

IT-06-90-T  
D 9752 - D 9768  
15 May 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: 15 May 2008  
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding  
Judge Uldis Ķiniš  
Judge Elisabeth Gwaunza  
Registrar: Mr Hans Holthuis  
Decision of: 15 May 2008

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

DECISION ON PROSECUTION'S SECOND MOTION TO AMEND THE EXHIBIT  
LIST

**Office of the Prosecutor**

Mr Alan Tieger  
Mr Stefan Waespi

**Counsel for Ante Gotovina**

Mr Luka Mišetić  
Mr Gregory Kehoe  
Mr Payam Akhavan

**Counsel for Ivan Čermak**

Mr Steven Kay, QC  
Mr Andrew Cayley  
Ms Gillian Higgins

**Counsel for Mladen Markač**

Mr Goran Mikuličić  
Mr Tomislav Kuzmanović

1. On 10 March 2008, the Prosecution filed a motion requesting leave to amend the exhibit list filed on 21 February 2008 by adding 208 documents.<sup>1</sup> On 11 March 2008, the Prosecution filed an Addendum to the Motion seeking to add one additional document to the exhibit list.<sup>2</sup> The Prosecution submitted that these 209 documents are relevant, of probative value and that it is in the interests of justice that they are added to the exhibit list.<sup>3</sup> The Prosecution divided the 208 documents into three categories and accepts that it may not have shown “good cause” to add the documents from category 3.<sup>4</sup> According to the Prosecution, category 1 contains military and police documents, whilst categories 2 and 3 contain documents related to the alleged killing of Serb civilians.<sup>5</sup> The Prosecution submitted that document 209 – an order allegedly issued by the Accused Ante Gotovina on 8 September 1995 – does not fall under any of the three categories.<sup>6</sup>

2. On 19 March 2008, the Čermak Defence responded to the Motion.<sup>7</sup> It did not object to the Prosecution’s request, but made some observations concerning possible future motions by the Prosecution to amend its exhibit list.<sup>8</sup> On 20 March 2008, the Markač Defence responded to the Motion.<sup>9</sup> It submitted that the Prosecution had not shown good cause for adding the documents listed under category 3 and requested the Chamber to deny the Prosecution’s request.<sup>10</sup> It argued that addition of these documents would be contrary to the interests of justice, since it would prejudice the Accused’s right to a fair and expeditious trial, pursuant to Articles 20 and 21 of the Tribunal’s Statute.<sup>11</sup> On 25 March 2008, the Gotovina Defence responded to the Motion.<sup>12</sup> It submitted that the Prosecution demonstrated a previous lack of due diligence by seeking to add the documents at this stage of trial and that the

<sup>1</sup> Prosecution’s Second Motion to Amend the Exhibit List, 10 March 2008 (“Motion”), paras 1, 18. The Prosecution’s exhibit list was filed pursuant to Rule 65ter (E) (iii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).

<sup>2</sup> Addendum to Prosecution’s Second Motion to Amend the Exhibit List, 11 March 2008 (“Addendum”). On the same day the Prosecution filed a Corrigendum to the Addendum: *Corrigendum* to Addendum to Prosecution’s Second Motion to Amend the Exhibit List, replacing Appendix A attached to the Addendum with a new Appendix.

<sup>3</sup> Motion, para. 1; Addendum, paras 2-4.

<sup>4</sup> Motion, paras 2, 7.

<sup>5</sup> Motion, paras 2, 3-4, 6-7, 9, Appendix B to the Motion.

<sup>6</sup> Addendum, para. 4.

<sup>7</sup> Ivan Čermak’s Response to Prosecution’s Second Motion to Amend the Exhibit List, 19 March 2008.

<sup>8</sup> *Ibid.*, para. 2.

<sup>9</sup> Defendant Mladen Markač’s Response to Prosecution’s Second Motion to Amend the Exhibit List, 20 March 2008.

<sup>10</sup> *Ibid.*, paras 4-7, 9.

<sup>11</sup> *Ibid.*, para. 4.

<sup>12</sup> Defendant Ante Gotovina’s Response to Prosecution’s Second Motion to Amend the Exhibit List, 25 March 2008.

addition of these documents would infringe the right of Mr Gotovina to have adequate time and facilities to prepare for his defence.<sup>13</sup>

3. The Chamber has discretionary powers to grant a motion to amend the exhibit list, if it is satisfied that to do so would be in the interests of justice.<sup>14</sup> In exercising this discretion 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.<sup>15</sup> The Chamber must take into consideration whether the documents sought to be added are *prima facie* relevant and probative, since it is not in the interests of justice to add documents that are obviously irrelevant.<sup>16</sup> The Chamber will also consider whether good cause for amending the exhibit list has been shown.<sup>17</sup>

4. Category 1 documents relate to the persecution, forcible removal, and deaths alleged in the indictment, as well as the responsibility of the Accused and their subordinates for the alleged crimes. The Chamber is satisfied that the documents sought to be added under category 1 are *prima facie* relevant and of probative value. The documents listed under category 2 and 3 relate to the allegations set forth in Counts 1, 6, and 7 of the indictment. They mainly concern the killing of Serb civilians during Operation Storm and are relevant to show the death of several individuals. The Chamber finds that also these documents are *prima facie* relevant and of probative value. Document 209 relates to the Accused Ante Gotovina's alleged control over the military police at the time of the indictment period. The Chamber is satisfied that document 209 is *prima facie* relevant and of probative value.

5. The documents listed under category 1 came into the Prosecution's possession only after the filing of the initial exhibit list on 16 March 2007. On 20 November 2007, the Prosecution filed a motion dealing with a portion of the material received after 16 March 2007.<sup>18</sup> The documents listed under category 1 in the current Motion contain the material that has been reviewed since the filing of the 20 November 2007 motion.<sup>19</sup> Since the Prosecution

<sup>13</sup> Ibid., paras 2, 4, 6, 8, 10.

<sup>14</sup> Decision on Prosecution's Motion to Amend the Exhibit List, 14 February 2008 ("First Gotovina decision"), para. 16.

<sup>15</sup> *Prosecutor v. Rasim Delić*, Decision on Motion for Leave to Amend the Prosecution's Witness and Exhibit Lists, 9 July 2007, p. 6.

<sup>16</sup> Ibid., pp. 6-7.

<sup>17</sup> First Gotovina decision, para. 17.

<sup>18</sup> Prosecution's Motion to Amend its Exhibit List, 21 November 2007.

<sup>19</sup> Motion, para. 3.

has been diligently reviewing the material received after 16 March 2007, it has shown good cause for amending its exhibit list with respect to category 1.

6. With respect to the documents listed under category 2, the Prosecution provided a large collection of documents to the Defence in early 2007. The Prosecution explained that it provided the Defence with these documents expecting that the number of documents could be reduced either by agreement on specific facts or by a more narrow selection by the Prosecution. So far the Prosecution and the Defence have not reached agreement on the facts to which the documents listed under this category relate and the Prosecution now seeks to add 53 documents from this larger collection to the exhibit list. The Chamber finds the practice which the Prosecution followed both workable and fair. It is the Chamber's view that the Prosecution has shown good cause for amending the exhibit list with respect to category 2.

7. With respect to the documents listed under category 3, the Chamber considers that the Prosecution has not shown good cause for amending its exhibit list. The Prosecution simply overlooked this material in the preparation of its initial exhibit list. Document 209 was also left out of the Prosecution's initial exhibit list because it was overlooked.<sup>20</sup> However, the Chamber will consider whether it is nevertheless in the interests of justice to grant the Prosecution leave to add these documents to its exhibit list.

8. The primary purpose of the exhibit list is to give notice to the Defence for its preparations.<sup>21</sup> The Chamber will therefore consider the moment the 209 documents were first provided to the Defence and the extent to which the addition of these documents will create an additional burden upon the Defence. This will depend on the quantity of the material and the time required for the Defence to review the material.<sup>22</sup>

9. The documents listed under category 1 are relatively concise; most of them only consist of a couple of pages. The documents contained in category 2 mainly consist of death certificates and exhumation pictures of alleged Serb victims. These documents have been in the possession of the Defence since early 2007. It is the Chamber's view that adding the documents from categories 1 and 2 to the exhibit list will put only a limited additional burden upon the Defence.

10. All but a few of the documents listed under category 3 are death certificates and exhumation pictures. Document 209 only consists of three pages. Reviewing this material will

<sup>20</sup> Addendum, para. 4.

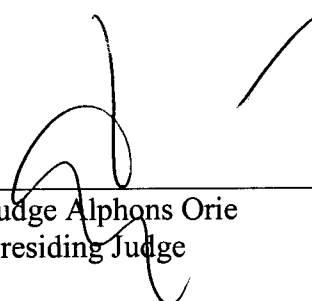
<sup>21</sup> First Gotovina decision, para. 22.

put only a limited additional burden upon the Defence. The Chamber finally considers that this trial will not be concluded in the near future and that therefore the Defence will have considerable time to assess all the new documents.

11. In balancing the duty of the Prosecution to present the available evidence to prove its case and the limited burden that the addition of these documents will place on the Accused's exercise of their rights, the Chamber concludes that it is in the interests of justice to grant the Prosecution leave to add the documents listed under categories 1, 2 and 3 and document 209 to its exhibit list.

12. For the foregoing reasons, the Chamber **GRANTS** the Motion and **ORDERS** the Prosecution to file its amended exhibit 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 15th day of May 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>22</sup> First Gotovina decision, para. 23.