

4-06-90-T  
D 26046 - D 26039  
of August 2009

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UNITED  
NATIONS



International Tribunal for the  
Prosecution of Persons Responsible for  
Serious Violations of International  
Humanitarian Law Committed in the  
Territory of the Former Yugoslavia  
since 1991

Case No.

IT-06-90-T

Date:

7 August 2009

Original:

English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 7 August 2009

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

DECISION ON IVAN ČERMAK'S MOTION REQUESTING THE TRIAL  
CHAMBER TO ORDER THE PROSECUTION TO DISCLOSE RULE 68 MATERIAL  
TO THE DEFENCE

Office of the Prosecutor

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## I. BACKGROUND AND SUBMISSIONS

1. On 28 May 2009, the Čermak Defence filed a motion requesting the Chamber to order the Prosecution to disclose material pursuant to Rule 68 of the Rules of Procedure and Evidence (“Rules”).<sup>1</sup> Specifically, the Čermak Defence is seeking disclosure of all public, confidential *inter partes*, *ex parte*, and Rule 70 material in the Prosecution’s possession concerning crimes committed in the geographic area of Sector South by Serbian military, police, and paramilitary forces, Serb volunteers, and Serb civilians (“Serbian Forces”) against Croatian civilians between 1991 and the start of Operation Storm.<sup>2</sup> The Čermak Defence submits that the Prosecution does not dispute that the material described is in its possession and cites examples of it being mentioned in the indictments, pre-trial briefs, and final briefs in the cases of *Prosecutor v. Slobodan Milošević*, *Prosecutor v. Martić*, and *Prosecutor v. Babić*.<sup>3</sup> The Čermak Defence further submits that it sought the requested material on 29 April 2009 through informal correspondence with the Prosecution.<sup>4</sup> According to the Čermak Defence, the Prosecution stated in reply that there is no dispute over the commission of crimes by Serbian Forces against Croatian civilians and evidence of the crimes is, therefore, not exculpatory.<sup>5</sup> It adds that the Prosecution suggested that, in lieu of disclosure, the Čermak Defence draft a stipulation of facts to be considered by the Prosecution.<sup>6</sup> It further adds that on 22 May 2009, the Prosecution served 16 documents pursuant to Rule 68 of the Rules, nine of which the Čermak Defence considered to be relevant to its request.<sup>7</sup>

2. The Čermak Defence explains that the disclosure request concerns *prima facie* exculpatory material which shows that many Croatian civilians and other groups of individuals committed crimes after Operation Storm out of revenge and in retaliation for crimes committed against them between 1991 and the start of Operation Storm, eroding the notion of a planned joint criminal enterprise (“JCE”) as alleged in the Indictment.<sup>8</sup> The Čermak Defence further submits that difficulties which arise from the disclosure being “extremely costly and time consuming” cannot relieve the Prosecution from fulfilling its

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<sup>1</sup> Ivan Čermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, 28 May 2009 (“Motion”), paras 1-2, 21, 23.

<sup>2</sup> Motion, paras 2, 21, 23.

<sup>3</sup> Motion, paras 16-17.

<sup>4</sup> Motion, paras 1-2.

<sup>5</sup> Motion, para. 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> Motion, para. 8.

<sup>8</sup> Motion, paras 3, 19.

continuing legal duty to disclose exculpatory material.<sup>9</sup> Finally, the Čermak Defence argues that it is not open to the Prosecution to choose not to disclose the material pursuant to Rule 68 of the Rules in preference to a stipulation of fact to be agreed between the parties.<sup>10</sup>

3. On 11 June 2009, the Prosecution filed a response asking the Chamber to dismiss the Motion on the grounds that the material sought is not exculpatory under Rule 68 of the Rules. The Prosecution argues that the Čermak Defence has not shown that crimes committed by Serbian Forces against Croatian civilians between 1991 and the start of Operation Storm may suggest that the crimes alleged in the Indictment were not committed pursuant to the JCE alleged in the Indictment.<sup>11</sup> The Prosecution submits that the question of whether there existed a personal motive of revenge on the part of the physical perpetrator of the crime is irrelevant to the question of whether the crimes were committed pursuant to the alleged JCE.<sup>12</sup> The Prosecution explains that a possibly relevant determination is whether there existed the necessary link between a JCE participant and the physical perpetrator to show that the physical perpetrator was used by a JCE member to commit the crime.<sup>13</sup> The Prosecution further explains that the factors which would establish this link are not incompatible with a personal motive for revenge on the part of the physical perpetrator and points out that the Prosecution case includes the theory that the Accused were aware of and harnessed the feelings of revenge that existed among Croatian forces.<sup>14</sup> In the alternative, the Prosecution submits that another possibly relevant determination is whether the physical perpetrator shared the common criminal purpose of the JCE with the Accused and explains that the existence of a personal motive for revenge is consistent and compatible with the existence of a shared objective to permanently remove Serbs from the Krajina as alleged in the Indictment.<sup>15</sup>

4. The Prosecution further submits that it does not dispute the facts the Čermak Defence seeks to prove through the requested material, making it, in its view, a waste of time and resources for the Prosecution to search for and disclose the requested material and for the Čermak Defence to present evidence of those facts.<sup>16</sup> Thus, the Prosecution suggests, the

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<sup>9</sup> Motion, para. 18.

<sup>10</sup> Motion, para. 21.

<sup>11</sup> Prosecution's Response to Defendant Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, 11 June 2009 ("Response"), paras 1, 5, 8-12, 15.

<sup>12</sup> Response, para. 8.

<sup>13</sup> Response, para. 10.

<sup>14</sup> Ibid.

<sup>15</sup> Response, paras 8-9.

<sup>16</sup> Response, para. 13.

better course would be a stipulation of facts or an application for adjudicated facts pursuant to Rule 94 (B) of the Rules.<sup>17</sup>

5. On 16 June 2009, the Čermak Defence filed a request for leave to reply to the Response which was granted and informally communicated to the parties on 17 June 2009.<sup>18</sup> On 18 June 2009, the Čermak Defence informally requested leave to exceed the word limit which was granted by the Chamber on the same day.<sup>19</sup> In the reply, filed on 18 June 2009, the Čermak Defence submits that the requested evidence is exculpatory in that it is relevant to a determination that JCE non-member perpetrators of the crimes may have been driven purely by personal motivations of retribution or revenge, unconnected to the common criminal purpose of the alleged JCE.<sup>20</sup> The Čermak Defence contends that if this possibility remains at the end of the case, the Prosecutor will have failed to prove beyond a reasonable doubt that the crimes were committed pursuant to a common criminal purpose.<sup>21</sup> The Čermak Defence submits that it requires disclosure of the material requested as this evidence may be used at trial to present circumstantial evidence supporting an inference of revenge in relation to the commission of the crimes.<sup>22</sup> Finally, the Čermak Defence submits that access to and evaluation of the material requested is essential before it can make an informed determination on agreed facts and therefore the Prosecution's suggestion that the parties agree to stipulate facts should not be part of the decision making process regarding disclosure.<sup>23</sup>

## II. APPLICABLE LAW

6. Exculpatory material is material which, in the actual knowledge of the Prosecutor, may suggest the innocence or mitigate the guilt of an accused or affect the credibility of Prosecution evidence.<sup>24</sup> According to Rule 68 of the Rules, subject to the provisions of Rule 70, the Prosecutor shall disclose exculpatory material to the Defence as soon as practicable. Material to be disclosed is not restricted to material which is in a form which would be admissible in evidence but also includes any material which may put an accused on notice that

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<sup>17</sup> Ibid.

<sup>18</sup> Request for Leave to Reply to Prosecution's Response to Defendant Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence, 16 June 2009.

<sup>19</sup> T. 18871

<sup>20</sup> Reply to Prosecution's Response to Defendant Ivan Čermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence Dated 11 June 2009, 18 June 2009 ("Reply"), paras 18-20.

<sup>21</sup> Reply, para. 20.

<sup>22</sup> Reply, paras 23-29.

<sup>23</sup> Reply, paras 31-33.

<sup>24</sup> Rule 68 of the Rules.

exculpatory material exists.<sup>25</sup> It also includes material which undermines the case presented by the Prosecution at trial.<sup>26</sup> The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution.<sup>27</sup> This duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned.<sup>28</sup> Where exculpatory material has been provided to the Prosecution by a person or entity under Rule 70 (B) of the Rules, the Prosecution shall take reasonable steps to obtain the consent of the provider to disclose that material, or the fact of its existence, to the accused.<sup>29</sup>

7. The Appeals Chamber has held that the disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether there was a breach of Rule 68 of the Rules.<sup>30</sup> The Appeals Chamber has recognized that the broad interpretation of the obligation to disclose may increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory.<sup>31</sup> However, it has held that given the fundamental importance of disclosing exculpatory evidence, it would be against the interests of a fair trial to limit the scope of disclosure to only include evidence which is on its face exculpatory.<sup>32</sup>

8. The Appeals Chamber has found that the Prosecution may be relieved of the obligations under Rule 68 of the Rules if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant with the exercise of due diligence.<sup>33</sup> The Appeals Chamber has further found that the Prosecution's Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection electronically and in a searchable format.<sup>34</sup>

<sup>25</sup> *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgement, 19 April 2004 ("Krstić Appeal Judgement"), para. 178.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004 ("Blaškić Appeal Judgement"), para. 264; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("Karemera 30 June 2006 Decision"), para. 9.

<sup>28</sup> *Blaškić Appeal Judgement*, para. 267.

<sup>29</sup> Rule 68 (iii) of the Rules.

<sup>30</sup> *Krstić Appeal Judgement*, para. 180; *Karemera 30 June 2006 Decision*, para. 9.

<sup>31</sup> *Krstić Appeal Judgement*, para. 180; *Blaškić Appeal Judgement*, para. 265.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Niyitegeka v. Prosecutor*, ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51; *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, ("Bralo 30 August 2006 Decision"), para. 30, *Blaškić Appeal Judgement*, para. 296.

<sup>34</sup> *Karemera 30 June 2006 Decision*, para. 10.

9. To show that the Prosecution is in breach of its disclosure obligations, the Defence must first sufficiently specify the nature of the evidence sought and show that the material is in the possession of the Prosecution.<sup>35</sup> However, such a request is not required to be as specific as to precisely identify which documents should be disclosed.<sup>36</sup> Furthermore, the Defence must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.<sup>37</sup>

### III. DISCUSSION

10. The Čermak Defence requests disclosure of material related to crimes committed by Serbian Forces against Croatian civilians between 1991 and the start of Operation Storm in the Indictment area and cites specific examples where the material has been used by the Prosecution in other cases. Further, the Prosecution does not deny that the material is in its possession. Therefore, the Chamber is satisfied that the Čermak Defence has sufficiently specified the nature of the evidence sought and that the material is in the possession of the Prosecution.

11. The Chamber will now turn to the question of whether the Čermak Defence has made a *prima facie* case which makes probable the exculpatory nature of the material sought. The Chamber notes that the disclosure obligation is not limited to material that is exculpatory "on its face". For material to fall within the scope of Rule 68 of the Rules, it is not required that it in fact suggests the innocence of the accused; it is sufficient that it *may* suggest the innocence of the accused. The Chamber further notes that evidence showing that the alleged physical perpetrators of the crimes alleged in the Indictment committed those crimes out of a motivation for revenge and retribution for the crimes committed by Serbs against Croatian civilians could be potentially relevant to the determination as to whether crimes were committed within the scope and as part of the implementation of the JCE in which the accused have allegedly participated. Such evidence may offer a reasonable alternative to the Prosecution's allegations of a JCE. Therefore, the Chamber is satisfied that the Čermak Defence has presented a *prima facie* case making probable the exculpatory nature of the material sought. The Chamber therefore finds that the Prosecution is under an obligation, pursuant to Rule 68 of the Rules, to disclose the requested material to the Čermak Defence.

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<sup>35</sup> *Blaškić* Appeal Judgement, para. 268; *Bralo* 30 August 2006 Decision, para. 30.

<sup>36</sup> *Bralo* 30 August 2006 Decision, para. 30.

<sup>37</sup> *Blaškić* Appeal Judgement, para. 268.

12. The Chamber has considered whether the Prosecution may be relieved of its duty to disclose public material in the Prosecution's possession concerning crimes committed by Serbian Forces in the Indictment area between 1991 and the start of Operation Storm. Any such material emanating from other cases before the Tribunal is available to the public and the Čermak Defence on the Tribunal's website. The Čermak Defence has therefore had ample opportunity to study and research that material. The Chamber finds that public material referenced in judgements from this Tribunal is known and accessible to the Čermak Defence with the exercise of due diligence, therefore, the Prosecution is relieved of its duty to disclose this material. However, with regard to non-public or non-referenced material from judgements from this Tribunal, the Prosecution must notify the Čermak Defence of the existence of exculpatory material and provide a means by which the Čermak Defence can reasonably be expected to access it.<sup>38</sup> Additionally, the Chamber notes that while Rule 68 of the Rules is subject to Rule 70 of the Rules, the Prosecution cannot be relieved of its obligations under Rule 68 to disclose potentially exculpatory material if it has not, pursuant to Rule 68 (iii), taken reasonable steps to obtain the consent of the provider to the disclosure of the material.

13. The Chamber notes the concerns of the Prosecution that it would be a waste of time and resources for the Prosecution to search for and disclose the requested material, considering that the Prosecution does not dispute the facts that the Čermak Defence seeks to prove through the requested material. The Chamber further acknowledges that disclosure may be instrumental for the Čermak Defence to explore in greater detail the existence of evidence which would be of potential support to the revenge thesis and may serve the defence in preparing the presentation of its case, or eventually the formulation of any fact it may reach agreement upon with the Prosecution. The Chamber encourages the parties to, at the appropriate time, engage in a process which would lead to a submission of agreed facts on the matter. However, such a process is independent of the disclosure obligations under Rule 68 of the Rules. As noted above, the Appeals Chamber has held that the potential burden on the Prosecution in terms of volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory, is subservient to the fundamental importance of disclosing exculpatory material and the interests of a fair trial.

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<sup>38</sup> See *Karemera* 30 June 2006 Decision, para. 13.

#### IV. DISPOSITION

14. For the foregoing reasons, and pursuant to Rules 54, 68 and 70 of the Rules, the Chamber **GRANTS** the Motion and **ORDERS** the Prosecution to:

- i. Disclose to the Čermak Defence all material in the Prosecution's possession concerning crimes committed in the geographical area of Sector South by Serbian Forces against Croatian civilians between 1991 and the start of Operation Storm;
- ii. Should any such material be protected by Rule 70 of the Rules, take all reasonable steps to obtain the consent for disclosure of material to the Čermak Defence from providers of Rule 70 material concerning crimes committed in the geographical area of Sector South by Serbian Forces against Croatian civilians between 1991 and the start of Operation Storm.

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



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Judge Alphons Orie  
Presiding Judge

Dated this seventh day of August 2009  
At The Hague  
The Netherlands

[Seal of the Tribunal]