



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: 21 April 2010  
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding  
Judge Uldis Ķinis  
Judge Elizabeth Gwaunza  
Registrar: Mr John Hocking  
Decision of: 21 April 2010

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*CONFIDENTIAL*

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DECISION ON PROSECUTION'S MOTION TO REOPEN ITS CASE

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Office of the Prosecutor

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## PROCEDURAL HISTORY

1. On 1 March 2010, the Prosecution filed a motion ("Prosecution's Motion") to reopen its case-in-chief to call forensic technicians Jozo Bilobrk and Ivica Vrtičević to testify in relation to the clearing up of the bodies of Serb civilians killed in Grubori on 25 August 1995.<sup>1</sup> On 12 March 2010, the Prosecution made a further submission in support of its Motion which sought to modify it in two respects, first, that the Prosecution no longer sought to call Ivica Vrtičević, and second, that it sought to call Croatian police investigators Antonio Gerovac and Željko Mikulić.<sup>2</sup> The Prosecution seeks to call Bilobrk to testify, in particular, about a suggestion by Čermak or someone in Čermak's presence that guns be placed next to the bodies of Grubori victims to make it appear as though the victims had put up resistance.<sup>3</sup> The Prosecution seeks to call Gerovac and Mikulić to testify, in particular, that Bilobrk had, in their interview with him on 9 November 2009, specifically attributed to Čermak the statement about planting weapons.<sup>4</sup> The Chamber granted requests from the Čermak Defence and the Markač Defence for extensions of their word limits and deadlines for filing responses, and informed the parties accordingly through informal communications.<sup>5</sup> On 17 March 2010, the Čermak Defence filed a Consolidated Response, asking that the Prosecution's Motion and Further Submission be denied.<sup>6</sup> On 18 March 2010, the Markač Defence asked the Chamber to deny the Prosecution's Motion and also joined in Čermak's Consolidated Response.<sup>7</sup> On 22 March 2010, the Chamber granted a Prosecution request for leave to reply to the responses of the Čermak Defence and the Markač Defence, and informed the parties accordingly through an informal communication.<sup>8</sup> On 24 March 2010, the Prosecution replied to Čermak's Consolidated Response and Markač's Consolidated Response and reiterated its request to

<sup>1</sup> Prosecution's Motion to Reopen Its Case, 1 March 2010, paras 1-2, 5, 24.

<sup>2</sup> Prosecution's Further Submission in Support of Its Motion to Reopen Its Case, 12 March 2010 ("Prosecution's Further Submission"), paras 1-2, 10.

<sup>3</sup> Prosecution's Motion, paras 2, 5-6, Confidential Appendix A; Prosecution's Reply, para. 9.

<sup>4</sup> Prosecution's Further Submission, paras 2, 4-5, Confidential Appendices A, D and E.

<sup>5</sup> Ivan Čermak's Request to Exceed the Word Limit and for Extension of Time to File a Response, 11 March 2010 (granted on 12 March 2010); Defendant Mladen Markač's Request for Extension of Time to File Response, 12 March 2010 (granted on 15 March 2010).

<sup>6</sup> Ivan Čermak's Consolidated Response to the Prosecution's Motion to Reopen Its Case and Its Further Submission in Support of the Motion, 17 March 2010 ("Čermak's Consolidated Response"), paras 3-4, 43.

<sup>7</sup> Defendant Mladen Markač's Consolidated Response to Prosecution's Motion to Re-open Its Case and Its Further Submission in Support of the Motion, 18 March 2010 ("Markač's Consolidated Response"), paras 3, 27-28; Corrigendum: Defendant Mladen Markač's Consolidated Response to Prosecution's Motion to Re-open Its Case and Its Further Submission in Support of the Motion, 22 March 2010.

<sup>8</sup> Prosecution's Request for Leave to Reply to Defendants Ivan Čermak and Mladen Markač's Consolidated Responses to the Prosecution's Motion to Reopen Its Case and Its Further Submission in Support of the Motion, 22 March 2010.

reopen its case to present the evidence of Jozo Bilobrk, Antonio Gerovac and Željko Mikulić.<sup>9</sup> On 25 March 2010, the Chamber granted a request by the Čermak Defence for leave to surreply to the Prosecution's Reply.<sup>10</sup> On 29 March 2010, the Čermak Defence in its Surreply reiterated its request to the Chamber to deny the Prosecution's Motion.<sup>11</sup>

## SUBMISSIONS OF THE PARTIES

### *(i) Submissions with regard to reasonable diligence*

2. The Prosecution argues that the testimony of forensic technician Jozo Bilobrk constitutes fresh evidence and could not through reasonable diligence have been identified and presented at the time of the Prosecution's case-in-chief.<sup>12</sup> The Prosecution submits that it acted quickly and diligently after discovering this evidence in an Official Note of an interview with Bilobrk dated 9 November 2009, which was contained in an investigation file of over 800 pages that the Prosecution received from the Croatian authorities on 25 January 2010 ("Grubori file") in response to a Request for Assistance ("RFA").<sup>13</sup>

3. The Prosecution submits that the following information in its possession regarding sanitation procedures after Operation Storm did not indicate that forensic technicians would be able to provide additional information on why Grubori victims' bodies were sanitised in the absence of any on-site investigation: (1) its interviews with high-level MUP personnel which indicated that the role of the forensic technicians was limited to documenting the collection and burial of the bodies in view of identification; (2) the minutes of a 7 August 1995 meeting of the Crime Police Sector Chiefs which indicated that the decision not to conduct on-site investigations of bodies collected on the terrain was a policy decision made at high levels of the MUP and not by forensic sanitation technicians; and (3) records compiled by forensic technicians during the sanitation of the Grubori hamlet on 27 August 1995 which indicated that sanitation in Grubori was conducted in the same manner as other sanitation

<sup>9</sup> Prosecution's Reply to Defendants Ivan Čermak and Mladen Markač's Consolidated Responses to the Prosecution's Motion to Reopen Its Case and Its Further Submission in Support of the Motion and Submission of New Statement of Jozo Bilobrk, 24 March 2010 ("Prosecution's Reply"), paras 1, 15.

<sup>10</sup> T. 27928-27929; Ivan Čermak's Request for Leave to Surreply to the Prosecution's Reply and Submission of 24 March 2010, 25 March 2010.

<sup>11</sup> Surreply to Prosecution's Reply to Defendant's (*sic*) Ivan Čermak and Mladen Markač's Consolidated Response to Reopen Its Case and Its Further Submission in Support of the Motion and Submission of New Statement of Jozo Bilobrk, 29 March 2010 ("Čermak's Surreply"), para. 11.

<sup>12</sup> Prosecution's Motion, paras 1-3.

<sup>13</sup> Prosecution's Motion, paras 8-9, Confidential Appendix A; Prosecution's Further Submission, para. 7.

exercises after Operation Storm.<sup>14</sup> The Prosecution further argues that if it had interviewed Bilobrk prior to 25 January 2010, he would probably not have revealed information about the planting of weapons at the crime scene, in particular since the Prosecution had no evidence which would have led it to ask such questions.<sup>15</sup> The Prosecution adds that none of the evidence it had gathered indicated that Čermak communicated with the forensic technicians involved in documenting the bodies in Grubori.<sup>16</sup> According to the Prosecution, it had thoroughly investigated the Grubori killings, interviewing approximately 60 persons in this regard.<sup>17</sup>

4. The Prosecution also argues that it could not have obtained the evidence of Gerovac and Mikulić with reasonable diligence before the Prosecution's Further Submission, as its probative value arose out of interviews that the Prosecution conducted on 3 and 4 March 2010 with Bilobrk, Vrtičević, Gerovac and Mikulić.<sup>18</sup> These interviews, the Prosecution further argues, were themselves a quick and diligent reaction to the information contained in the Grubori file.<sup>19</sup>

5. The Čermak Defence and Markač Defence ("Defence") argue that the Prosecution could have found and interviewed Jozo Bilobrk with reasonable diligence in time to present his evidence in its case-in-chief.<sup>20</sup> The Defence points out that the Prosecution's case theory has for a long time been that unlawful killings occurred in Grubori, that sanitation was used to cover up crimes, and that Čermak visited Grubori the day after the killings and participated in covering up those crimes.<sup>21</sup> It further points out that the Prosecution investigated and discovered evidence on the use of forensic technicians in sanitation, including in Grubori, and had information indicating that Bilobrk and Vrtičević were carrying out forensic work for the Zadar-Knin Police Administration at the time, including at Knin cemetery.<sup>22</sup> In this regard, the Markač Defence submits that the Prosecution's list of persons it interviewed in connection with the Grubori incident does not contain any forensic technicians.<sup>23</sup> The Čermak Defence

<sup>14</sup> Prosecution's Motion, paras 3, 14; Prosecution's Reply, paras 2-8.

<sup>15</sup> Prosecution's Motion, para. 14; Prosecution's Reply, paras 3, 10.

<sup>16</sup> Prosecution's Motion, para. 14.

<sup>17</sup> Prosecution's Motion, paras 14-16.

<sup>18</sup> Prosecution's Further Submission, paras 3, 7, Confidential Appendices A, B, D and E.

<sup>19</sup> Prosecution's Further Submission, para. 7.

<sup>20</sup> Čermak's Consolidated Response, paras 3-4, 17-22, 28; Markač's Consolidated Response, paras 3, 11, 13-16, 19, 28; Čermak's Surreply, paras 1-5, 11.

<sup>21</sup> Čermak's Consolidated Response, paras 14-16, 20, 23, 28; Markač's Consolidated Response, paras 15-16, 18; Čermak's Surreply, para. 2.

<sup>22</sup> Čermak's Consolidated Response, paras 14, 20, 22, 24-28, 41, Confidential Annexes A and B; Markač's Consolidated Response, paras 11, 15-17; Čermak's Surreply, para. 2.

<sup>23</sup> Markač's Consolidated Response, para. 12. See also Čermak's Consolidated Response, paras 18, 21.

notes that it is surprising that the Prosecution would not have interviewed members of sanitation teams whom they must have concluded were almost certainly present at the scene of crimes alleged in the indictment.<sup>24</sup> It further submits that if the Prosecution had interviewed Bilobrk and Vrtičević about crime sites such as Grubori, it would certainly have asked them questions about Čermak.<sup>25</sup>

*(ii) Submissions with regard to probative value and fairness to the accused*

6. The Prosecution submits that the proposed evidence of Bilobrk is probative of Čermak and Markač's alleged role in concealing crimes committed by Special Police in Grubori and their alleged individual criminal responsibility through the mode of liability of joint criminal enterprise, as well as probative of allegations that Markač knew or had reason to know of Special Police crimes and failed to take measures to prevent or punish them.<sup>26</sup> The Prosecution submits that this evidence is probative even if the suggestion to place guns next to the bodies in Grubori is not ultimately attributed to Čermak as it would still indicate that Čermak was aware at the time of attempts to conceal crimes and did not object to them.<sup>27</sup> The Prosecution submits that the evidence of Gerovac and Mikulić will help resolve discrepancies that may arise between Bilobrk's testimony and prior statements, and thus is probative of the substance of those statements and not merely Bilobrk's credibility.<sup>28</sup>

7. Further, the Prosecution argues that a reopening of its case to present Bilobrk's evidence would not be unfair to the Accused, as the evidence relates to a discrete factual issue, is limited in quantity, has already been reviewed by the parties, and does not result in any shift in the Prosecution's case against the Accused.<sup>29</sup> The Prosecution contends that calling the witnesses would only take a few days, result in minimal or no delay, and that the Accused would have several weeks to prepare if the witnesses were heard immediately after the final Chamber Witness.<sup>30</sup>

8. The Defence argues that reopening the Prosecution's case would cause prejudice to the Accused that would outweigh any probative value.<sup>31</sup> The Defence argues that any alleged probative value of Bilobrk's evidence is undermined by the following: (1) he gave varying

<sup>24</sup> Čermak's Surreply, paras 2-3.

<sup>25</sup> Čermak's Surreply, para. 4.

<sup>26</sup> Prosecution's Motion, paras 2, 17-20.

<sup>27</sup> Prosecution's Reply, para. 13.

<sup>28</sup> Prosecution's Further Submission, paras 4-5, 8; Prosecution's Reply, paras 11-12.

<sup>29</sup> Prosecution's Motion, paras 3, 21-23.

<sup>30</sup> Prosecution's Motion, paras 4, 21, 23; Prosecution's Further Submission, para. 8.

accounts of what happened, the majority of which do not state that Čermak suggested the planting of guns at the crime scene; (2) Bilobrk resiled from the Official Note which contains that statement; (3) the first Croatian police interview with Bilobrk was conducted in the presence of Vrtičević; (4) Bilobrk did not sign or attest to the Official Notes that the Prosecution relies upon, as opposed to the statement taken by the Prosecution; and (5) he offered his statement about Čermak's supposed statement about planting weapons only after Croatian police officers had put to him that a senior official of the Ministry of Interior or Ministry of Defence had suggested that weapons be placed next to the bodies.<sup>32</sup> The Defence contends further that the probative value of calling as witnesses Gerovac and Mikulić is negligible as they will not be able to give evidence of the substance of the Grubori events, but will only be able to undermine the reliability of Bilobrk.<sup>33</sup> In addition, the Markač Defence submits that official notes are inherently flawed documents, unworthy of admission into evidence.<sup>34</sup>

9. With respect to fairness to the Accused, the Defence submits that the Prosecution's Motion has been filed after all parties have called their evidence and almost one year after the Prosecution closed its case.<sup>35</sup> The Defence argues that if the Prosecution's case were reopened, the Defence would need to thoroughly investigate the new evidence and possibly reopen their own cases, which would delay the trial.<sup>36</sup> Finally, the Defence argues that the evidence could, under the joint criminal enterprise alleged in the indictment, also be prejudicial to Ante Gotovina.<sup>37</sup>

#### APPLICABLE LAW

10. According to the Appeals Chamber, when considering an application for reopening a case to allow for the admission of fresh evidence, a Trial Chamber should first determine whether the evidence could, with reasonable diligence, have been identified and presented in

<sup>31</sup> Čermak's Consolidated Response, paras 29, 38; Markač's Consolidated Response, paras 3, 24; Čermak's Surreply, paras 8-9.

<sup>32</sup> Čermak's Consolidated Response, paras 2-3, 33-37, 42; Markač's Consolidated Response, para. 24; Čermak's Surreply, paras 8-9.

<sup>33</sup> Čermak's Consolidated Response, paras 3, 33-34, 37; Markač's Consolidated Response, para. 24; Čermak's Surreply, paras 6-8.

<sup>34</sup> Markač's Consolidated Response, para. 24. See also Čermak's Consolidated Response, para. 35.

<sup>35</sup> Čermak's Consolidated Response, para. 30; Markač's Consolidated Response, para. 22.

<sup>36</sup> Čermak's Consolidated Response, paras 3, 31-32; Markač's Consolidated Response, para. 23.

<sup>37</sup> Čermak's Consolidated Response, paras 39-40; Markač's Consolidated Response, para. 26.

the case-in-chief of the party making the application.<sup>38</sup> If not, the Trial Chamber has the discretion to admit it, and should consider whether its probative value is substantially outweighed by the need to ensure a fair trial.<sup>39</sup> When making this determination, the Trial Chamber should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.<sup>40</sup>

## DISCUSSION

### *(i) Reasonable diligence*

11. The Chamber notes that the dispute between the parties with regard to reasonable diligence turns on whether the Prosecution could have presented the evidence of Bilobrk during its case-in-chief. The Prosecution has explained why forensic technicians involved in sanitation in Grubori were not a promising lead in its investigations. The Chamber accepts that an investigation can take many possible directions and that it is not possible to pursue all of them, particularly in a big and complex case such as the present one. It also accepts that despite extensive investigations of the Prosecution into the Grubori part of its case, there were previously no clear leads to the evidence now proposed by the Prosecution. In this regard, the Chamber notes that the parties have not identified any prior leads that would have put the Prosecution on notice of a suggestion to plant weapons in Grubori, or of the presence of Bilobrk in Grubori. The indication that Bilobrk was involved in sanitation work at Knin cemetery around the time of the sanitation of Grubori does not suffice in this regard, particularly in light of the number of persons involved in sanitation work. The Chamber therefore finds that the Prosecution could not, with reasonable diligence, have identified and presented in its case-in-chief the proposed evidence of Bilobrk. Considering the submissions of the Prosecution on its diligence with regard to Gerovac and Mikulić, and noting the absence of any Defence objections in this regard, the Chamber further finds that the Prosecution could not, with reasonable diligence, have identified and presented in its case-in-chief the proposed evidence of Gerovac and Mikulić.

<sup>38</sup> *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21A, 20 February 2001, para. 283.

<sup>39</sup> *Ibid.*, with reference to Rule 89 (D) of the Tribunal's Rules of Procedure and Evidence.

<sup>40</sup> *Ibid.*, paras 280, 283, 290.

*(ii) Probative value and fairness to the accused*

12. The Chamber first notes that the proposed evidence could not be probative if it were irrelevant to the Indictment. The Prosecution's submissions with regard to the relevance of the proposed evidence to certain allegations made in the Indictment were not contested by the Defence. The Chamber agrees with the Prosecution that the proposed evidence would be relevant, for instance, to the allegations of investigative failures contained in paragraph 17 (e) of the Indictment. The Chamber further notes that the Prosecution's Motion is for three witnesses to testify before the Chamber, not to tender any witness statements or interview notes into evidence.<sup>41</sup> The Chamber will therefore focus here on the anticipated probative value of the live testimony of the proposed witnesses. As for Bilobrk, he could provide direct testimony of efforts and/or intent to conceal crimes allegedly committed in Grubori. The Chamber is not persuaded by the arguments of the Defence concerning problems with the probative value of his anticipated testimony. In this regard, the Chamber notes in particular the following: (1) Bilobrk's live testimony could help clarify the varying accounts of what he is reported to have stated; (2) there is no indication before the Chamber that Vrtičević witnessed the alleged statement about planting weapons or that he was present at the interview with Bilobrk dated 9 November 2009 in which Bilobrk apparently first mentioned it; (3) nor has the Chamber received any indication that Gerovac and Mikulić suggested the name of Čermak to Bilobrk, and they could in any event be asked questions in court about that. The Chamber considers that hearing the testimony of all three proposed witnesses would assist in clarifying these matters. The Chamber also notes that the proposed evidence relates to a topic, the events in Grubori in late August 1995, on which the Chamber has specifically called a number of witnesses to testify. The Chamber finally notes that the proposed evidence is substantially different from evidence previously admitted and could have significant bearing on the individual criminal responsibility of the Accused.<sup>42</sup>

13. As for the fairness to the Accused, the Prosecution's Motion was filed at an advanced stage of the trial proceedings. The Chamber will in that regard focus on the prejudicial consequences for the Accused. The relevant arguments of the Defence turn on the potential delay that would be caused to the trial. Under Article 21 (c) of the Tribunal's

<sup>41</sup> This does not prejudice any decision of the Chamber with regard to admission into evidence of any documents that any party might tender in this regard.

<sup>42</sup> See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 37.



Statute, the accused have a right to be tried without undue delay. The proposed evidence deals with a limited and discrete set of facts. The time required for hearing the proposed witnesses and for the Defence, to the extent needed, to research and reopen their cases would therefore be limited. Consequently, the Chamber is convinced that the requested reopening of the Prosecution's case would not result in undue delay. As for any fairness issues specifically with regard to Ante Gotovina, the Chamber notes the absence of any objections from his Defence. The Defence has not argued, nor is the Chamber convinced, that there are any other significant fairness issues raised by the Prosecution's Motion. In conclusion, the Chamber finds that the anticipated probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.

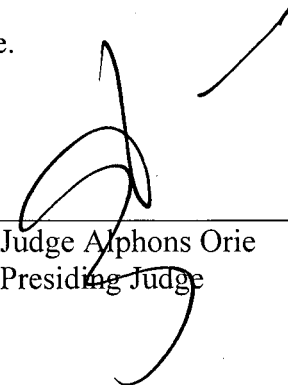
### DISPOSITION

For the foregoing reasons the Chamber:

**GRANTS** the Prosecution's Motion;

**SUSPENDS** until further notice the deadline for the submission of final briefs.<sup>43</sup>

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



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Judge Alphons Orie  
Presiding Judge

Dated this 21th day of April 2010  
At The Hague  
The Netherlands

[Seal of the Tribunal]

<sup>43</sup> See T. 28047.