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D 27395 - D 27387
22 September 2009

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UNITED
NATIONS



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:

22 September 2009

Original:

English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 22 September 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

**DECISION ON ČERMAK DEFENCE'S SECOND AND THIRD MOTIONS TO ADD
A WITNESS TO ITS RULE 65 TER (G) WITNESS LIST**

Office of the Prosecutor

Mr Alan Tieger
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Counsel for Ivan Čermak

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Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 17 July 2009, the Čermak Defence filed a motion requesting leave to add Witness IC-44 to its Rule 65 *ter* witness list.¹ On 30 July 2009, the Prosecution responded, objecting to the Second Motion.² Neither the Gotovina Defence nor the Markač Defence responded to the Second Motion.

2. On 23 July 2009, the Čermak Defence filed a motion requesting leave to add Witness IC-45 to its Rule 65 *ter* witness list.³ On 30 July 2009, the Prosecution responded, objecting to the Third Motion.⁴ Neither the Gotovina Defence nor the Markač Defence responded to the Third Motion.

SUBMISSIONS OF THE PARTIES

Second Motion:

3. The Čermak Defence submits that the need to add Witness IC-44 to its Rule 65 *ter* witness list arose as a result of its further investigations.⁵ The Čermak Defence also submits that, at the Pre-Defence Conference on 27 May 2009, it provided advance notice of the need for further investigations which might result in the requested addition of three witnesses.⁶ Finally, the Čermak Defence submits that adding Witness IC-44 to its Rule 65 *ter* witness list will be in the interests of justice, will allow the Chamber to hear the best available evidence to determine the issues in this case, and is significant, relevant, and of probative value because it directly concerns central issues of the allegations in the Indictment.⁷ As stated in the Čermak Defence's Second Motion, Witness IC-44 is a retired officer of the Croatian Armed Forces who worked in the Main Staff at the time of Operation Storm, and is an expert on the Croatian

¹ Ivan Čermak's Second Motion to Amend the Rule 65 *ter* (G) Witness List, 17 July 2009 ("Second Motion"), paras 1, 14.

² Prosecution's Reply [*sic*] to Ivan Čermak's Second Motion to Amend the Rule 65 *ter* (G) Witness List, 30 July 2009 ("Second Response"), para. 1.

³ Ivan Čermak's Third Motion to Amend the Rule 65 *ter* (G) Witness List, 23 July 2009 ("Third Motion"), paras 4, 13.

⁴ Prosecution's Response to Ivan Čermak's Third Motion to Amend the Rule 65 *ter* Witness List, 30 July 2009 ("Third Response"), para. 1.

⁵ Second Motion, paras 1, 5.

⁶ *Ibid.*, para. 5; Pre-Defence Conference, T. 17732-17733. Witness IC-43 was added to Ivan Čermak's Rule 65 *ter* list in the Chamber's Decision on Čermak's Defence Motion to Add a Witness to its Rule 65 *ter* (G) Witness List, 17 July 2009.

⁷ Second Motion, paras 2, 7.

Military and on events related to Operation Storm.⁸ The Čermak Defence submits that he has used his military expertise, knowledge of the NATO map reference system, and information contained in exhibits in evidence, to plot the movements of members of international organizations onto daily maps of Sector South for the period 8-31 August 1995.⁹ The Čermak Defence argues that these maps will provide the Chamber with an increased understanding of the alleged restriction of movement.¹⁰ The Čermak Defence also submits that Witness IC-44 provides a helpful analysis of the measures taken to prevent crimes by Croatian officials during and after Operation Storm.¹¹ The Čermak Defence argues that Witness IC-44 was in a position to offer the results of his expert analysis only after the completion of the Prosecution's case, the filing of the Defence's Rule 65 *ter* witness list on 4 May 2009, and receipt of both the final collection of exhibits tendered during the testimony of the Prosecution's expert witnesses and the final translations of all relevant exhibits into the language of Witness IC-44.¹² The Čermak Defence argues that the addition of Witness IC-44 will not prejudice the other parties or cause an unreasonable delay, since the start of the Čermak Defence case has not yet been scheduled and all parties are in possession of most of the documents pertaining to the expert report.¹³

4. The Prosecution objects and submits that adding Witness IC-44 would not be in the interests of justice because the Čermak Defence has not shown good cause for this late addition.¹⁴ The Prosecution submits that at the Pre-Defence Conference on 27 May 2009, the Čermak Defence made no mention of adding an expert witness or finalizing an expert report.¹⁵ The Prosecution also notes that its last witness from an international organization testified on 23 January 2009, and that the Čermak Defence has not shown what specific witnesses, documents, or outstanding translations prevented Witness IC-44 from completing his analysis in time to be added to the Defence's witness lists on 4 May 2009.¹⁶ Additionally, the Prosecution argues that the Second Motion contains no information regarding when Witness IC-44 began to analyze the materials or when the final expert report was submitted to the Čermak Defence.¹⁷ The Prosecution further submits that the Čermak Defence did not

⁸ Ibid., para. 8.

⁹ Ibid., paras 6, 9-10.

¹⁰ Ibid., para. 7.

¹¹ Ibid., para. 11.

¹² Ibid., para. 6.

¹³ Ibid., paras 12-13.

¹⁴ Ibid., para. 1.

¹⁵ Second Response, para. 5; Pre-Defence Conference, T. 17732-17733.

¹⁶ Second Response, paras 2, 4.

¹⁷ Ibid., para. 3.

establish that the proposed expert and his report are *prima facie* relevant to or probative of issues in the case.¹⁸ The Prosecution argues that the Čermak Defence does not explain how Witness IC-44's transfer of information from admitted exhibits onto maps, which requires no expertise, will assist the Chamber, particularly since the maps appear suitable either for a bar table submission or an agreement between the parties.¹⁹ The Prosecution further argues that the Čermak Defence does not explain, substantiate, or describe how Witness IC-44's analysis of Croatian crime-prevention measures is relevant to or will help in understanding disputed issues in the case.²⁰

Third Motion:

5. The Čermak Defence submits that the need to add Witness IC-45, a Rule 92 *bis* witness, to its Rule 65 *ter* witness list arose as a result of the Chamber's ordered disclosure of confidential material related to Witness IC-45 on 13 July 2009.²¹ The Čermak Defence argues that at the time of the filing of its Rule 65 *ter* witness list on 4 May 2009, it did not have access to the transcript of the witness's testimony or exhibits from the Martić trial, which were under seal.²² The Čermak Defence submits that Witness IC-45's testimony is important, relevant, and probative because it concerns central issues of the allegations in the Indictment.²³ The Čermak Defence argues that the witness's testimony regarding the crimes committed by Serbs against Croats in 1991 will show that Croats acted out of revenge against Serbs in Sector South after Operation Storm, which will thus undermine the notion of a planned joint criminal enterprise.²⁴ The Čermak Defence further argues that the addition of Witness IC-45 will not result in prejudice to any parties or delay of the proceedings as the content of the testimony is not a matter of contention and the witness will likely not need to give testimony in court.²⁵

6. The Prosecution objects and submits that the proposed evidence of Witness IC-45 lacks relevance, does not have probative value, and is unnecessarily cumulative.²⁶ Regarding relevance, the Prosecution argues that the Čermak Defence did not establish a direct

¹⁸ Ibid., paras 1, 6-7.

¹⁹ Ibid., para. 6.

²⁰ Ibid., para. 7.

²¹ Third Motion, paras 1-4, 8; Decision on Ivan Čermak's Motion for Access to Confidential Materials in the Milan Martić Case, 13 July 2009.

²² Third Motion, para. 8.

²³ Ibid., paras 9-10.

²⁴ Third Motion, para. 10, Annex A.

²⁵ Third Motion, para. 12.

²⁶ Ibid., paras 1, 4, 7.

connection between the crimes charged in the Indictment and Witness IC-45's testimony, which therefore does not tend to prove that revenge was a motive for these crimes.²⁷ The Prosecution argues that Witness IC-45's testimony has no probative value for alleged crimes in the Indictment because it will only establish the commission of certain undisputed crimes committed by Serbs against Croats in 1991.²⁸ The Prosecution further argues that the Čermak Defence's Rule 65 *ter* witness list already contains 19 witnesses whose evidence relates solely to the issue of crimes committed between 1991 and 1995 and additional testimony about the same issue will be repetitive and might delay the proceedings.²⁹ Further, the Prosecution argues that none of the other listed witnesses provide evidence of revenge being a motivation for the crimes charged in the Indictment.³⁰

APPLICABLE LAW

7. 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 justice.³¹ 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.³² 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.³³ The Chamber will also consider whether the proposed evidence is *prima facie* relevant and of

²⁷ Ibid., paras 5-7.

²⁸ Ibid., para. 6

²⁹ Ibid., para. 7.

³⁰ Ibid.

³¹ 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; Decision on Čermak's Defence Motion to Add a Witness to Add a Witness to Its Rule 65 *ter* (G) Witness List, 17 July 2009, ("17 July 2009 Decision"), para. 3.

³² *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 ("Popović Decision"), para. 36; Lukić Decision, para. 15; 17 July 2009 Decision, para. 3.

³³ 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 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.

probative value.³⁴ 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.³⁵ 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.³⁶

DISCUSSION

Second Motion:

8. The proposed testimony of Witness IC-44 identifies and transfers certain geographical information contained in admitted exhibits onto a series of daily maps in order to analyze alleged movement restrictions, and also analyzes crime prevention measures taken by Croatian officials during and after Operation Storm. In both instances, the proposed testimony may well fall within one of the areas of expertise stated by the Čermak Defence and *prima facie* supports its submission that the testimony of Witness IC-44 will assist the Chamber. The Chamber therefore accepts that the potential evidence of this witness is *prima facie* relevant and of probative value.

9. The Chamber accepts the representations of the Čermak Defence regarding Witness IC-44 not being in a position to offer the results of his analysis at an earlier stage. Therefore, the Chamber finds that the Čermak Defence has shown good cause for why it did not include Witness IC-44 in its witness list of 4 May 2009. According to the Čermak Defence, all parties are in possession of most of the documents upon which the witness relies. Additionally, when the Čermak Defence filed its Second Motion to add this witness, the beginning of the Čermak Defence case was not imminent and all parties were put on notice of this potential addition. For these reasons, and considering that no party has argued that the addition of Witness IC-44 will be particularly burdensome, the Chamber finds that the addition of this witness will place a very limited additional burden on the other parties.

10. In conclusion, the Chamber finds that it is in the interests of justice to grant the addition of the proposed Witness IC-44 to the Čermak Defence's Rule 65 *ter* witness list.

³⁴ 27 May 2008 Decision, para. 8; 16 June 2008 Decision, para. 3; Lukić Decision, para. 15; 6 February 2009 Decision, para. 10; 27 February 2009 Decision, para. 5; 17 July 2009 Decision, para. 3.

³⁵ 27 May 2008 Decision, para. 8; 16 June 2008 Decision, para. 3; Popović Decision, para. 36; Lukić Decision, para. 15; 6 February 2009 Decision, para. 10; 17 July 2009 Decision, para. 3.

³⁶ 16 June 2008 Decision, para. 3; 6 February 2009 Decision, para. 10; 17 July 2009 Decision, para. 3.

Third Motion:

11. The testimony expected from Witness IC-45 deals with crimes committed by Serbs against Croats in 1991. Its proposed introduction is in support of the notion that Croats acted against Croatian Serbs after Operation Storm out of revenge for those earlier attacks. While the witness's potential testimony does involve acts outside of the Indictment area and period, it could form one link in a chain of evidence suggesting an alleged revenge motive as a reasonable alternative explanation to the joint criminal enterprise allegations in the Indictment, and the Chamber therefore finds that the potential testimony is *prima facie* relevant and probative.

12. The Chamber notes that at the time the Čermak Defence filed its witness list it had not yet received disclosure of information that led it to identify Witness IC-45 as a potential witness. Therefore, the Chamber accepts that the Čermak Defence has shown good cause for why it did not include IC-45 in its witness list of 4 May 2009. Considering that the details of IC-45's testimony are unlikely to be contentious and that no party has argued that the addition of Witness IC-45 will be particularly burdensome, the Chamber finds that the addition of this witness will place a very limited additional burden on the other parties.

13. In conclusion, the Chamber finds that it is in the interests of justice to grant the addition of the proposed Witness IC-45 to the Čermak Defence's Rule 65 *ter* witness list.

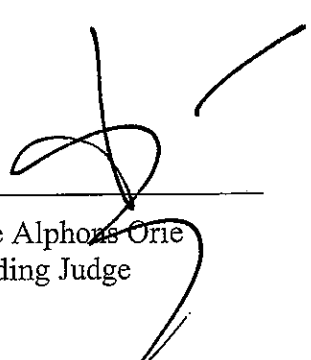
14. For the foregoing reasons, the Trial Chamber:

GRANTS the Second Motion;

GRANTS the Third Motion;

ORDERS the Čermak Defence to file addenda 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.



Judge Alphons Orie
Presiding Judge

Dated this 22nd day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]