

IT-06-90-T  
D34415-D34412  
16 July 2010

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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 July 2010**  
**Original: English**

**IN TRIAL CHAMBER I**

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

**Registrar: Mr John Hocking**

**Decision of: 16 July 2010**

**PROSECUTOR**

v.

**ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ**

***PUBLIC***

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**DECISION ON MARKAČ DEFENCE BAR TABLE SUBMISSIONS**

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**Office of the Prosecutor**

Mr Alan Tieger

**Counsel for Ante Gotovina**

Mr Luka Mišetić  
Mr Gregory Kehoe  
Mr Payam Akhavan

**Counsel for Ivan Čermak**

Mr Steven Kay, QC  
Ms Gillian Higgins

**Counsel for Mladen Markač**

Mr Goran Mikuličić  
Mr Tomislav Kuzmanović

## Procedural History and Submissions of the Parties

### *Motion of 15 June 2010*

1. On 20 January 2010, the Markač Defence notified the Chamber on the record that it intended to file a bar table submission on Mr Markač's medical history and records.<sup>1</sup> On 27 January 2010, the Chamber closed the Markač Defence case with the exception of some outstanding bar table submissions.<sup>2</sup> On 11 June 2010, the Markač Defence informally indicated to the Chamber's staff that because of an oversight it still had not filed the documents. On 15 June 2010, the Markač Defence filed a motion requesting admission under seal of medical documents concerning Mr Markač ("Motion of 15 June") that would be relevant to possible sentencing.<sup>3</sup> The Prosecution has not responded to the Motion of 15 June.

### *Motion of 11 June 2010*

2. On 11 June 2010, the Markač Defence announced for the first time on the record its intention to tender into evidence a document related to the surrender of the 21st Kordun Corps of the Army of the Republic of Serb Krajina.<sup>4</sup> The Prosecution objected for a procedural reason: the Markač Defence case was already closed.<sup>5</sup> The Chamber cautioned the Markač Defence that only in exceptional circumstances would the Chamber exercise its discretion to admit evidence offered by a party after the close of that party's case.<sup>6</sup> Later that day, the Markač Defence filed a motion requesting admission of a bar table document entitled "Agreement on the Surrender of the XXI Corps" ("Motion of 11 June").<sup>7</sup> The Markač Defence submitted that the document had probative value and was relevant to the alleged armed conflict.<sup>8</sup> The Markač Defence further submitted that the Prosecution took more than three months, from March to June 2010, to apprise the Markač Defence of its position on admission of the document.<sup>9</sup> The Markač Defence's only other answer to the Prosecution's procedural objection was that the Chamber could, in the interests of justice, admit any evidence that is relevant and probative.<sup>10</sup>

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<sup>1</sup> T. 27032.

<sup>2</sup> T. 27113-27114.

<sup>3</sup> Mladen Markač's Bar Table Submission, 15 June 2010, para. 1, Appendices A-C; see also T. 27059.

<sup>4</sup> T. 29000-29001.

<sup>5</sup> T. 27113-27114, 29001-29003.

<sup>6</sup> T. 29002-29004.

<sup>7</sup> Defendant Mladen Markač's Bar Table Submission, 11 June 2010, para. 1, Appendix A.

<sup>8</sup> T. 29000-29001; Motion of 11 June, para. 1.

<sup>9</sup> T. 29000-29002; Motion of 11 June, Appendix B.

<sup>10</sup> T. 29000-29001.

### Applicable Law

3. Pursuant to Rule 89 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), a Chamber may admit any relevant evidence that it deems to have probative value. Under Rule 85 (A) of the Rules, evidence at trial shall be presented in a certain sequence unless the Chamber directs otherwise in the interests of justice. Consequently, when a party seeks to admit evidence outside the sequence prescribed by Rule 85 (A) of the Rules, a Trial Chamber may exercise its discretion to admit the evidence when it is in the interests of justice.<sup>11</sup> The Chamber will exercise this discretion after the close of the tendering party's case only if there are exceptional circumstances justifying admission into evidence.<sup>12</sup>

### Discussion

#### *Motion of 15 June*

4. The Chamber finds that the medical documents have probative value and would be relevant should the Chamber impose a sentence on Mr Markač. Furthermore, the Chamber notes that the Prosecution has not objected to their admission into evidence. Given that the Chamber closed the Markač Defence case with an exception for the anticipated medical documents, their admission into evidence would be consistent with the sequence prescribed by Rule 85 (A) of the Rules. In any event, particularly considering that the documents cannot affect any aspect of the case other than the potential sentencing of Mr Markač,<sup>13</sup> the Chamber is satisfied that it is in the interests of justice to admit the medical documents into evidence even at this late stage of the proceedings.

#### *Motion of 11 June*

5. The Markač Defence announced its intention to tender, and tendered, the document entitled "Agreement on the Surrender of the XXI Corps" after the closure of its case.<sup>14</sup> Therefore, the document is being offered for admission into evidence outside the sequence prescribed by Rule 85 (A) of the Rules. Considering the Markač Defence's failure to show

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<sup>11</sup> *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 75 and note 88; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.14, Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009 ("*Prlić Decision*"), paras 23-24.

<sup>12</sup> *Prlić Decision*, para. 24; T. 28986-28987, 29002-29004.

<sup>13</sup> See T. 27060.

<sup>14</sup> The Prosecution's delay in apprising the Markač Defence of its off-the-record position on admission into evidence of the document is not relevant. In any event, the submissions before the Chamber indicate that the Markač Defence first approached the Prosecution in this regard in March 2010, after the closure of the Markač Defence case in January 2010.

any exceptional circumstances justifying admission into evidence, the Prosecution's procedural objection, and the nature and content of the document, the Chamber finds that it is not in the interests of justice to admit the document into evidence.

**Disposition**

6. For these reasons, pursuant to Rules 85 (A) and 89 (C) of the Rules, the Chamber hereby

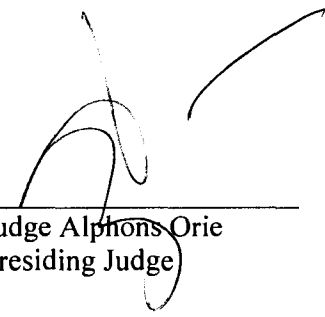
**DENIES** the Motion of 11 June;

**GRANTS** the Motion of 15 June, admitting into evidence under seal the documents contained in its Appendices A-C;<sup>15</sup>

**INSTRUCTS** the Markač Defence to upload the admitted documents into eCourt; and

**REQUESTS** that the Registrar assign an exhibit number to the admitted documents and inform the Chamber and the parties of the exhibit number so assigned.

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

  
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Judge Alphons Orie  
Presiding Judge

Dated this sixteenth day of July 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>15</sup> On 5 July 2010, the Chamber's staff notified the parties, through an informal communication, of the Chamber's decision on these motions in order to assist the parties in the preparation of their final briefs.