

IT-06-90-T
D34424-034417
16 July 2010

34424
SMS



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: 16 July 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 July 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE GOTOVINA BAR TABLE SUBMISSION

Office of the Prosecutor

Mr Alan Tieger

Counsel for Ante Gotovina

Mr Luka Mišetić
Mr Gregory Kehoe
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 19 April 2010, the Gotovina Defence filed a bar table submission requesting that the 14 documents identified in the attached Appendix A be admitted into evidence (“Request”).¹ On 3 May 2010, the Prosecution responded, stating that it had no objection to the admission of the documents listed as items 1 to 11 of Appendix A of the Request and asked that the entire case file in relation to item 8 be admitted together with these eleven documents (“Prosecution Response”).² The Prosecution further objected to the admission into evidence of items 12 to 14.³ On 4 May 2010, the Gotovina Defence sought leave to reply to the Prosecution Response (“Request for Leave to Reply”).⁴ On 6 May 2010, the Prosecution filed an objection to the Request for Leave to Reply.⁵ Also on 6 May 2010, the Gotovina Defence further responded in support of the Request for Leave to Reply (“Further Response”).⁶ On the same day, the Chamber granted the Request for Leave to Reply, and informed the parties accordingly through an informal communication. On 7 May 2010, the Prosecution filed a further submission in response to the Further Response (“Prosecution’s Submission”).⁷ Also on 7 May 2010, the Gotovina Defence responded to the Prosecution’s Submission (“Response to Prosecution’s Submission”).⁸ On 10 May 2010, the Gotovina Defence filed its reply in support of the Request and withdrew item 14 of the Request (“Reply”).⁹ On 11 June 2010, the Chamber announced its decision admitting into evidence items 1 to 13 of Appendix A of the Request and denying the admission of the entire case file for item 8 tendered in the Prosecution Response, with a written decision to follow.¹⁰ On the same day, the parties stipulated to a matter in relation to item 8.¹¹ On 12 July 2010, the Chamber requested the Registry through an informal communication to assign exhibit numbers to the admitted documents. On the same day, the Registry filed a memo assigning

¹ Gotovina Bar Table Submission, 19 April 2010, para. 1, Appendix A.

² Prosecution Response to Gotovina Bar Table Submission Filed on 19 April 2010, 3 May 2010, paras 1-4, 6, Appendix A.

³ Prosecution Response, paras 1, 5-6.

⁴ Gotovina Defence Motion for Leave to Reply to the Prosecution Response to the Gotovina Bar Table Submission, 4 May 2010.

⁵ Prosecution’s Objection to Gotovina Defence Motion for Leave to Reply to Prosecution Response to Gotovina Bar Table Submission Filed on 19 April 2010, 6 May 2010.

⁶ Gotovina Defence Response to Prosecution Objection to Gotovina Defence Motion for Leave to Reply, 6 May 2010.

⁷ Prosecution Submission Regarding Gotovina Defence Response to Prosecution Objection to Gotovina Defence Motion for Leave to Reply, 7 May 2010.

⁸ Ante Gotovina’s Response to Prosecution’s “Submission” of 7 May 2010, 7 May 2010.

⁹ Reply in Support of Gotovina Bar Table Submission of 19 April 2010, 10 May 2010, para. 23.

¹⁰ T. 28983-28984.

¹¹ T. 28984-28986, 29005-29007.

exhibit numbers D2158, D2159, D2160, D2161, D2162, D2163, D2164, D2165, D2166, D2167, D2168, D2169, and D2170 to the admitted documents.¹²

SUBMISSIONS OF THE PARTIES

(i) Bar Table Documents Items 1 to 11

2. The Gotovina Defence submits that items 1 to 11 of the Request form the underlying information to Exhibit D1783, and that the Chamber had requested this information.¹³ The Gotovina Defence submits that these documents demonstrate that investigations were carried out on bodies discovered during and after Operation Storm in circumstances where investigation was warranted.¹⁴ The Gotovina Defence wishes to tender these documents in order to contradict the Prosecution's contention that a decision was made by the MUP in Zagreb (Exhibit D235) to conduct human sanitation of all bodies discovered, without investigation.¹⁵

3. The Prosecution does not object to the admission of these eleven documents.¹⁶

(ii) Bar Table Document Item 12

4. The Gotovina Defence submits that CLSS's translation of exhibit P461 improperly attributes the word "tobože" to the wrong word.¹⁷ The Gotovina Defence seeks the admission of item 12, an academic article ("the Tobože Article"), in order to provide further discussion on the the use of the term "tobože".¹⁸ Because the Chamber's 20 January 2010 order to CLSS to verify certain portions of Exhibit P461 in which the word "tobože" is used and CLSS's subsequent translation were both issued after the conclusion of the Defence cases, the Gotovina Defence argues that it should be allowed to provide additional relevant evidence in response to CLSS's translation.¹⁹ The Gotovina Defence also points out that as item 12 was not prepared for the purposes of proceedings at the Tribunal, it is admissible under Rule 89 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules").²⁰

¹² Corrigendum to Internal Memo Assignment of Exhibit Numbers Pursuant to the Oral Decision dated 11 June 2010, 12 July 2010.

¹³ Request, Appendix A; see T. 24115.

¹⁴ Request, Appendix A.

¹⁵ Ibid.

¹⁶ Prosecution Response, paras 1-2, 6.

¹⁷ Reply, para. 21.

¹⁸ Request, Appendix A.

¹⁹ Reply, para. 22.

²⁰ Ibid.

5. In response, the Prosecution objects to item 12's admission submitting that there is no justification for seeking to re-open the Defence case to tender this article as evidence at this stage of the proceedings.²¹ The Prosecution adds that if the Gotovina Defence seeks to present evidence in the form of academic or expert analysis it should have called testimony on this issue during the Defence's case-in-chief.²² The Prosecution also disputes the probative value of the article.²³

(iii) Bar Table Document Item 13

6. Item 13 contains a set of orders cited by Witness Theunens in his expert report (Exhibit P1113).²⁴ The Gotovina Defence argues that this is the document upon which both Witness Theunens and the Prosecution rely to support their allegations against Gotovina.²⁵ The Gotovina Defence submits that the Chamber is obliged to review this document to determine whether Witness Theunens's conclusion is supported by it.²⁶ It is further submitted by the Gotovina Defence that allowing the position that every item of Witness Theunens's report not specifically challenged on cross-examination is deemed admitted as evidence, results in an improper shifting of the burden of proof onto the Accused.²⁷

7. The Prosecution submits that the Defence has not sought to rely on this document either during the testimony of Witness Theunens or in its case-in-chief.²⁸ The Prosecution further argues that, if the Gotovina Defence seeks to tender this document for impeachment purposes, the Defence could and should have presented it to the witness and tendered it during cross-examination of Witness Theunens.²⁹

(iv) Bar Table Document Item 8 – Prosecution's "Rebuttal" Evidence

8. With regard to item 8, the Prosecution proposes that the entire case file, which includes the document tendered by the Gotovina Defence under item 8, be admitted into evidence, if need be as rebuttal evidence.³⁰ The Prosecution submits that the case file is relevant to rebutting the Gotovina Defence assertion that investigations were carried out.³¹ According to the Prosecution, this rebuttal evidence shows that, although an examination was

²¹ Prosecution Response, para. 5.

²² Ibid.

²³ Ibid.

²⁴ Request, Appendix A.

²⁵ Reply, para. 12.

²⁶ Reply, paras 12 (footnote 11), 15.

²⁷ Reply, paras 13-14.

²⁸ Prosecution Response, para. 5.

²⁹ Ibid.

³⁰ Prosecution Response, paras 3-4, 6.

³¹ Prosecution Response, para. 4.

performed on 8 August 1995, no other action was taken until 2006, at which time the case file was actually opened.³²

9. In response, the Gotovina Defence objects to the submission of the entire case file.³³ The Gotovina Defence submits that there is simply nothing to “rebut” because all parties are in agreement that an investigation was conducted on 8 August 1995.³⁴ As the Gotovina Defence makes no other claims about the investigation, the rest of the case file is immaterial to the Request.³⁵ The Gotovina Defence further submits that there is no attempt by the Prosecution to meet the standard for the admission of rebuttal evidence.³⁶

(v) Additional submissions

10. In the Response to Prosecution’s Submission, the Gotovina Defence requests that the Chamber strike the Prosecution’s Submission as it was filed in violation of Rule 126 *bis* of the Rules and in violation of the Chamber’s prior order to the parties.³⁷ In addition, the Gotovina Defence requests that the Chamber further admonish the Prosecution to abide by its prior oral order in compliance with Rule 126 *bis* of the Rules.³⁸

APPLICABLE LAW

11. Under Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value.

12. Rule 85 (A) (iii) of the Rules provides for the presentation of rebuttal evidence. The jurisprudence of the Appeals Chamber establishes that rebuttal evidence must relate to a significant issue arising out of a particular piece of defence evidence which could not reasonably have been anticipated.³⁹ The Prosecution may not call rebuttal evidence merely

³² Prosecution Resposne, para. 3.

³³ Reply, para. 5.

³⁴ Reply, paras 5, 7.

³⁵ Reply, para. 5.

³⁶ Reply, para. 7.

³⁷ Response to Prosecution’s Submission, paras 2-4.

³⁸ Response to Prosecution’s Submission, para. 4.

³⁹ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 273. This definition has been followed in numerous instances including most recently *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Further Decision on Prosecution’s Motion to Admit Evidence in Rebuttal and to Reopen Its Case, confidential, 27 March 2009, para. 95 (with other references cited therein).

because its case has been met by contradicting evidence,⁴⁰ or in order to reinforce its case-in-chief.⁴¹

DISCUSSION

13. At the outset, in relation to the two filings of 7 May 2010, the Chamber reminds the parties of the proper procedure for filing responses and replies set in Rule 126 *bis* of the Rules. Furthermore, the requirement to seek leave from the Chamber before replying should not be circumvented by labelling filings ‘submissions’ or ‘addenda’. With this guidance, the Chamber considers the requests of the Response to Prosecution’s Submission dealt with.

14. Items 1 to 11 of Appendix A of the Request underlie Exhibit D1783, and were subject of an inquiry by the Chamber.⁴² For this reason, the Chamber will exceptionally consider their admission into evidence at this stage of the proceedings, namely, after the closure of the Gotovina Defence’s case-in-chief. The documents provide the Chamber with additional information regarding the extent of the investigations performed following the discovery of dead bodies during and after Operation Storm. As this information forms part of the investigative case files for the incidents reported in D1783 by the Šibenik Police Administration, the Chamber finds the documents listed as items 1 to 11 to be both relevant and of probative value.

15. The translation of certain portions of Exhibit P461 (“Brioni Transcript”) in which the word “tobože” is used was completed only recently.⁴³ For this reason, the Chamber will exceptionally consider the admission into evidence of item 12 of Appendix A of the Request at this stage of the proceedings, namely, after the closure of the Gotovina Defence’s case-in-chief. Item 12 is an academic article that was not prepared for the purposes of proceedings at the Tribunal, and accordingly the Chamber finds that its admission is governed by Rule 89 (C) of the Rules. The article provides further context in assisting the Chamber in understanding the usage of the word “tobože”. The Chamber is mindful that the article is not specific to the use of the word “tobože” in the context of the Brioni Transcript, but finds it to provide reliable academic insight. For these reasons, the Chamber finds item 12 to be a

⁴⁰ *Čelebići Appeal Judgement*, para. 275.

⁴¹ *Prosecutor v. Kordić and Čerkez*, Case No IT-94-14/2-T, T. 26647. See also *Prosecutor v. Galić*, No. IT-98-29-T, Decision on Rebuttal Evidence, 2 April 2003, p. 3 and *Prosecutor v. Mrksić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution’s Motion to Admit Evidence in Rebuttal, confidential, 28 December 2006, para. 4.

⁴² T. 24115.

⁴³ See T. 28485-28488.

relevant and probative document. The Chamber further emphasizes that its admission is no indication of the weight, if any, which the Chamber may ultimately attach to this document.

16. With regard to item 13 of Appendix A to the Request, the Chamber recalls its previous guidance on the expert report, addendum, and testimony of Witness Theunens (“Guidance Decision”).⁴⁴ Therein, the Chamber recognised the length, broad-scope, and complexity of the expert report and its addendum.⁴⁵ The underlying documents of the report are also numerous. In the Guidance Decision, the Chamber invited the Defence to address the Chamber in relation to any issues that may arise from documents referenced in Witness Theunens’s expert report.⁴⁶ Considering the volume of the expert report and the Chamber’s willingness to accommodate the Defence by inviting submissions on the underlying documentation, the Chamber will exceptionally consider item 13’s admission into evidence at this stage of the proceedings, namely, after the closure of the Gotovina Defence’s case-in-chief. The Chamber finds that item 13 provides additional information on the participation of the 134th Home Guard Battalion in Operation Ljeto-95. This is relevant to the assertion that during Operation Ljeto-95 the 134th Home Guard Battalion was involved in the widespread commission of crimes, and that Gotovina was aware of this. As a set of official military orders the Chamber is also satisfied that item 13 has probative value.

17. With regard to the admission of the entire case file for item 8, the Chamber considers that what the Prosecution wished to illustrate was not in dispute, namely that following initial investigations on the discovered bodies on 8 August 1995 no further action was taken until 2006. This was confirmed in court on 11 June 2010 and all parties joined in this stipulation. The Prosecution also submitted the entire case file, in the alternative, as rebuttal evidence showing what investigative actions were taken in relation to one of the victims on the Prosecution’s Further Clarification of Victims. The Chamber considered the Prosecution’s contention that the case file was not available during the Prosecution’s case-in-chief but found that it had not properly argued or demonstrated the requirements for admission of rebuttal evidence. Accordingly, the Chamber found no reason to admit into evidence the entire case file of item 8.

⁴⁴ Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008.

⁴⁵ Guidance Decision, para. 21.

⁴⁶ Guidance Decision, paras 22, 31-32.

DISPOSITION

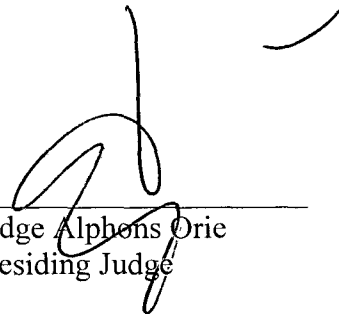
For the foregoing reasons, and pursuant to Rule 89 (C) of the Rules, the Chamber

GRANTS the Request;

ADMITS into evidence items 1 to 13 of Appendix A of the Request;

DENIES admission of the entire case file of item 8 in “rebuttal” by the Prosecution.

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



Judge Alphons Orie
Presiding Judge

Dated this sixteenth day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]