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D 29025 - D 29022
15 October 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: 15 October 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 15 October 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ČERMAK DEFENCE'S FOURTH MOTION TO AMEND THE RULE
65 TER (G) WITNESS LIST

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Mr Tomislav Kuzmanović

PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 16 September 2009, the Čermak Defence filed a motion requesting leave to add Witness IC-46 to its Rule 65 *ter* witness list.¹ On 30 September 2009, the Prosecution responded, not opposing the Fourth Motion.² Neither the Gotovina Defence nor the Markač Defence responded to the Fourth Motion.
2. The Čermak Defence submits that the need to add Witness IC-46 to its Rule 65 *ter* witness list arose as a result of its further investigations.³ 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, of whom Witness IC-46 is the third.⁴ According to the Čermak Defence, adding Witness IC-46 to its Rule 65 *ter* witness list will be in the interests of justice, and will allow the Chamber to hear relevant and probative evidence, as well as the best available evidence, on certain issues in this case.⁵ As stated in the Fourth Motion, Witness IC-46 was involved with human hygiene and sanitation and will provide evidence on, among other things, the sanitation of the terrain in Knin in the wake of Operation Storm, the burial of deceased persons in the Knin cemetery, and the cooperation with members of the Civilian Protection team.⁶ The Čermak Defence submits that the witness will provide evidence contradicting the presentation of facts by the Prosecution.⁷ The Čermak Defence also argues that Witness IC-46 will provide evidence that General Čermak was neither responsible for, nor in command of, the units who were cleaning the terrain.⁸ The Čermak Defence submits that addition of Witness IC-46 will not demand any further time allocation to the Čermak Defence case or cause unreasonable delay. Finally, the Čermak Defence submits that the addition of Witness IC-46 will not prejudice the other parties since the witness could be scheduled to appear late in the Čermak Defence case.⁹

¹ Ivan Čermak's Fourth Motion to Amend the Rule 65*ter*(G) Witness List, 16 September 2009 ("Fourth Motion"), paras 1, 15.

² Prosecution's Response to Defendant Ivan Čermak's Fourth Motion to Amend the Rule 65 *ter* (G) Witness List, 30 September 2009, para. 2.

³ Fourth Motion, paras 1, 5-7.

⁴ *Ibid.*, para. 5.

⁵ *Ibid.*, paras 2, 8.

⁶ *Ibid.*, paras 9-11.

⁷ *Ibid.*, para. 10.

⁸ *Ibid.*, para. 11.

APPLICABLE LAW

3. Pursuant to Rule 73 *ter* (D) of the Tribunal's Rules of Procedure and Evidence, 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.¹⁰ In this respect, the Chamber must balance the accused's right to present the available evidence during his or her defence case with the rights of the Prosecution and any co-accused to have adequate time and facilities to prepare their cases.¹¹ 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.¹² The Chamber will also consider whether the proposed evidence is *prima facie* relevant and of probative value.¹³ 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.¹⁴ 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.¹⁵

DISCUSSION

4. The anticipated testimony of Witness IC-46 could provide the Chamber with further insight into the system of sanitation of the terrain in Knin and the role of Ivan Čermak, if any,

⁹ *Ibid.*, paras 2, 12-14.

¹⁰ 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 Its Rule 65 *ter* (G) Witness List, 17 July 2009 ("17 July 2009 Decision"), para. 3; Decision on Čermak Defence's Second and Third Motions to Add a Witness to its Rule 65 *ter* (G) Witness List, 22 September 2009 ("22 September 2009 Decision"), para. 7.

¹¹ *Prosecutor v. Popović et. al.*, Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*, 18 December 2008 ("Popović Decision"), para. 36; Lukić Decision, para. 15; 17 July 2009 Decision, para. 3; 22 September 2009 Decision, para. 7.

¹² 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; 17 July 2009 Decision, para. 3; 22 September 2009 Decision, para. 7.

¹³ 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; 22 September 2009 Decision, para. 7.

¹⁴ 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; 22 September 2009 Decision, para. 7.

¹⁵ 16 June 2008 Decision, para. 3; 6 February 2009 Decision, para. 10; 17 July 2009 Decision, para. 3; 22 September 2009 Decision, para. 7.

in this respect. Therefore, the Chamber finds that the potential evidence of this witness is *prima facie* relevant and of probative value.

5. The Chamber accepts the representations of the Čermak Defence regarding not being in a position to add Witness IC-46 to its Rule 65 *ter* witness list at an earlier stage of the proceedings due to continuing investigations. Therefore, the Chamber finds that the Čermak Defence has shown good cause for why it did not include Witness IC-46 in its Rule 65 *ter* witness list of 4 May 2009.

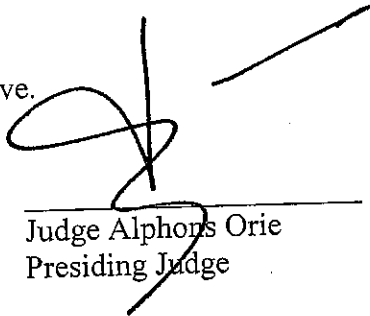
6. Considering the nature of the testimony of Witness IC-46, that the witness is scheduled to appear late in the Čermak Defence case, and that no party has opposed the addition of Witness IC-46 to the Rule 65 *ter* witness list, the Chamber finds that the addition of this witness will place only a limited additional burden on the other parties.

7. In conclusion, the Chamber finds that it is in the interests of justice to grant the addition of the proposed Witness IC-46 to the Čermak Defence's Rule 65 *ter* witness list.

DISPOSITION

8. For the foregoing reasons, the Chamber **GRANTS** the Fourth Motion and **ORDERS** the Čermak Defence to file an addendum 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 fifteenth day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]