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S/r



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-08-91-T

Date: 1 February 2011

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Burton Hall, Presiding  
Judge Guy Delvoie  
Judge Frederik Harhoff

**Registrar:** Mr. John Hocking

**Decision of:** 1 February 2011

**PROSECUTOR**

v.

**MİĆO STANIŠIĆ AND STOJAN ŽUPLJANIN**

***PUBLIC***

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**DECISION GRANTING PROSECUTION'S MOTION ON  
PROOF OF DEATH DATABASE**

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**The Office of the Prosecutor**

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## I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. Trial Chamber II (“Trial Chamber”) of the 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 (“Tribunal”) is seised of the “Prosecution’s motion to add proof of death database to its 65 *ter* exhibit list and to tender it into evidence with confidential annexes A and B”, filed publicly on 23 July 2010 (“Motion”) with two confidential annexes (respectively, “Motion Annex A” and “Motion Annex B”, and together “Motion Annexes A and B”), as amended by the “Prosecution’s notice of compliance with the Trial Chamber’s directives relating to the proof of death consolidated hyperlinked spreadsheet, with confidential annexes A and B”, filed publicly with two confidential annexes on 14 January 2011 (“Notice”), whereby the Prosecution seeks leave to substitute the Consolidated Hyperlinked Spreadsheet (“CHS”) in Annex A to the Notice for Motion Annexes A and B, to add the CHS to its Rule 65 *ter* exhibit list and to tender it into evidence.
2. On 4 August 2010, the Stanišić Defence and the Župljanin Defence (collectively, “Defence”) responded jointly opposing the Motion (“Joint Response”).<sup>1</sup>
3. On 10 August 2010, the Prosecution sought leave to reply and replied to the Joint Response arguing that the Trial Chamber “would be assisted by a concise submission addressing the main points raised by the Defence” (“Reply”).<sup>2</sup>
4. On 17 September 2010, the parties made oral submissions on the matter (“Defence Joint Oral Submission”<sup>3</sup> and “Prosecution Oral Submission”).<sup>4</sup> The Defence, *inter alia*, requested the Prosecution to disclose additional information related to the Motion (“Request for Underlying Material”),<sup>5</sup> and cited Tribunal jurisprudence relevant to issues contested by the parties.<sup>6</sup> The Prosecution also provided a list of authorities.<sup>7</sup>
5. On 2 December 2010, the Stanišić Defence made new submissions on the matter (“Stanišić

<sup>1</sup> Joint Defence response to Prosecution’s motion to add proof of death database to its 65 *ter* exhibit list and to tender it into evidence with confidential annexes A and B, 4 Aug 2010.

<sup>2</sup> Prosecution’s motion for leave to reply and reply to Joint Defence response to Prosecution’s motion to add proof of death database to its 65 *ter* exhibit list and to tender it into evidence with confidential annexes A and B, 10 Aug 2010, para. 2.

<sup>3</sup> The Župljanin Defence adopted the Stanišić Defence submission and, in this sense, the Trial Chamber considers the Stanišić Defence submissions as a joint submission from counsel of both Accused. See T. 14832-14833.

<sup>4</sup> Hearing, 17 Sep 2010, T. 14824 onwards.

<sup>5</sup> Hearing, 17 Sep 2010, T. 14831.

<sup>6</sup> Email to legal officer, 17 Sep 2010 and Defence Joint Oral Submission, T. 14828.

<sup>7</sup> Email to legal officer, 17 Sep 2010 and Prosecution Oral Submission, T. 14838.

Second Oral Submission”),<sup>8</sup> and informed the Trial Chamber that “on 18 October, in batch 151, the Prosecution provided the Defence, in an electronic format, the documentation which allegedly contained the requested information.”<sup>9</sup> It further informed the Trial Chamber that it “is not prepared nor is it able to stipulate to the facts contained in the OTP’s exhumation database.”<sup>10</sup>

6. At the status conference of 15 December 2010 (“Status Conference”), the Defence indicated that as a result of the Request for Underlying Material the Prosecution had provided the Defence with a “spreadsheet with the hyperlinks to the alleged underlying documents” (“hyperlinked spreadsheet”).<sup>11</sup> On the same day and in response to the Trial Chamber’s request conveyed by its Senior Legal Officer, the Prosecution provided the Trial Chamber with the Hyperlinked Spreadsheet.<sup>12</sup>

7. On 17 December 2010, the Trial Chamber directed the Prosecution to provide by 3 January 2011 a consolidated hyperlinked spreadsheet which, *inter alia*, should consolidate the different categories of information contained in Motion Annexes A and B (“Directions”).<sup>13</sup> On 22 December 2010, the Trial Chamber provided further instructions to the Prosecution via email from its Legal Officer (“Further Instructions”).

8. On 23 December 2010, Judge Árpád Prandler, Duty Judge of the Tribunal, granted the Prosecution an extension of time and ordered the Prosecution to comply with the Directions as amended by the Further Instructions by 12 January 2011.<sup>14</sup> On 12 January 2011, the Trial Chamber granted the Prosecution an additional extension of time until 14 January 2011, on which date the Notice was filed.<sup>15</sup>

9. On 25 January 2011 the Defence filed a joint response to the Notice. While the Trial Chamber notes that the Rules of Procedure and Evidence (“Rules”) do not contemplate responses to a notice, given that new elements were introduced by the Prosecution in the Notice, the Trial Chamber accepts the response volunteered by the Defence (“Joint Response to Notice”).<sup>16</sup>

<sup>8</sup> Hearing, 2 Dec 2010, T. 18091 onwards. The Župljanin Defence did not indicate whether it joins the Stanišić submission.

<sup>9</sup> Stanišić Second Oral Submission, T. 18093.

<sup>10</sup> Stanišić Second Oral Submission, T. 18096.

<sup>11</sup> Status Conference, 15 Dec 2010, T. 18486-18487.

<sup>12</sup> Status Conference, 15 Dec 2010, T. 18499.

<sup>13</sup> Directions to the Prosecution with regard to its motion to add proof of death database, 17 Dec 2010.

<sup>14</sup> Decision on Prosecution’s urgent motion seeking variation of the deadline in relation to the proof of death database, 23 Dec 2010.

<sup>15</sup> Hearing, 12 Jan 2011, T. 18698-18699.

<sup>16</sup> Joint Defence response to Prosecution’s notice of compliance with the Trial Chamber’s directives relating to the proof of death consolidated hyperlinked spreadsheet, with confidential annexes A & B, filed with confidential annexes, 25 January 2011.

10. On 27 January 2010, the Prosecution, with the leave of the Trial Chamber, orally replied to the Joint Response to Notice (“Reply to Joint Response to Notice”).<sup>17</sup>

## II. SUBMISSIONS

### 1. Motion

11. The Prosecution submits that it has a directory where “information from a variety of sources is collated in order to prove the death of a person”.<sup>18</sup> The sources of this directory include “autopsy reports, BiH State Commission for Tracing Missing Persons Reports, Court Records of Exhumations, Court Records of Post Mortem Examinations, ICRC Missing Persons Reports, Death certificates, Court declarations of death and witness statements.”<sup>19</sup> The Prosecution submits that it “has extracted from this directory the relevant information pertaining to this case”,<sup>20</sup> and prepared Annexes A and B of the Motion:

- Annex A contains a spreadsheet called “SZ Victim Report”,<sup>21</sup> which is “a list of the relevant exhumation sites in each Indictment municipality together with the number of bodies found and the names of those victims who have been identified.”<sup>22</sup> The Prosecution has highlighted in green the names of the victims who are contained in the confidential annex to the indictment.
- Annex B contains a spreadsheet which lists the supporting documentation from its directory for those victims listed in the confidential annex to the indictment and “additional information such as the date of the exhumation and cause of death (if known)”.<sup>23</sup>

12. The Prosecution submits that it is in the interests of justice to add Motion Annexes A and B to its Rule 65 *ter* exhibit list,<sup>24</sup> and that they are “relevant and summarise, *inter alia*, the 58 documents the Prosecution has sought to withdraw and the portions of the OTP database relevant to this case”.<sup>25</sup> It also submits that their addition will not prejudice the Accused’s right to a fair trial as “the Defence have known since February 2010 that the Prosecution would seek to add its

<sup>17</sup> Hearing, 27 Jan 2011, T. 19254-19255.

<sup>18</sup> Motion, para. 4.

<sup>19</sup> Motion, para. 4.

<sup>20</sup> Motion, para. 5.

<sup>21</sup> Motion, para. 5.

<sup>22</sup> Motion, para. 5. The Prosecution further indicates that “the names highlighted in green are contained in the Confidential Annex to the Indictment” and that the “victims whose whereabouts remain unknown are listed separately”.

<sup>23</sup> Motion, para. 6.

<sup>24</sup> Motion, para. 11.

<sup>25</sup> Motion, para. 11. Referring to 58 documents related to exhumations which the Prosecution withdrew “in reliance on its upcoming motion seeking to replace autopsy reports and court records of exhumations by a summary database”.

exhumation database to its Rule 65*ter* list.”<sup>26</sup> The Prosecution notes in this context that despite “repeated attempts to settle the issue of exhumations with the Defence, no agreement has been reached.”<sup>27</sup> The Prosecution states that it had to update its directory “with the exhumation reports received in the last 12 months, including numerous reports from the exhumation of Koričanski Stijene which only occurred in the summer of 2009”,<sup>28</sup> which was a “time-consuming and detailed exercise”.<sup>29</sup>

13. The Prosecution submits that Motion Annexes A and B are reliable and relevant as they prove that the persons named in the confidential annex to the indictment have died.<sup>30</sup> It argues that their admission into evidence through a bar table motion “will expedite the proceedings and enable the trial time to be used for witness testimony on other matters more directly linked to the culpability of the Accused.”<sup>31</sup>

## 2. Joint Response

14. The Defence oppose the admission of Annex A and B. They argue that Annex A “lists 3031 names (compared to 1445 names listed in Schedule A and Schedule B of the Indictment)”<sup>32</sup> and that it contains the following “anomalies and missing information”:<sup>33</sup>

- The alleged victim is not named in the indictment;<sup>34</sup>
- The alleged death is not attributed to the indictment;
- The alleged date of death is outside the indictment period;<sup>35</sup>
- There is no alleged date of death or disappearance;<sup>36</sup>
- The alleged date of death conflicts with the allegation contained in the indictment;
- The name of the alleged victim’s father is not provided;
- The date of birth of the alleged victims is not provided;
- The first name of the alleged victim is not provided;
- Alleged victims identified as being listed in a particular Schedule of the Indictment are not

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Prosecution’s consolidated list of exhibits pursuant to Rule 65 *ter*, 28 Jun 2010, para. 8.

<sup>26</sup> Motion, para. 11.

<sup>27</sup> Motion, para. 11.

<sup>28</sup> Motion, para. 11.

<sup>29</sup> Motion, para. 11.

<sup>30</sup> Motion, para. 14.

<sup>31</sup> Motion, para. 15.

<sup>32</sup> Joint Response, para. 2.

<sup>33</sup> Joint Response, para. 3.

<sup>34</sup> See also Defence Joint Oral Submission at T. 14824, where the Defence state that the Prosecution claims at item 9.4 of the Annex to Indictment that “two unidentified men are victims” and at item 14.4 of the Annex to Indictment that there are “about 150 [*sic*] persons whose identity is unknown to the Prosecution or cannot be verified by the Prosecution at this point in time”.

<sup>35</sup> See also Defence Joint Oral Submission at T. 14825, where the Defence state that the SZ Proof of Death Database “contains 80 persons whose date of death falls outside of the scope of the time-period relevant to the indictment”.

<sup>36</sup> See also Defence Joint Oral Submission at T. 14825, where the Defence state that the SZ Proof of Death Database does not “even have a date of death in the case of 582 persons”.

included in those Schedules;

- The whereabouts of the alleged victims are unknown.<sup>37</sup>

15. The Defence further submit that the Prosecution “has never approached the Accused with any offer or proposal concerning the exhumation database”.<sup>38</sup> They argue that it was not until the Wednesday before the summer recess that “the Prosecution sent Annex A and Annex B to the Accused by email for review”<sup>39</sup> and that the Prosecution “two days later [...] filed the Motion.”<sup>40</sup> The Defence contend that “[h]aving never been presented with a complete exhumation database from the Prosecution, there is no basis on which to make an assessment on potential agreement”.<sup>41</sup>

### 3. Reply

16. The Prosecution replies that the Defence submission that the Prosecution has never disclosed the underlying material is incorrect and provides some examples of “the disclosure that has been made over the course of the past few years on the issue of exhumations and proof of death”.<sup>42</sup>

17. The Prosecution submits that it “has been mindful of overburdening the Defence with thousands of pages of material”.<sup>43</sup> It states that it had at an unspecified time in the past offered to disclose the documentation to the Defence but that “the Defence did not take up this offer”.<sup>44</sup> In any event, the Prosecution asserts that the Defence was aware of the Prosecution’s intention to seek to admit the database into evidence since at least 4 February 2010, when the Prosecution raised this issue in court.<sup>45</sup> On this basis, in addition to “discussions between Counsel about the database”, the Prosecution considers that “it is disingenuous for the Defence to now claim that they were never approached by the Prosecution in relation to this issue.”<sup>46</sup>

<sup>37</sup> See also Defence Joint Oral Submission at T. 14825, where the Defence state that “for a total of 862 persons, their whereabouts are stated as ‘unknown’”.

<sup>38</sup> Joint Response, para. 4.

<sup>39</sup> Joint Response, para. 4.

<sup>40</sup> Joint Response, para. 4.

<sup>41</sup> Joint Response, para. 4.

<sup>42</sup> Reply, paras 3-4, where the Prosecution notes that 58 documents were on the Prosecution’s Rule 65 *ter* exhibit list (referring to Motion, para. 2 and fn 3), that on 25 February 2008 the Prosecution disclosed “a list of supporting documentation relating to the exhumation of human remains from various gravesites, prepared by exhumation expert Alison Kipp”, that “[o]n 29 February 2008 the Prosecution disclosed further source material from the Proof of Death database in the form of court records, autopsy reports and death certificates”, that “[o]n 1 September 2009 the Prosecution disclosed numerous documents and materials from the International Commission on Missing Persons which had been updated and provided to the OTP for other cases” and that “[o]n 1 September 2009 the Prosecution disclosed numerous documents and materials from the International Commission on Missing Persons which had been updated and provided to the OTP for other cases”.

<sup>43</sup> Reply, para. 4.

<sup>44</sup> Reply, para. 5.

<sup>45</sup> Reply, para. 7.

<sup>46</sup> Reply, para. 9.

18. With regard to the Defence submission that Motion Annex A contains anomalies and missing information, the Prosecution replies that it “has never suggested that the [confidential annex to the indictment] is comprehensive or that the information in the database is complete for each victim.”<sup>47</sup> The Prosecution maintains that “the information available is sufficiently reliable to justify the victim being placed on the database.”<sup>48</sup>

#### 4. Defence Joint Oral Submission

19. The Defence submit that they have identified “as many as 1.795 persons whose names are not to be found in any of the annexes to the indictment”.<sup>49</sup> They argue that “each new victim is a new allegation of crime” and “a material fact that must be stated in the indictment in a timely manner with sufficient detail provided.”<sup>50</sup> In support of these submissions, the Defence cited a decision of the *Krnjelac* Trial Chamber and the *Kvočka* Appeal Judgement.<sup>51</sup>

20. The Defence further argue that “there was no preliminary announcement to the effect that the Prosecution was intending to amplify or add to the indictment by introducing new victims.”<sup>52</sup> The Defence submit that the indications found in the confidential annex to the indictment do not “as such make clear the intention of the Prosecutor to add new victims”.<sup>53</sup> Therefore, the Defence “has not been able to mount any sort of investigation or prepare itself until [...] the 22<sup>nd</sup> of July this year.”<sup>54</sup> The Defence submit that it is “difficult to accept that during the entire investigation [...] there had been a total of 1.443 persons listed in the Annex to the Indictment” and that “no less than 18 years after those persons allegedly went missing or were killed, we have an additional 1.795 victims”.<sup>55</sup>

21. The Defence submit that “amending an indictment in this way at such a late stage in the proceedings leaves the Defence at a distinct disadvantage, simply because [they] have no time to verify these allegations.”<sup>56</sup> The Defence submit that in order to do that the Defence “would have to cease all other preparations for this trial”. Moreover, the Defence argue that the information

<sup>47</sup> Reply, para. 10.

<sup>48</sup> Reply, para. 12.

<sup>49</sup> Defence Joint Oral Submission, T. 14825.

<sup>50</sup> Defence Joint Oral Submission, T. 14826.

<sup>51</sup> Defence Joint Oral Submission, T. 14827-14828 citing *Prosecutor v. Krnjelac*, Case No. IT-97-25-PT, Decision on preliminary motion on form of amended indictment, 11 Feb 2000, para. 54; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 Feb 2005, para. 67.

<sup>52</sup> Defence Joint Oral Submission, T. 14826.

<sup>53</sup> Defence Joint Oral Submission, T. 14826.

<sup>54</sup> Defence Joint Oral Submission, T. 14826.

<sup>55</sup> Defence Joint Oral Submission, T. 14825. The Defence also state at T. 1426-1427 that the Prosecution “had this information long before the information was disclosed to [the Defence].”

<sup>56</sup> Defence Joint Oral Submission, T. 14827.

available cannot be verified, for example by interviewing witnesses who have already testified.<sup>57</sup>

22. The Defence further submit that Motion Annexes A and B “have a duplication of victims in various incidents” and that “for the purpose of a criminal trial, this renders the database unusable”.<sup>58</sup> The Defence also submit that some of the sources used to create Motion Annexes A and B lack objectivity, referring, as examples, to the “Sarajevo Household Survey”,<sup>59</sup> the “Muslims against Genocide 2002 list”<sup>60</sup> and the “Book of Missing Persons, Prijedor”.<sup>61</sup>

#### 5. Prosecution Oral Submission

23. The Prosecution emphasised that it has “from the beginning, told the Defence that [it] will at any stage supply them with the underlying information relating to the deaths which are in the schedules and in the database”<sup>62</sup> and that “if there is any suggestion that we have deliberately withheld that information, then we reject that”.<sup>63</sup>

24. The Prosecution further submitted that while “the Defence is entitled to challenge each and every name”, it would considerably extend the length of the proceedings to call every witness from which the relevant evidence is to be elicited.<sup>64</sup>

25. The Prosecution also cited jurisprudence<sup>65</sup> in support of its submission that the extra names contained in the database are not “material averments in the indictment”<sup>66</sup> and that they do not constitute a new allegation but rather “further detail [...] of the names of those we say died at the various killings”.<sup>67</sup>

#### 6. Stanišić Second Oral Submission

26. The Stanišić Defence submits that the Prosecution has received databases from various sources “which it simply copies [...] without comparing [...] and without verifying”.<sup>68</sup> It submits that, therefore, “there is a certain number of duplicates for the same victims received from different

<sup>57</sup> Defence Joint Oral Submission, T. 14827.

<sup>58</sup> Defence Joint Oral Submission, T. 14830.

<sup>59</sup> Defence Joint Oral Submission, T. 14830.

<sup>60</sup> Defence Joint Oral Submission, T. 14830.

<sup>61</sup> Defence Joint Oral Submission, T. 14830.

<sup>62</sup> Prosecution Oral Submission, T. 14834

<sup>63</sup> Prosecution Oral Submission, T. 14835.

<sup>64</sup> Prosecution Oral Submission, T. 14835.

<sup>65</sup> *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-PT, Decision on joint Defence motion to strike the Prosecution’s further clarification of identity of victims, 9 Oct 2008, paras 11-12 (“*Gotovina Decision*”); *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on objections by Momir Talić to the form of the amended indictment, 20 Feb 2001, paras 18-19.

<sup>66</sup> Prosecution Oral Submission, T. 14836-14838.

<sup>67</sup> Prosecution Oral Submission, T. 14838.



sources”.<sup>69</sup> The Stanišić Defence also submits that these sources “only very rarely provide the Prosecution with documents on the basis of which these entries were made”.<sup>70</sup> Moreover, the Defence asserts that a “significant number of [...] data is entered on the basis of witness statements which the Prosecution heard during the years of investigations.” In its view, a consequence of “such an approach is the further duplication of victims, because [...] this data is not compared with data received from other sources.”<sup>71</sup>

27. The Defence reiterated its submissions from the Defence Joint Oral Submission with regard to whether “each new victim is a new allegation of crime” and “a material fact that must be stated in the indictment in a timely manner with sufficient detail provided” by referring to additional relevant case law.<sup>72</sup>

## 7. Notice

28. The Prosecution submits that the CHS is “in conformity with the Trial Chamber’s directives and instructions”<sup>73</sup> and provides a number of “comments and observations” with regard to the CHS,<sup>74</sup> *inter alia*:

- The CHS includes new supporting documents for victims originally listed in the indictment, such as ICMP databases, newly obtained autopsy reports, identification records for the municipality of Bosanski Šamac, and evidence from witnesses who testified after the filing of the Motion.<sup>75</sup>
- Documents which are not provided in English have never been translated “as in earlier cases the underlying evidence was not challenged”.<sup>76</sup>
- Where multiple and varying documentation is provided from different sources pertaining to the same victim “such entries do not indicate any discrepancy” but rather that some sources may possess more accurate information for the same victim.<sup>77</sup>
- The CHS includes references to statements or testimony of witnesses currently or previously

<sup>68</sup> Stanišić Second Oral Submission, T. 18094.

<sup>69</sup> Stanišić Second Oral Submission, T. 18094.

<sup>70</sup> Stanišić Second Oral Submission, T. 18094.

<sup>71</sup> Stanišić Second Oral Submission, T. 18094-18095.

<sup>72</sup> Stanišić Second Oral Submission, T. 18096.

<sup>73</sup> Notice, paras 2 and 5.

<sup>74</sup> Notice, para. 3.

<sup>75</sup> Notice, para. 5(g).

<sup>76</sup> Notice, para. 5(h).

<sup>77</sup> Notice, paras 6-7.

on the Prosecution's Rule 65 *ter* witness list,<sup>78</sup> as well as statements of witnesses who were never on the Prosecution's Rule 65 *ter* witness list.<sup>79</sup>

29. The Prosecution further submits that searches are still ongoing and that it will inform the Trial Chamber and the Defence when these are complete.<sup>80</sup>

30. The Prosecution has removed some names of victims, listed in Annex B, due to duplication.<sup>81</sup>

#### 8. Joint Response to the Notice

31. The Defence requested that the Trial Chamber deny the Prosecution request to add the CHS to its Rule 65 *ter* list and to admit it into evidence.<sup>82</sup> Following a review of the Notice and the CHS, the Defence note that they "identified many shortcomings, errors, varying and diverging information, and non compliance with the Directions."<sup>83</sup> Specifically, the Defence highlight the following:

- the "proposed addition of 328 names which cannot be found in any of the annexes to the indictment";<sup>84</sup>
- "131 names with no database, underlying or supporting documents";<sup>85</sup>
- "1283 names with no date of death";<sup>86</sup>
- "674 names with no date of disappearance";<sup>87</sup>
- "651 names with no date of death and no date of disappearance";<sup>88</sup>
- "109 names are linked to databases, with no underlying or supporting documents";<sup>89</sup>
- descriptions of the contents are not provided "for each document or item";<sup>90</sup> and
- documents in the CHS "are not translated into a working language of the Tribunal."<sup>91</sup>

<sup>78</sup> Notice, para. 8.

<sup>79</sup> Notice, para. 9.

<sup>80</sup> Notice, para. 10.

<sup>81</sup> Notice, para. 11 and Annex B.

<sup>82</sup> Joint Response to Notice, p. 4.

<sup>83</sup> Joint Response to Notice, para. 3.

<sup>84</sup> Joint Response to Notice, para. 4.

<sup>85</sup> Joint Response to Notice, para. 6.

<sup>86</sup> Joint Response to Notice, para. 6.

<sup>87</sup> Joint Response to Notice, para. 6.

<sup>88</sup> Joint Response to Notice, para. 6.

<sup>89</sup> Joint Response to Notice, para. 6.

<sup>90</sup> Joint Response to Notice, para. 7.

32. The Defence assert they have been prejudiced “by this cumbersome, unfair, and inadequate approach to disclosing material to them and the short period since the filing of the Notice [...] during which they were required to review and respond to it.”<sup>92</sup>

33. In addition, the Defence urge the Trial Chamber to “disregard the assertion that ‘statements’ which were never on the Rule 65ter list and which were never disclosed to the Accused can be considered for any purpose in these proceedings.”<sup>93</sup> Further, the Defence request that the Trial Chamber “disregard the assertion that the Prosecution is undertaking searches where no information exists for named individuals.”<sup>94</sup>

34. The Defence concludes that the CHS should neither be added to the Prosecution’s Rule 65 *ter* nor admitted into evidence on the following basis: (1) “the inadequacy of the information provided in the *Notice*, demonstrate [*sic*] that the CHS does not contain relevant evidence under Rule 89 (C)”, (2) “its probative value is substantially outweighed by the need to ensure a fair trial under Rule 89(D)”, and (3) “the indictment [...] is limited temporally and geographically”.<sup>95</sup>

#### 9. Oral Reply to Joint Response to Notice

35. The Prosecution first notes that under Rule 73, the Notice was not a motion, and therefore, “the Defence have no right to respond under the rules.”<sup>96</sup> The Prosecution further notes “mistakes of fact contained in the response.”<sup>97</sup> Specifically, the Prosecution point out that, contrary to the Defence assertion, it was not directed to translate the documents in the database.<sup>98</sup> Further, the Prosecution submits that the Notice does not contain for each document or item a brief description of its contents because “to give a totally full description of each and every one of the documents in there [*sic*] would have taken months.”<sup>99</sup>

36. Finally, the Prosecution reiterates that it has, “at one of the earliest Status Conferences or 65 *ter* indicated [its] intention to put in a database,” that it “invited the Defence at any stage to inspect the documents,” and that it has “always said if this was not accepted, [it would] call evidence”.<sup>100</sup>

<sup>91</sup> Joint Response to Notice, para. 8.

<sup>92</sup> Joint Response to Notice, para. 3.

<sup>93</sup> Joint Response to Notice, para. 9. The Defence argue that “[t]here is no Rule or any other legal basis to offer or to rely on these ‘statements’.”

<sup>94</sup> Joint Response to Notice, para. 10

<sup>95</sup> Joint Response to Notice, para. 12.

<sup>96</sup> Oral Reply to Joint Response to Notice, T. 19254.

<sup>97</sup> Oral Reply to Joint Response to Notice, T. 19254.

<sup>98</sup> Oral Reply to Joint Response to Notice, T. 19255.

<sup>99</sup> Oral Reply to Response to Notice, T. 19255.

<sup>100</sup> Oral Reply to Joint Response to Notice, T. 19256.

The Prosecution concluded its remarks stating that “[it] will not -- depending on the ruling, close [its] case if that is the effect of it, without calling the evidence which is available to [it].”<sup>101</sup>

### III. APPLICABLE LAW

37. The Trial Chamber may grant any motion for an amendment to the Prosecution’s Rule 65 *ter* exhibit list if satisfied that to do so is in the interests of justice. Factors that may be taken into account in assessing the interests of justice include: (1) whether the Prosecution has shown good cause for the proposed addition and (2) has exercised due diligence; (3) the *prima facie* relevance and importance of the documents; (4) the possibility of undue delay in proceedings; (5) the repetitive or cumulative nature of the documents; (6) the stage of the proceedings; and (7) whether the Defence would suffer undue prejudice as a result of the amendment.<sup>102</sup> In this respect, the Trial 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.<sup>103</sup>

38. Admission of evidence from the bar table is a practice established in the case-law of the Tribunal.<sup>104</sup> Evidence may be admitted from the bar table if it fulfils the requirements of Rule 89, specifically that the item proposed for admission into evidence has sufficient reliability, relevance and probative value in respect of issues in the case.<sup>105</sup> The Trial Chamber recalls that it has previously held that tendering documents through bar table motions at the end of a party’s case is a safety clause designed to ensure that documents, which for one reason or another could not be tendered through a witness, can still be included in the trial record.<sup>106</sup> The tendering party must still demonstrate, with clarity and specificity, the relevance of each document and where and how it fits into the party’s case.<sup>107</sup> However, even when the requirements of Rule 89 are satisfied, the Chamber retains discretionary power over the admission of the evidence.

<sup>101</sup> Oral Reply to the Joint Response to Notice, T. 19256.

<sup>102</sup> *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on motion for leave to amend Prosecution’s list of witnesses, 29 Aug 2008 (“*Lukić Decision*”), paras 24-25; *Prosecutor v. Prlić et al.*, Case No. IT-04-81-T, Decision on motion to amend witness and exhibit list, 16 Jan 2008, pp. 5-6; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on appeals against decision admitting material related to Borovčanin’s questioning, 14 Dec 2007, paras 37-38.

<sup>103</sup> *Lukić Decision*, para. 23.

<sup>104</sup> See, for example, *Prosecutor v. Karadžić*, Case No. IT-95-5/18/T, Decision on the Prosecution’s first bar table Motion, 13 Apr 2010 (“*Karadžić Decision*”), para. 5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s motion for admission of exhibits from the bar table, motion to amend the bar table motion, and oral motion for admission of additional exhibits, 14 Mar 2008 (“*Popović Decision*”), para. 15.

<sup>105</sup> *Karadžić Decision*, para. 5; *Popović Decision*, para. 15; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s motion to re-open the case and exceed the word limit and second motion to admit exhibits from the bar table, 7 Dec 2009, para. 4 (“*Đorđević Decision*”); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Defence motions for admission of documents from the bar table, 11 Jun 2008 (“*Milutinović Decision*”), para. 7.

<sup>106</sup> Hearing, 26 Nov 2009, T. 3878.

<sup>107</sup> *Karadžić Decision*, para. 6; *Đorđević Decision*, para. 4; *Milutinović Decision*, para. 10.

## IV. DISCUSSION

### A. Addition of the CHS and the underlying material provided to the Rule 65 *ter* exhibit list

39. The Trial Chamber recalls that it invited the parties during the pre-trial stage to reach agreement on, *inter alia*, facts related to the crime-base and welcomed the parties' initiative to reach an agreement specifically on exhumations and the number of victims in the present case.<sup>108</sup> Agreements of this kind were encouraged in view of the nature of the present case with two high-level Accused far removed from the crime-base. In this context, it is recalled that as early as 29 February 2008, as part of the Rule 92 *bis* package of the exhumations witness Alison Kipp, the Prosecution had tendered a statement providing details about the creation of a proof of death database tailored to the present case.<sup>109</sup> On 11 September 2009, the Prosecution removed its seven exhumations witnesses from the witness list and stated that, if required to prove the death of victims, it would seek leave to reinstate them.<sup>110</sup> On 4 February 2010, the Prosecution explicitly stated in court that it would tender its proof of death database.<sup>111</sup>

40. The Trial Chamber is satisfied that, since the early stages of the case, the Prosecution has manifested an intention to tender victim-related evidence in the event that the parties fail to come to an agreement, either through exhumations witnesses or by tendering a proof of death database. The Trial Chamber is, therefore, persuaded that the Prosecution has shown good cause for its request to add the CHS to its Rule 65 *ter* exhibit list.

41. The CHS lists 328 victims whose identities are not specified in the indictment. The Defence submits that the addition of new victims in this manner implies new material facts which need to be pleaded by the Prosecution and that the Defence, as a result, would be unduly prejudiced by adding the CHS to the Prosecution's exhibit list.

42. The Trial Chamber recalls that "the materiality of a particular fact, including the identity of alleged victims, cannot be decided in the abstract" and that such a determination "is dependent on the nature of the Prosecution case and is to be made on a case-by-case basis".<sup>112</sup> In the present case, and considering, *inter alia*, "the sheer scale of the alleged crimes"<sup>113</sup> and the fact that the Accused

<sup>108</sup> Rule 65 *ter* Conference, 9 Jun 2009, T. 136 and Rule 65 *ter* Conference, 24 Aug 2009, T. 278.

<sup>109</sup> Rule 92 *bis* motion, para. 18 and the attached package.

<sup>110</sup> Prosecution's reduced list of witnesses, 10 Sep 2009, para. 4.

<sup>111</sup> Hearing, 4 Feb 2010, T. 6133-6136. See also hearing, 15 Feb 2010, T. 6282-6283.

<sup>112</sup> *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence interlocutory appeal against Trial Chamber's decision on Joint Defence motion to strike the Prosecution's further clarification of identity of victims, 26 Jan 2009, ("Gotovina Appeal Decision"), para. 17.

<sup>113</sup> *Gotovina Appeal Decision*, para. 17, citing *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 Oct 2001, paras 89-90.

are far removed from the crime-base for which they are alleged to be criminally responsible, the Trial Chamber is of the view that the identities of the victims do not constitute material facts which need to be pleaded.

43. With regard to the Defence submission that “there was no preliminary announcement to the effect that the Prosecution was intending to amplify or add to the indictment by introducing new victims”,<sup>114</sup> the Trial Chamber notes that a plain reading of Schedules A and B of the indictment indicates that the number of victims is not exhaustive.<sup>115</sup> Furthermore, the Trial Chamber notes that with the exception of four incidents,<sup>116</sup> the confidential annex to the indictment includes a “safe-guard clause”,<sup>117</sup> which leaves open the possibility that the incident may be updated with regard to the identity of the victims. Moreover, the Trial Chamber holds that none of the specific increases in the number of victims in the CHS with regard to any of the incidents in the indictment, is substantial enough to affect the legal characterisation of the crimes charged or to cause undue prejudice to the Defence.<sup>118</sup>

44. For these reasons, the Trial Chamber concludes that the fact that the CHS lists and identifies 328 new victims does not constitute a *de facto* or implicit amendment of the indictment which could form “a new basis for conviction on [its] own”.<sup>119</sup> The CHS rather provides further details on victims of the crimes charged, information which the Defence should have reasonably expected in light of the indictment’s open-ended nature in this respect. For these reasons, the addition of victims through the CHS does not unduly prejudice the Defence.

45. It is established that the “obligation resting upon the Prosecution to name the alleged victims to the extent possible logically implies that it should do so as soon as practicable after obtaining the

<sup>114</sup> Defence Joint Oral Submission, T. 14826.

<sup>115</sup> Schedules A and B only provide a determined or approximate number of victims with regard to six of the thirty-three incidents, i.e. Schedule A, 4.1 (Nova Mahala Višegrad), “about 70 people”; schedule B, 4.1 (Keraterm “Room 3”), “approximately 200 prisoners”; schedule B, 10.1 (warehouse in Crkvina, Bosanski Šamac) “18 men”; schedule B, 13.3 (prison building in Vlasenica), “20 men”; schedule B, 13.4 (Nova Kasaba, Vlasenica) note that while the schedule mentions “at least 32 men”, the annex says “32 men”; schedule B, 14.4 (Gero’s slaughter house) “about 190 men”. The remaining twenty-seven incidents refer to undetermined numbers of victims by using terms such as “a number of men” or “a large number of men”.

<sup>116</sup> Schedule A 1.1, Schedule B 2.2, 8.1 and 12.1. Furthermore, the subheading of the confidential annex to the indictment reads “*known* victims of killings listed in schedule A and schedule B” (emphasis added), confidential annex to the indictment, p. 1.

<sup>117</sup> This clause reads “The victims included others whose identities at the time are either not known to or cannot be confirmed by the Prosecution.”

<sup>118</sup> For example, in relation to indictment schedule A2.1, the killing of a number of men in the settlement of Kotor and on the way from Kotor to the Medical centre in Kotor Varoš and in front of the Medical Centre in Kotor Varoš on 25 June 1992, 24 victims were named. Six victims were newly identified in the CHS. In relation to indictment schedule B14.1, the killing of a number of men in the Drinjača school, 49 victims were named. One newly identified victim is named in the CHS.

<sup>119</sup> *Gotovina* Decision, 9 Oct 2008, para 12.

information in order to facilitate the preparation of an effective defence”.<sup>120</sup> The Appeals Chamber has held that this obligation also requires the Prosecution to provide “all the particulars which [the Prosecution] is able to give”.<sup>121</sup> The Prosecution has not provided details as to when all material contained in the CHS was disclosed to the Defence. However, the Trial Chamber is aware that a large portion of the material had been disclosed before the commencement of the trial, including the identities of at least the 1,445 victims listed in the indictment and several batches of related information.<sup>122</sup>

46. The Trial Chamber is satisfied that, due to the nature of crimes alleged in the indictment which involves allegations of killings and extermination in the context of a widespread or systematic attack against the civilian population, it is to be expected that evidence collection concerning victims of these crimes may be conducted on an on-going basis. Therefore, the Prosecution is not required to disclose all victim-related material “prior to filing its indictment” as asserted by the Defence. However, the Prosecution has an obligation to disclose new information as it becomes available, regardless of the stage of the proceedings. The Trial Chamber concludes that the Defence is not unduly prejudiced by the addition of the CHS to the Prosecution’s Rule 65 *ter* exhibit list.

47. In view of all the above, the Trial Chamber is satisfied that it is in the interests of justice to add the CHS into the Prosecution’s Rule 65 *ter* list.

#### **B. Admission of the CHS and the underlying material provided into evidence**

48. The Trial Chamber now turns to the Prosecution’s request to admit the CHS into evidence. For the purposes of Rule 89(C), the Trial Chamber has considered the admissibility of the CHS and the underlying material provided as a comprehensive tool. To this end, the Trial Chamber has conducted a number of random checks on the relevance and probative value of the CHS and the underlying material provided.

49. As a preliminary observation, the Trial Chamber notes that a large number of documents have not been provided in one of the official working languages of the Tribunal. The Trial Chamber will, therefore, order the Prosecution to provide official English translations as soon as practicable and no later than by end of the Defence case.

<sup>120</sup> *Gotovina* Appeal Decision, para. 20, emphasis added.

<sup>121</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on objections by Momir Talić to the form of the amended indictment, Trial Chamber II, 20 Feb 2001, para. 19.

<sup>122</sup> Confidential annex to the indictment; Reply, para. 3; and *supra* footnote 24.

1. Relevance of the CHS and the underlying material provided

50. The Trial Chamber has analysed the CHS, which links each of the 1,760 victims with an incident in the indictment by providing the corresponding incident code found in the indictment schedules.<sup>123</sup> The CHS lists the material on the basis of which the Prosecution submits that the mentioned persons are victims of the crimes charged in the indictment.

51. The underlying material which has been provided by the Prosecution consists of databases and collections of information from different institutions or organisations (“Collections of Information”), local court and police records and exhumations and autopsy-related expert reports concerning alleged victims of crimes charged in the indictment.

52. The Trial Chamber finds that the CHS and the underlying material provided are relevant.

2. Probative value of the CHS and the underlying material provided

53. The lack of reliability of Motion Annexes A and B constituted one of the major objections of the Defence to the Motion.<sup>124</sup> While, *a priori*, the CHS is a result of a merger of the information contained in Motion Annexes A and B, the Prosecution, in the process of complying with the Directions and in substituting the CHS for Motion Annexes A and B, has remedied a significant number of deficiencies that rendered Motion Annexes A and B unreliable. The CHS contains the underlying material, which the Prosecution has offered in support of the information reflected therein. Moreover, the Prosecution has removed 1,425 victims listed in Motion Annexes A and B who were not linked to a crime charged in the indictment. The Prosecution has also removed a number of duplications of victims. Finally, in compliance with the Directions, the Prosecution formatted the CHS so as to allow easy access and cross-referencing of the material.

54. The CHS is not a perfect tool. While the Directions required the Prosecution to provide an indication of whether the victim was already identified in the indictment or is a newly identified victim, the CHS does not accurately reflect the number of victims listed in the confidential annex to the indictment, even when taking into account the removal of victims due to duplication.<sup>125</sup> With regard to two victims, the CHS does not specify whether they were identified in the indictment.<sup>126</sup> The Trial Chamber will direct the Prosecution to correct these oversights.

<sup>123</sup> Victims listed in the CHS Spreadsheet are linked with the indictment through the assignment of an “indictment code”, that corresponds to the indictment schedules.

<sup>124</sup> Joint Response, para. 3. See also Defence Joint Oral Submission at T. 14824.

<sup>125</sup> With regard to incident A3.1, the confidential annex to the indictment identifies 50 victims. The Prosecution has removed two victims due to duplications. However, the CHS indicates that 53 victims were identified in the indictment.

<sup>126</sup> The Trial Chamber has confirmed that these victims appear listed under schedule B12.1.



55. The Defence also make observations with regard to the reliability of the CHS, including that it does not indicate the date of death of 1,283 victims. The Trial Chamber notes, however, that for a number of these 1,283 victims, there is an indication of the date of disappearance and / or at least one source of information in support of their inclusion in the CHS. Moreover, information on the trial record may complement the information contained in the CHS. Therefore, the fact that a date of death has not been provided in the CHS does not exclude the death of the victim mentioned therein.

56. With regard to the Trial Chamber's direction to provide "for each document or item, a brief description of its contents", the Trial Chamber is satisfied that for most of the documents, such as autopsy reports, the self-explanatory title is sufficient. However, with regard to the category of Collections of Information,<sup>127</sup> the Trial Chamber still requires the Prosecution to provide a brief description as requested in the Directions. This description should include summary details about the issuing institution and the scope and source of the information. The Directions also required that where the hyperlink leads to a database, the Prosecution should provide the reference in that database pertaining to each alleged victim. However, in some instances, the references provided in the CHS are wrong<sup>128</sup> or absent.<sup>129</sup> The Trial Chamber will direct the Prosecution to also correct these oversights.

57. As has been stated above, the Trial Chamber considers these and other deficiencies to be either technical oversights or issues which could eventually affect the weight to be accorded to the evidence rather than a bar to the admissibility of the CHS and the underlying material provided. Moreover, the Trial Chamber is mindful of the fact that due to the nature and scope of the crimes and the alleged role of the Accused, the CHS is not and could not be a final and accurate account of the identity or the number of victims of the crimes alleged in the indictment.

58. Therefore, and notwithstanding the deficiencies in the CHS, the Trial Chamber is satisfied that, on the whole, it is relevant and that it has probative value in relation to the alleged death of a large number of victims of the crimes charged in the indictment. The Trial Chamber will therefore admit the CHS and the underlying material provided into evidence.

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<sup>127</sup> "MAG 2002"; "Federal Institute for Statistics"; "ICRC Missing Persons Report"; "SHS"; "Prijedor Book of Missing Persons"; "Karton Zrtve"; "UN/IPTF"; and "Visegrad area War Crimes Victims".

<sup>128</sup> For example, all references checked with regard to the database "Federal Institute for Statistics".

<sup>129</sup> For example, where the CHS indicates that a victim is referred to in the "SHS" database, the "database reference" field is blank.

**V. DISPOSITION**

59. Pursuant to Rules 54 and 89, the Trial Chamber:

**GRANTS** the Prosecution leave to reply;

**GRANTS** the Prosecution leave to substitute the CHS for Motion Annexes A and B;

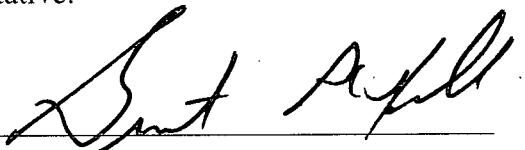
**GRANTS** the Prosecution leave to add the CHS and the underlying material provided to its Rule 65 *ter* exhibit list;

**ADMITS** the into evidence the CHS and the underlying material provided;

**DIRECTS** the Prosecution to provide the missing official English translations as soon as practicable and no later than by end of the Defence case; and

**DIRECTS** the Prosecution to correct other deficiencies as specified in this decision by 1 March 2011.

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



Judge Burton Hall  
Presiding

Dated this first day of February 2011

At The Hague

The Netherlands

[Seal of the Tribunal]