

IT-06-90-T
D33559 - D33555
10 May 2010

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**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: 10 May 2010
Original: English

IN TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Uldis Ķinis
Judge Elizabeth Gwaunza**

Registrar: Mr John Hocking

Decision of: 10 May 2010

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON ČERMAK AND MARKAČ DEFENCE REQUESTS FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER DECISION OF 21 APRIL
2010 TO REOPEN THE PROSECUTION'S CASE**

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
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 21 April 2010, the Chamber issued a confidential decision granting the Prosecution's motion to reopen its case in order to present new evidence ("Decision").¹ On 22 April 2010, the Chamber announced the reopening in open court, and the parties made preliminary submissions on the matter.² On 26 April 2010, the Čermak Defence filed a motion requesting certification to appeal the Decision ("Čermak's Request").³ On 28 April 2010, the Markač Defence also requested certification to appeal the Decision ("Markač's Request").⁴ The Chamber on the same date decided to set 4 May 2010 as the deadline to respond to both Requests, and informed the parties of this decision through an informal communication.⁵ The Gotovina Defence responded on 29 April 2010, not opposing the Requests but opposing a stay of the proceedings.⁶ The Prosecution responded on 4 May 2010, requesting that the Chamber deny certification to appeal and – in case the Requests were granted – opposing a stay of the proceedings pending a resolution on appeal.⁷ On 6 May 2010, the Chamber denied an informally communicated Čermak Defence request for leave to reply to the Prosecution's response, and informed the parties of this decision through an informal communication.

APPLICABLE LAW

2. Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules") requires two cumulative criteria to be satisfied to allow a Trial Chamber to grant a request for certification to appeal: 1) that the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that, in the opinion of a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹ Decision on Prosecution's Motion to Reopen Its Case, 21 April 2010.

² T. 28632, 28641-28647.

³ Ivan Čermak's Request for a Certificate to Appeal the Decision on Prosecution's Motion to Reopen Its Case, 26 April 2010 (and Corrigendum of Ivan Čermak's Request for a Certificate to Appeal the Decision on Prosecution's Motion to Reopen Its Case, 27 April 2010), paras 2, 14.

⁴ Defendant Mladen Markač's Request for Certification to Appeal the Trial Chamber's 21 April 2010 Decision on Prosecution's Motion to Reopen Its Case, 28 April 2010, para. 10.

⁵ Superseding a previous decision, setting a deadline to respond by 3 May 2010, which was informally communicated to the parties on 28 April 2010, prior to the filing of Markač's Request.

⁶ Ante Gotovina's Response to Ivan Čermak's [sic] and Mladen Markač's [sic] Requests for Certification to Appeal the Decision on Prosecution's Motion to Reopen the Case, 29 April 2010, paras 2-4.

⁷ Prosecution's Response to Defence Requests for Certification to Appeal the Decision on Prosecution's Motion to Reopen Its Case, 4 May 2010 ("Prosecution's Response"), paras 1, 12-15.

SUBMISSIONS OF THE PARTIES

3. In relation to the first requirement of Rule 73 (B) of the Rules, both the Čermak Defence and the Markač Defence argue that the Decision affects the fair and expeditious conduct of the proceedings.⁸ The Čermak Defence notes that consideration of the fairness to the accused is part of the legal test for a motion to reopen a case.⁹ Both the Čermak Defence and the Markač Defence argue that the reopening of the Prosecution's case affects the rights of the Accused, including the right to be tried without undue delay, to be informed promptly and in detail of the charges against them, to have adequate time and facilities for the preparation of a defence, and to examine witnesses against them.¹⁰ The Čermak Defence and the Markač Defence submit that, due to the Decision, they would need additional time to investigate and address the new evidence and potentially present their own evidence on the matter, resulting in substantial delay.¹¹ The Čermak Defence further submits that the Decision acknowledged that the reopening could materially affect the outcome of the trial.¹²

4. The Prosecution accepts that the Decision involves an issue relating to the fair conduct of the proceedings, but argues that it does not significantly affect their expeditious conduct.¹³ The Prosecution submits that the Decision will not result in a substantial delay to the trial, arguing in particular that the new evidence deals with a narrow and discrete factual matter, for which the Defence has already had some time to prepare, and that the Defence did not identify any prior witness who could have provided meaningful testimony on this matter.¹⁴

5. In relation to the second requirement of Rule 73 (B) of the Rules, both the Čermak Defence and the Markač Defence argue that an immediate resolution of the disputed issue by the Appeals Chamber would materially advance the proceedings.¹⁵ The Čermak Defence contends that if the Appeals Chamber were to reverse the Decision, the cost and time of presenting the new evidence would be avoided and the parties would have greater certainty as

⁸ Čermak's Request paras 2, 4-5; Markač's Request, paras 2, 5-6.

⁹ Čermak's Request, para. 5.

¹⁰ Čermak's Request, paras 6-8, 10, 12; Markač's Request, paras 2, 6.

¹¹ Čermak's Request, paras 7-10; Markač's Request, para. 6.

¹² Čermak's Request, paras 7, 11; see also Markač's Request, paras 5, 7.

¹³ Prosecution's Response, paras 2-3.

¹⁴ Prosecution's Response, paras 2-9.

¹⁵ Čermak's Request, paras 2, 4, 11, 13; Markač's Request, para. 7.

to the case, the evidence, and the issues to address.¹⁶ The Markač Defence notes that it would seek an adjournment to investigate the evidence if certification were not granted, which it submits would itself further delay the proceedings.¹⁷

6. In response, the Prosecution argues that in light of the narrow scope of the new evidence and of the late stage of trial, a decision by the Appeals Chamber would not materially advance the proceedings.¹⁸ In the Prosecution's submission, the time and resources required to resolve the matter through an interlocutory appeal would be comparable to those needed to present the new evidence and any defence evidence in response.¹⁹

DISCUSSION

7. With regard to the first requirement of Rule 73 (B) of the Rules, the Chamber in its Decision noted that the new evidence could have significant bearing on the individual criminal responsibility of the Accused.²⁰ The Chamber emphasizes that the ultimate significance of the evidence will only be determined in the final judgement, in light of all other evidence. However, considering for the purposes of Rule 73 (B) of the Rules the potential significance of the new evidence, the Chamber is satisfied that the Decision involves an issue that would significantly affect the outcome of the trial. The first requirement of Rule 73 (B) of the Rules is therefore met.

8. In relation to the second requirement of Rule 73 (B) of the Rules, the Chamber has given careful consideration to whether an intervention of the Appeals Chamber may, at this stage, materially advance the proceedings considered as a whole, including the possible stage of an appeal from judgement. In doing so, the Chamber has also considered that no party sought a stay of the proceedings as a remedy.

9. The Chamber considers that should the Chamber deny certification, and should the Appeals Chamber later find that it erred in allowing the reopening, this would have repercussions on all the sections of the judgement which were influenced by or based on the new evidence. In light of the aforementioned potential significance of the new evidence, these repercussions could have a considerable impact on the judgement and entail significant

¹⁶ Čermak's Request, para. 13.

¹⁷ Markač's Request, paras 8-9.

¹⁸ Prosecution's Response, para. 10.

¹⁹ Prosecution's Response, paras 10-11.

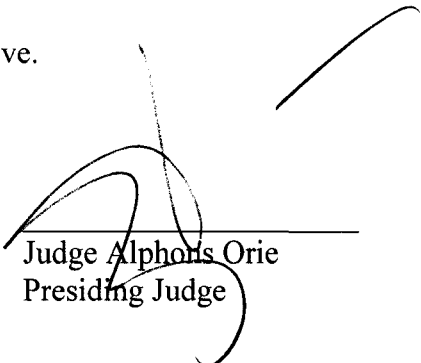
²⁰ Decision, para. 12.

complications and delays for the proceedings as a whole. Any delay that could potentially result from the Appeals Chamber deciding on this matter now would be limited, in particular considering that no party has requested a stay of the proceedings. For these reasons the Chamber is convinced that an immediate resolution by the Appeals Chamber may materially advance the proceedings. The second requirement of Rule 73 (B) of the Rules is therefore met.

DISPOSITION

10. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **GRANTS** Čermak's Request and Markač's Request.

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



Judge Alphons Orie
Presiding Judge

Dated this tenth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]