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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: 2 April 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 2 April 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

REASONS FOR DECISION ON THE PROSECUTION'S MOTION TO ADMIT 28
DOCUMENTS INTO EVIDENCE AND TO ADD SEVEN DOCUMENTS AND A
VIDEO TAPE TO ITS RULE 65 TER EXHIBIT LIST

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I. PROCEDURAL HISTORY

1. On 10 February 2009, the Prosecution filed a motion to add seven documents and a video to its 65 *ter* Exhibit List, and admit 28 documents and a video tape, including those not on its 65 *ter* Exhibit List, into evidence.¹ On 13 February 2009, the Prosecution filed a corrigendum to its Motion.²

2. On 24 February 2009, the Čermak Defence responded to the Motion, objecting only to the admissibility of the video, firstly on the grounds that its contents go toward the acts and conduct of the Accused, and secondly on the grounds that it is unreliable and that its probative value is substantially outweighed by the need to ensure a fair trial.³ On the same day the Markač Defence responded to the Motion.⁴ In addition to joining the Čermak Response, the Markač Defence objected to the Motion in its entirety on three grounds.⁵ Firstly, it submitted that it would have liked to put the seven documents and video tape not on the Prosecution's 65 *ter* exhibit list to Prosecution witness Željko Žganjer, though it is was now unable to do so as the witness completed his testimony on 12 November 2008.⁶ Secondly, it argued that the Motion amounted to a prejudicially "late-stage document dump" which imposed a severe burden on the Defence case preparation.⁷ Thirdly, the Markač Defence reiterated its position that Official Notes should not be admitted into evidence on account of their inherent unreliability.⁸

3. On 26 February 2009, the Prosecution sought leave to reply to the Čermak and Markač Responses.⁹ On 27 February 2009, the Chamber decided to grant this request and informed the parties accordingly through an informal communication. On 3 March 2009, the Prosecution filed its reply firstly addressing the Čermak Response, by stating that out of court

¹ Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 10 February 2009 ("Motion").

² Corrigendum to the Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 13 February 2009.

³ Ivan Čermak's Response to Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 24 February 2009 ("Čermak Response"), paras 3,7-9.

⁴ Defendant Mladen Markač's Response to Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 24 February 2009 ("Markač Response").

⁵ *Ibid.*, paras 1-5.

⁶ *Ibid.*, para. 3.

⁷ *Ibid.*, para. 4.

⁸ *Ibid.*, para. 5.

statements of an Accused are admissible into evidence.¹⁰ The Prosecution added that there is a more than ample basis for assessing the video's provenance and reliability as the video itself, as well as other evidence before the Chamber reveals where, by whom and of whom the footage was taken.¹¹ In then addressing the Markač Response, the Prosecution stated that the date of submission of the Motion did not impose a severe burden on the Defence as most of the documents tendered were on the Prosecution's 65 *ter* list, the documents were similar to other documents already admitted into evidence, and they presented no new issues. The Prosecution added that this notwithstanding, the Defence failed to specify what the alleged prejudice arising from their admission would be.¹² The Prosecution also pointed out that the claim that Official Notes are inherently unreliable had already been addressed by the Chamber in a previous decision.¹³ Finally, the Prosecution argued that none of the seven documents not on the Prosecution's 65 *ter* list were relevant to the testimony of witness Željko Žganjer.¹⁴

4. On 4 March 2009, the Chamber issued an oral decision granting the Motion and admitting all 28 documents and the video, contained in the Motion into evidence, adding that it would give its reasons for doing so at a later date.¹⁵

II. REASONS

Addition of the seven documents and a video to the Prosecution's Rule 65 ter exhibit list

5. It is within the discretion of the Chamber to grant a motion to amend the Rule 65 *ter* exhibit list, if it is satisfied that to do so would be in the interests of justice.¹⁶ 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

⁹ Prosecution's Request for Leave to Reply to Ivan Čermak and Mladen Markač's Responses to the Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 26 February 2009.

¹⁰ Prosecution's Reply to Ivan Čermak and Mladen Markač's Responses to the Prosecution's Motion to Admit 28 Documents and a Video Tape into Evidence and to add Seven Documents and Video Tape to the Prosecution's 65 *ter* Exhibit List, 3 March 2009, paras 1-3.

¹¹ *Ibid.*, paras 4-5.

¹² *Ibid.*, para. 6.

¹³ *Ibid.*, para. 7.

¹⁴ *Ibid.*, para. 8.

¹⁵ T. 17,139.

¹⁶ Decision on Prosecution's Motion to Amend the Exhibit List, 14 February 2008 ("February 2008 Decision"), para. 16; Decision on Prosecution's Second Motion to Amend the Exhibit List, 15 May 2008 ("May 2008 Decision"), para. 3; Decision on Prosecution's Motion to Admit Documents into Evidence and to Add Two Documents to the Prosecution's Rule 65 *ter* Exhibit List, 25 November 2008 ("November 2008 Decision"), para. 9.

right to have adequate time and facilities for the preparation of their defence.¹⁷ In this respect, the Chamber considered whether the documents contained in the Motion were *prima facie* relevant and probative, whether the Prosecution had shown good cause to add the documents and the video at this stage of the proceedings, and the extent to which these items created an additional burden on the Defence.¹⁸

6. Concerning the addition of the seven documents and the video to the Prosecution's 65 *ter* exhibit list, the Chamber found that they are relevant to the charges against the Accused in that they relate to disciplinary measures within the Special Police, Mladen Markač's alleged command and control, and Ivan Čermak's alleged notice of events in Grubori. As the seven documents were issued by official sources, the majority signed by one of the Accused, and the video is made up of contemporary footage of events which took place during the indictment period, they were considered by the Chamber as having probative value.

7. The seven documents and video were received by the Prosecution between July and December 2008, directly from the Croatian Government in response to a request for assistance, and were subsequently disclosed to the Defence. The Chamber found that this constituted good cause why the Prosecution disclosed them at this late stage. Additionally, the Chamber agreed with the Prosecution that the seven documents presented no new issues, and similar documents had already been admitted into evidence.

8. With regard to the argument that the Markač Defence's would be prevented from putting any of the seven documents not on the Prosecution's 65 *ter* list to witness Željko Žganjer, the Chamber took the view that should it still wish to do so, the Markač Defence is at liberty to file a request to recall this witness in order to put these documents to him.

9. Finally, the Chamber found that approximately half of the video, including the interview of Ivan Čermak, is already in evidence as part of exhibit P2321. Furthermore, the Chamber had already ruled on the admission of footage of the nature contained in the video in question, in its decision on the admission of P2321.¹⁹ Consequently, there was no reason to believe that the new documents and video tape would create such a burden upon the Defence as to justify not allowing their addition to the list, and the Chamber found that it would be in

¹⁷ Prosecutor v. Delić, Case no. IT-04-83-PT, Decision on Motion for Leave to Amend the Prosecution's Witness and Exhibit Lists, 9 July 2007, p. 6; May 2008 Decision, para. 3; November 2008 Decision, para. 9.

¹⁸ See February 2008 Decision, para. 17; May 2008 Decision, paras 3, 8; November 2008 Decision, para. 9.

¹⁹ T. 15,933.

the interests of justice to add the seven documents and video contained in the Motion to the Prosecution's Rule 65 *ter* exhibit list.

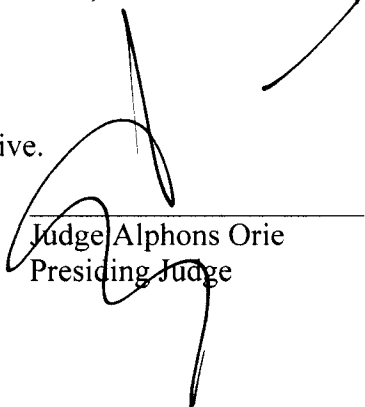
Admission of documents into evidence

10. Pursuant to Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. A party is not necessarily precluded from seeking the admission of a document even though it has not been put to a witness with knowledge of the document or its content when the witness gave testimony in court.²⁰

11. In addition to the nature of the seven documents and video, discussed above in paragraph 6, the remaining 21 documents were either produced by the Croatian Ministry of the Interior, originated from Mladen Markač, or are Official notes. While the Chamber has in a previous decision stated that it is desirable that documents are tendered for admission through witnesses who are able to comment on them,²¹ the official origin of the contemporaneous documents allowed the Chamber to establish their relevance and probative value on the basis of the documents themselves. Additionally, with regard to the Official Notes, the Chamber has already issued a decision on the matter and so dismissed the Markač Defence's arguments that they should not be admitted into evidence due to their inherent unreliability.²²

12. For the reasons given, the Chamber granted the Prosecution leave to add the seven documents and the video listed in the Motion to its Rule 65 *ter* list, and admitted all 28 documents and the video tendered in the Motion into evidence.

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


 Judge Alphons Orié
 Presiding Judge

Dated this 2nd day of April 2009
 At The Hague
 The Netherlands

[Seal of the Tribunal]

²⁰ Prosecutor v. Boškoski and Tarčulovski, Case no. IT-04-82-T, Decision on Tarčulovski Second Motion for Admission of Exhibits from the Bar Table with Annex A, 7 April 2008 ("Boškoski and Tarčulovski Decision"), para. 5.

²¹ November 2008 Decision, para. 15.

²² Decision on Admission of MUP Official Notes and Reasons for the Decision to Deny the Admission of the Official Note of Ivan Čermak, 30 January 2009.