 1, 15.

² Prosecution's Response to Defendant Mladen Markač's Motion to Amend the Rule 65 *ter* (G) Witness List, 25 November 2009 ("Response"), paras 2-3, 13.

³ Defendant Mladen Markač's Reply to Prosecution's Response to Defendant Mladen Markač's Motion to Amend the Rule 65 *ter* (G) Witness List, 4 December 2009 ("Reply"), para. 2.

⁴ T. 25810-25811.

⁵ Prosecution's Response to Defendant Mladen Markač's Reply to Prosecution's Response to Defendant Mladen Markač's Motion to Amend the Rule 65 *ter* (G) Witness List, 11 December 2009, paras 2-3.

⁶ T. 26478.

⁷ Motion, paras 1, 5.

⁸ Ibid., paras 2, 7-8, 10.

⁹ Ibid., paras 8-9.

Conference on 27 May 2009, the other parties and the Chamber to possible motions to amend its witness list, in addition to which the Markač Defence had experienced a set-back in the preparation of its case due to staffing changes resulting from a Chamber decision of 27 February 2007.¹⁰ Finally, the Markač Defence submitted that the addition of Witness MM-28 to the list would not cause prejudice or delay proceedings, as the Markač Defence would not call four other witnesses on its Rule 65 *ter* list, would not require an extension of its allocated hours to present its case, and could call the witness towards the end of its case to accommodate any needs connected with cross-examination.¹¹ The Prosecution did not object to the request to add Witness MM-28 to the Markač Defence Rule 65 *ter* witness list.

APPLICABLE LAW

3. Pursuant to Rule 73 *ter* (D) of the 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 justice. In this respect, the Chamber must balance the accused's right to present the available evidence during his or her defence case with the rights of the Prosecution and the co-accused to have adequate time and facilities to prepare their cases. The Chamber will consider the burden placed on the other parties by the late addition of a witness to the Rule 65 *ter* witness list. The Chamber will also consider whether the proposed evidence is *prima facie* relevant and of probative value. The Chamber will 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. 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

DISCUSSION

4. The anticipated testimony of Witness MM-28 could provide the Chamber with further insight into Croatian laws in relation to abandoned property in the Krajina during the indictment period. Therefore, the Chamber found that the potential evidence of this witness is *prima facie* relevant and of probative value.

¹⁰ Ibid., paras 5-6.

¹¹ Ibid., paras 2, 12-14.

¹² Decision on Čermak Defence's Fourth Motion to Amend the Rule 65 *ter* (G) Witness List, 15 October 2009, para. 3, and all sources cited therein.

5. The reasons given by the Markač Defence for its late request to add Witness MM-28 to its Rule 65 *ter* witness list were not challenged by the Prosecution, and the Chamber found no reason not to accept the representations of the Markač Defence that it was not in a position to add Witness MM-28 to its Rule 65 *ter* witness list at an earlier stage of the proceedings.

6. Considering the nature of the testimony of MM-28, the fact that the appearance of the witness could be delayed until the late stages of the Markač Defence case, and that no party had opposed the addition of Witness MM-28 to the Markač Defence's Rule 65 *ter* witness list, the Chamber found that the addition of this witness would place only a limited additional burden on the other parties.

7. In conclusion, the Chamber found that it was in the interests of justice to grant the addition of the proposed Witness MM-28 to the Markač Defence's Rule 65 *ter* witness list.

DISPOSITION

8. For the foregoing reasons, the Chamber:

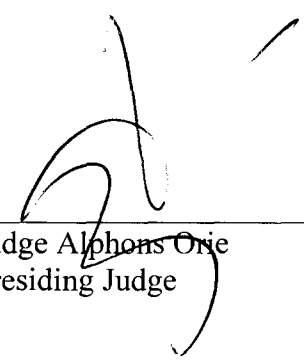
GRANTED the Motion relating to Witness MM-28;

DECLARES the Motion relating to Witness MM-27 moot;

ORDERS the Markač Defence to file an addendum relating to Witness MM-28 to its Rule 65 *ter* witness list within one week of the filing of this decision.

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

Dated this 15th day of January 2010
At The Hague
The Netherlands



Judge Alphons Orie
Presiding Judge

[Seal of the Tribunal]