

IT-06-90-T
017312-017306
25 November 2008

17312
sc



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: 25 November 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 25 November 2008

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO ADMIT DOCUMENTS INTO
EVIDENCE AND TO ADD TWO DOCUMENTS TO THE PROSECUTION'S RULE
65 TER 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 5 August 2008, the Prosecution filed a motion requesting the Chamber to admit into evidence forensic documents relating to the collection and burial of human remains of persons allegedly killed during and after Operation Storm, and for leave to add two documents to the Rule 65 *ter* exhibit list.¹ The Defence filed a joint response to the Motion on 26 August 2008, objecting to the admission of the forensic documents, but not to the addition of the two documents to the Rule 65 *ter* exhibit list.²

Submissions

2. The Prosecution seeks to add two documents to its Rule 65 *ter* exhibit list; one is a list of bodies which the Prosecution received in July 2007, while the other is a list of identified individuals, which was omitted from the Prosecution's Rule 65 *ter* exhibit list due to oversight.³ Both documents are included in Appendix E of the Motion and they are referred to in Appendices B and D, respectively.⁴

3. The Prosecution divides the proposed documents sought for admission into evidence into two categories. Category 1 contains contemporaneous identification forms and photographs of bodies found and collected in August and September 1995 by the Ministry of the Interior of the Republic of Croatia ("MUP") and lists of names of persons to whom those bodies belong, prepared by MUP officials (Appendices A and B).⁵ Category 2 contains exhumation records composed by a Prosecution team and by a team from the Republic of Croatia with regard to remains found in the Knin cemetery and in the Gračac cemetery, respectively (Appendices C and D).⁶ The Prosecution submits here and in its Further Clarification on Identity of Victims ("Further Clarification"), that the documents are relevant to the alleged killing of hundreds of Serb civilians in the Indictment area during August and September 1995, specifically to the allegations in Count 1 (persecution, including by murder) and Counts 6 and 7 (murder) of the Indictment.⁷ According to the Prosecution, the documents in Appendices A and B are relevant to show the systematic collection of large numbers of bodies by the Croatian authorities, their burial in common locations, and the reporting of this

¹ Prosecution's Motion to Admit Documents into Evidence and to Add Two Documents to the Prosecution's Rule 65 *ter* Exhibit List, 5 August 2008 ("Motion"), paras 1, 4.

² Joint Defence Response to Prosecution's Motion to Admit Documents into Evidence and to Add Two Documents to the Prosecution's Rule 65 *ter* Exhibit List, 26 August 2008 ("Response"), paras 2, 16-17.

³ Motion, paras 21-22.

⁴ Motion, para. 23, Appendices B, D, E.

⁵ Motion, para. 3.

⁶ Motion, para. 3.

⁷ Motion, paras 13-15. See Further Clarification, 17 July 2008.

information to senior Croatian authorities.⁸ The forensic documents in Appendices C and D, the Prosecution submits, reveal the methodology of the burial and identification of bodies in the aftermath of Operation Storm, link the contemporaneous documentation on the collection and burial of bodies to the later exhumation and examination of these same remains, and are relevant for the purpose of establishing the identity and cause of death of many of the victims.⁹ Additionally, the Prosecution submits that these documents demonstrate the absence of forensic examinations, until 2001, of the remains of individuals allegedly killed during or after Operation Storm.¹⁰

4. In addition to being relevant, the Prosecution submits that the documents contain indicia of authenticity and reliability that satisfy the threshold for admission, as they are official records produced by Croatian or international authorities, many of which were obtained through official requests for assistance to the Croatian authorities.¹¹ The exhumations at the Knin cemetery were conducted by an expert forensic team from the Office of the Prosecutor (“OTP”) and those at the Gračac cemetery were conducted by an expert forensic team assembled by the Republic of Croatia and monitored by an expert team from the OTP.¹² Both exhumations were followed by forensic examinations of the remains at the Šalata mortuary in Zagreb.¹³ Further, Appendix D contains identifying information obtained by the Republic of Croatia Government Office for Missing and Detained Persons from the Forensic and Criminology Institute of the Medical Faculty in Zagreb.¹⁴

5. The Prosecution acknowledges that a number of the documents contained in the Appendices have already been admitted into evidence, yet submits them now in order to provide the Chamber and the Defence with a comprehensive list of documents under each category, organized in a manner that connects the documents to individual victims listed in the Schedule to the Indictment and the Further Clarification.¹⁵

6. In their Response, the Defence object to the admission into evidence of the documents in Appendices A-D of the Motion.¹⁶ They submit that almost all of the documents in Appendix B, authored by Ivica Cetina, the Chief of the Zadar-Knin Police Administration,

⁸ Motion, para. 16.

⁹ Motion, para. 20.

¹⁰ Motion, para. 20.

¹¹ Motion, paras 7-8.

¹² Motion, para. 10.

¹³ Motion, para. 10.

¹⁴ Motion, para. 12.

¹⁵ Motion, para. 6.

¹⁶ Response, para. 2.

and addressed to the MUP Povratak command staff, have been tendered from the bar table by the Čermak Defence and have already been admitted into evidence.¹⁷ The Defence submit that the documents not yet in evidence should be more appropriately tendered through witnesses scheduled to testify.¹⁸ Moreover, they submit that the additional “decedents” in Appendices A-D are not “victims” under Rule 2 of the Rules of Procedure and Evidence (“Rules”), as the Prosecution, in their Motion, refers to the “killing” of hundreds of civilians, but does not state that they were murdered.¹⁹

7. Further, the Defence argue that granting the Motion would violate the Defendant’s fundamental rights guaranteed by Articles 20 and 21 of the Tribunal’s Statute, because the Prosecution requests the admission of documents relevant to the 189 persons identified in the Further Clarification,²⁰ which is contested by the Defence and for which, at the time of the Defence Response, a decision was still pending.²¹

8. The Defence do not object to the addition of the two documents in Appendix E of the Motion to the Prosecution’s Rule 65 *ter* exhibit list.²²

Applicable Law

9. 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.²³ 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.²⁴ In this respect, the Chamber will consider whether the documents in Appendix E are *prima facie* relevant and probative, whether the Prosecution has shown good cause to add the documents at this stage, and the extent to which the new documents create an additional burden on the Defence.²⁵

¹⁷ Response, paras 2, 13.

¹⁸ Response, paras 2, 15.

¹⁹ Response, paras 4, 6-8.

²⁰ Further Clarification, 17 July 2008, Annex C, “Amended Schedule 2”.

²¹ Response, paras 2, 9-12.

²² Response, para. 16. The Defence refers to “Appendix F” of the Motion but as the Motion contains no such Annex the Chamber understands the Defence’s submission to refer to Appendix E, which contains the two additional documents.

²³ Decision on Prosecution’s Motion to Amend the Exhibit List, 14 February 2008 (“February Decision”), para. 16; Decision on Prosecution’s Second Motion to Amend the Exhibit List, 15 May 2008 (“May Decision”), para. 3.

²⁴ *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 Decision, para. 3.

²⁵ February Decision, para. 17; May Decision, paras 3, 8.

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.²⁶

Discussion

Addition of two documents to the Rule 65 ter exhibit list

11. Concerning the addition of the two documents in Appendix E of the Motion, *i.e.*, the list of bodies and a list of identified individuals, to the Rule 65 *ter* exhibit list, the Chamber finds that they are *prima facie* relevant to the allegations of persecution and murder in Counts 1, 6 and 7 of the Indictment. Because the documents were issued by official sources, including the Croatian MUP, and expert forensics teams assembled by the OTP and the Croatian Government, they are considered as having *prima facie* probative value.

12. The Prosecution received the first document, the list of bodies, sometime in July 2007, after its filing of the initial Rule 65 *ter* exhibit list on 16 March 2007. However since that date, the Prosecution has filed two motions to amend its Rule 65 *ter* exhibit list which were granted by the Chamber on 14 February 2008 and 15 May 2008.²⁷ The Prosecution did not seek the addition of the document in either of those motions and no explanation was offered for its failure to do so. As for the second document, the list of identified individuals, the Prosecution states that it was previously omitted due to oversight. Therefore, the Chamber does not find any good cause shown for the Prosecution's delay in filing the documents. Nonetheless, the Defence do not oppose the addition of these two documents to the Rule 65 *ter* exhibit list, and the Chamber does not find any reason to believe that the new filings will create such a burden upon the Defence as to justify not allowing their addition to the list at this time. The Chamber therefore finds that it is in the interests of justice to add the two documents in Appendix E of the Motion, to the Rule 65 *ter* exhibit list.

Admission of documents into evidence

13. Concerning the Defence submission that the Prosecution has improperly identified the individuals contained in the documents proposed for admission as victims, while the

²⁶ *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.

²⁷ February Decision; May Decision.

Chamber finds no improper use of the term victim, it notes that the burden of proving that the deceased persons were killed by murder remains with the Prosecution.

14. The Chamber considers that the documents referred to in Appendices A-D of the Motion relate to the death of persons during and immediately following Operation Storm and are therefore relevant to the Indictment allegations contained in Count 1 (persecution, including by murder), and Counts 6 and 7 (murder). It is also satisfied that the Prosecution has demonstrated the probative value of the proposed evidence which consists of contemporaneous records provided by the Republic of Croatia and expert teams assembled by the Republic of Croatia and the OTP.

15. As has been set out in the jurisprudence of this Tribunal, “[i]t is desirable that documents are tendered for admission through witnesses who are able to comment on them”.²⁸ This allows for proper contextualization of the documents without which the Chamber is left to determine relevance and probative value primarily on the basis of the documents alone.²⁹ With regard to the documents referred to in Appendices A-D of the Motion, the Chamber considers this to be a rare instance in which the relevance and probative value can be established on the basis of the documents themselves.

16. With regard to the Defence submission that they have not received proper notice of the alleged killing victims contained in the additional evidence, the Chamber notes that this issue was decided upon in the recent Decision on the Joint Defence Motion to Strike the Prosecution’s Further Clarification, filed on 9 October 2008.³⁰

17. For the forgoing reasons, the Chamber;

GRANTS the request to add two documents to the Prosecution’s Rule 65 *ter* exhibit list;

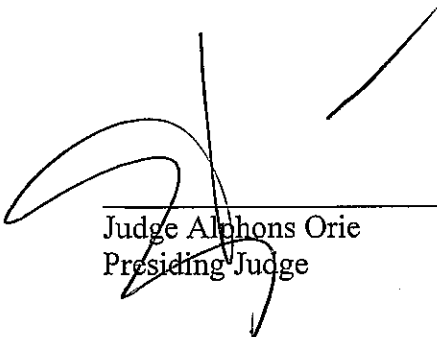
ADMITS into evidence those documents referred to in Appendices A-D of the Motion that have not already been admitted into evidence;

INSTRUCTS the Prosecution to provide the Registrar with a list of these documents and the Registrar to assign exhibit numbers to them and to inform the parties of the exhibit numbers so assigned.

²⁸ Boškoski and Tarčulovski Decision, para. 5.

²⁹ See *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution’s Motion to Tender Documents on Its Rule 65 *ter* Exhibit List, 30 November 2007.

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



Judge Alphons Orie
Presiding Judge

Dated this 25th day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁰ Decision on the Joint Defence Motion to Strike the Prosecution's Further Clarification of Victims, filed 9 October 2008, paras 12, 15.