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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-AR73.6
		Date:	1 July 2010
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Decision of: **1 July 2010**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON IVAN ČERMAK AND MLADEN MARKAČ INTERLOCUTORY APPEALS AGAINST TRIAL CHAMBER'S DECISION TO REOPEN THE PROSECUTION CASE

The Office of the Prosecutor:

Mr. Alan Tieger

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Mr. Luka Mišetić, Mr. Gregory Kehoe, and Mr. Payam Akhavan for Ante Gotovina
Mr. Steven Kay QC, Mr. Andrew T. Cayley, and Ms. Gillian Higgins for Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mladen Markač

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of "Ivan Čermak's Interlocutory Appeal Against the Decision on Prosecution's Motion to Reopen its Case", filed confidentially by Counsel for Ivan Čermak ("Čermak") on 17 May 2010 ("Čermak Appeal") and of "Defendant Mladen Markač's Appeal of the Trial Chamber's 21 April 2010 Decision on Prosecution's Motion to Re-Open its Case" filed confidentially by Counsel for Mladen Markač ("Markač") on the same date ("Markač Appeal", collectively "Appeals"). The Office of the Prosecutor ("Prosecution") submitted a confidential consolidated response on 27 May 2010.[1] Neither Čermak nor Markač filed a reply. On 14 June 2010 Markač notified the Appeals Chamber of the withdrawal of some of his arguments on appeal.[2]

I. BACKGROUND

2. The trial proceedings in the case of *Prosecutor v. Ante Gotovina et al.* commenced on 11 March 2008.[3] Pursuant to the Amended Joinder Indictment, Ante Gotovina, Čermak and Markač (collectively "Accused") are charged with five counts of crimes against humanity and four counts of violations of the laws or customs of war.[4] Under counts six and seven, the Accused are charged with, *inter alia*, the alleged killings of five civilians in the hamlet of Grubori on 25 August 1995.[5]

3. The Prosecution closed its case-in-chief on 5 March 2009 and the Defence cases concluded on 27 January 2010.[6] On 1 March 2010 the Prosecution requested to reopen its case in order to call two forensic technicians, Jozo Bilobrk ("Bilobrk") and Ivica Vrtičević ("Vrtičević"), to testify before the Trial Chamber in relation to Čermak's and Markač's criminal responsibility.[7] On 12 March 2010 the Prosecution filed further submissions modifying its initial request and stating that it no longer sought to call Vrtičević.[8] Instead, the Prosecution requested the Trial Chamber's authorisation to call Bilobrk and two Croatian police investigators – Antonio Gerovac ("Gerovac")

[1] Prosecution's Response to Čermak's and Markač's Interlocutory Appeals Against the Decision to Reopen the Prosecution's Case, 27 May 2010 (confidential) ("Response").
[2] Defendant Mladen Markač's Notice to the Appeals Chamber, 14 June 2010 (confidential) ("Notice").
[3] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Scheduling Start of Trial and Terminating Provisional Release, 6 February 2008; Procedural Matters, 11 March 2008, T. 414 *et seq.*
[4] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Corrected Corrigendum to Prosecution's Notice of Filing of Amended Joinder Indictment, 12 March 2008, with attached Amended Joinder Indictment ("Amended Joinder Indictment").
[5] Amended Joinder Indictment, Schedule to Joinder Indictment "Killing Incidents", Incident No. 4.
[6] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Closing Order and Amended Scheduling Order, 23 March 2009, p. 2; Procedural Matters, 27 January 2010, T. 27113.
[7] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution's Motion to Reopen its Case, 1 March 2010 (confidential with confidential appendices) ("Motion to Reopen"), paras 17-20.
[8] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution's Further Submission in Support of its Motion to Reopen its Case, 12 March 2010 (confidential with confidential appendices) ("Prosecution's Further Submission"), para. 2.

and Željko Mikulić ("Mikulić").[9] The Prosecution explained that Bilobrk had provided new information to the Croatian police whereby Čermak, or someone in Čermak's presence, had suggested that guns be placed next to the bodies of the victims in Grubori, in order to create the impression that the victims had mounted resistance.[10] Concerning the testimony of Gerovac and Mikulić, the Prosecution argued that the witnesses were expected to confirm that Bilobrk identified Čermak as the person who had suggested that weapons be placed next to the bodies of the victims in Grubori.[11]

4. The Trial Chamber granted the Prosecution's request to reopen its case on 21 April 2010[12] and both Čermak and Markač were granted certification to appeal the Impugned Decision on 10 May 2010.[13] As none of the parties requested a stay of proceedings pending the resolution of the present appeal, the Trial Chamber scheduled the reopening of the Prosecution case for 2 June 2010.[14]

II. STANDARD OF REVIEW

5. It is well established in the jurisprudence of the Tribunal that matters related to the management of the trial proceedings fall within the discretion of the Trial Chamber.[15] The Trial Chamber's decision to allow the reopening of the Prosecution's case-in-chief is such a discretionary decision to which the Appeals Chamber must accord deference.[16] Such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case".[17] The Appeals Chamber examination is therefore limited to establishing whether the Trial Chamber has abused its discretion by

[9] *Ibid.*, para. 2.
[10] Motion to Reopen, para. 2; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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 (confidential with confidential appendix) ("Prosecution's Reply to Consolidated Responses"), para. 9; see also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution's Motion to Reopen its Case, 21 April 2010 (confidential) ("Impugned Decision"), para. 1. The Trial Chamber lifted the confidential status of the Impugned Decision on 16 June 2010 (see *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Lifting Confidentiality of the Decision on Prosecution's Motion to Reopen its Case, 16 June 2010 ("Order of 16 June 2010")).
[11] Prosecution's Further Submission, para. 5.
[12] Impugned Decision, p. 9.
[13] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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, 10 May 2010 ("Decision on Certification").
[14] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Scheduling a Hearing, 14 May 2010 ("Scheduling Order"); see also Decision on Certification, para. 9.
[15] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief, 24 September 2008 ("*Popović* Decision of 24 September 2008"), para. 3.
[16] *Ibid.*
[17] *Ibid.*, citing, *inter alia*, *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 4.

committing a "discernible error".[18] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[19] The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[20]

III. DISCUSSION

A. Preliminary issue

6. The Appeals Chamber notes that on 16 June 2010 the Trial Chamber lifted the confidential status of the Impugned Decision.[21] Consequently, the identities of the prospective witnesses named herein have become part of the public record. In view of this fact and recalling that under Rules 78 and 107 of the Rules, all proceedings before the Appeals Chamber, including the Appeals Chamber's orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential,[22] the Appeals Chamber renders the present decision publicly.

B. Arguments of the parties

1. Čermak's appeal

7. Under his first ground of appeal, Čermak argues that the Trial Chamber committed an error of law by applying an "overly narrow standard" of "reasonable diligence" and in defining what constitutes "fresh evidence".[23] He submits that instead of establishing whether through the exercise of reasonable diligence the Prosecution could have discovered and presented the "specific part" of witness Bilobrk's evidence during the Prosecution's case-in-chief, the Trial Chamber should have looked into the steps undertaken by the Prosecution to "identify, locate and obtain" witness Bilobrk himself.[24]

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[18] *Popović* Decision of 24 September 2008, para. 3.
[19] *Ibid.*, citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against "Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge", 1 July 2008, para. 15.
[20] *Popović* Decision of 24 September 2008, para. 3.
[21] Order of 16 June 2010, p. 2.
[22] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Motion to Present Additional Evidence and on Prosecution's Motion for Order Requiring Translations of Excerpts of Annex E of Lazarević's Rule 115 Motion, 26 January 2010, para. 14, referring to, *inter alia*, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Third Motion to Present Additional Evidence, 8 September 2009, para. 15.
[23] Čermak Appeal, paras 9(a), 10, 12, 17.
[24] *Ibid.*, para. 11, referring to Impugned Decision, para. 11; *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 283.

8. Under his second ground of appeal, Čermak argues that the Impugned Decision is based on patently incorrect conclusions of fact as the Trial Chamber attributed no weight or insufficient weight to evidence showing that, had the Prosecution exercised reasonable diligence, it could have identified and presented the testimony of witness Bilobrk during the presentation of its case-in-chief.[25] Čermak adds that the Trial Chamber failed to give explicit consideration to his argument that the length of the Prosecution's investigation, together with the evidence showing that Bilobrk was an eye-witness to the immediate aftermath of the events in Grubori, made it implausible that the Prosecution had exercised reasonable diligence in identifying the proposed evidence.[26]

9. In particular, Čermak argues that the Prosecution could have "identified and presented" witness Bilobrk during the presentation of its case-in-chief because: (i) the Prosecution's case theory was that sanitation teams were used as a means to conceal crimes and the Prosecution knew that such teams comprised forensic technicians; (ii) the Prosecution was aware that Vrtičević and Bilobrk were forensic technicians sent to assist the Zadar Knin Police Administration and were present in Knin immediately prior to the events in Grubori; and (iii) the Prosecution knew that a senior forensic officer was not aware why investigations had not been carried out, or whether instructions had been issued to sanitation teams not to investigate crimes.[27] In Čermak's view, this last fact would have prompted a reasonably diligent Prosecution to ask members of a sanitation team, among them forensic technicians like Bilobrk, whether such instructions had ever been given to them.[28] Čermak adds that the above mentioned facts were known to the Prosecution prior to the commencement of its case-in-chief.[29] He further claims that the Prosecution's assertion that "it is not necessary to interview persons present at a crime scene" was disregarded by the Trial Chamber.[30]

10. Čermak further argues that the Trial Chamber erred in finding that the Prosecution could not have identified and presented witnesses Gerovac and Mikulić.[31] In Čermak's view, the relevance and admissibility of the evidence of the two witnesses depends on a proper finding that Bilobrk's evidence could not have been identified and presented through the exercise of reasonable diligence.[32]

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[25] Čermak Appeal, paras 9(b), 13, 15-16, 19, referring to Impugned Decision, para. 11.
[26] Čermak Appeal, para. 17.
[27] *Ibid.*, para. 18.
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*, para. 20.
[31] *Ibid.*, para. 21, referring to Impugned Decision, para. 11.
[32] Čermak Appeal, para. 22.

11. Under his third ground of appeal, Čermak alleges that in light of the scarce explanation provided by the Prosecution in its Motion to Reopen as to its investigative efforts in relation to the events in Grubori, the Trial Chamber erred in finding that the Prosecution had successfully discharged its burden of showing that it had exercised reasonable diligence.[33] In this respect, Čermak submits that the Prosecution should not have been allowed to cure the defects of its Motion to Reopen by factual arguments appearing for the first time in its reply.[34]

12. In the alternative, Čermak argues that the Trial Chamber erred in law by failing to provide a properly reasoned opinion.[35] In this regard, he contends that the Trial Chamber failed to address the particular circumstances of the case and to consider the issues raised in Čermak's Consolidated Response.[36]

13. In response, the Prosecution submits that the Trial Chamber correctly articulated the legal standard relevant to the reopening of a party's case[37] and properly focused on the discovery of the fresh evidence, rather than on the availability of the source thereof.[38]

14. The Prosecution further contends that it had conducted an "extensive investigation" into the Grubori incident, and that even if it had identified witness Bilobrk as a potential witness, "there [was] no reason to expect" that he would have revealed the fresh evidence.[39] In this respect, the Prosecution points out that although he was interviewed twice by the Croatian authorities, witness Bilobrk revealed the fresh evidence only when investigators Gerovac and Mikulić asked him specific questions, following information that they had received about a high-level official who allegedly suggested that weapons be placed next to the bodies of the victims in Grubori.[40] The Prosecution thus asserts that prior to receiving that information and the revelation of the fresh evidence during his third interview with the Croatian authorities, Bilobrk was not a "promising lead", as his evidence concerning the sanitation process was expected to be redundant in light of the fact that the sanitation process "had already been fully investigated".[41] The Prosecution argues that

[33] *Ibid.*, paras 9(c), 23-24.
[34] *Ibid.*, paras 25-26.
[35] *Ibid.*, paras 9(c), 27, referring to Impugned Decision, para. 11.
[36] Čermak Appeal, para. 28.
[37] Response, para. 5.
[38] *Ibid.*, para. 6, referring to *Popović* Decision of 24 September 2008, para. 11.
[39] Response, paras 2, 7.
[40] *Ibid.*, para. 7, referring to Prosecution's Further Submission, Appendix D (confidential), paras 3, 6, 7, and Appendix E (confidential), paras 4-9.
[41] Response, para. 9.

"[r]easonable diligence does not require a perfect investigation that follows every possible lead and interviews every possible witness".[42]

15. The Prosecution further submits that Čermak fails to show that the Trial Chamber committed a discernible error in its evaluation of the facts.[43] The facts concerning the sanitation teams and Bilobrk's presence in Knin were not, in the Prosecution's view, promising leads in the investigation.[44] Similarly, the Prosecution argues, the evidence of Gerovac and Mikulić relates to their interviews with Bilobrk in late 2009 and therefore could not have been discovered in the course of the presentation of the Prosecution's case-in-chief.[45]

16. Finally, the Prosecution submits that the Trial Chamber correctly assessed the Prosecution's investigative efforts and properly based its findings on the totality of the parties' submissions.[46] According to the Prosecution, the Trial Chamber also provided sufficient reasoning in support of its conclusions.[47]

2. Markač's Appeal

17. Markač submits that in view of Article 21(4) of the Statute of the Tribunal ("Statute"), the reopening of a party's case must be allowed only in exceptional circumstances.[48] Under his first ground of appeal, he argues that the Trial Chamber erred in law and in fact in finding that the Prosecution exercised reasonable diligence in identifying the fresh evidence.[49] Markač contends that since the Prosecution had been investigating the events in Grubori prior to 21 May 2001, the exercise of reasonable diligence would have prompted the Prosecution to interview Bilobrk before the commencement of the trial.[50] Like Čermak, Markač argues that the Prosecution's case theory, together with the evidence collected in the course of the investigation, should have prompted the Prosecution to pose the relevant questions to Bilobrk earlier. This, in Markač's view, is an indication of the Prosecution's failure to exercise reasonable diligence.[51] Consequently, Markač

[42] *Ibid.*, para. 10, referring to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, para. 31.
[43] Response, para. 12.
[44] *Ibid.*, para. 13.
[45] *Ibid.*, para. 14.
[46] *Ibid.*, para. 15.
[47] *Ibid.*, para. 16.
[48] Markač Appeal, paras 6-10, and the references cited therein. Markač further provides extensive references to domestic and international jurisprudence that, in his view, sets the standard of "fresh evidence", "reasonable diligence", the burden of proof that must be satisfied by a party requesting the reopening of its case, and the factors that a Trial Chamber must take into consideration when adjudicating on the matter (*Ibid.*, paras 11-20, and the references cited therein).
[49] *Ibid.*, para. 21(i).
[50] *Ibid.*, para. 23.
[51] *Ibid.*, paras 25-27, and the references cited therein.

submits that the proposed evidence cannot be considered "fresh evidence" for the purposes of reopening the Prosecution's case-in-chief.[52]

18. Under his second ground of appeal, Markač argues that in setting 2 June 2010 for the reopening of the Prosecution's case-in-chief the Scheduling Order violated his right to have adequate time for the preparation of his defence.[53] He asserts that recalling witnesses and reopening the Defence case "can never completely cure the resulting harm to the Accused's right to make full answer and defence".[54] He further suggests that the official notes authored by Gerovac and Mikulić lack probative value,[55] and adds that if the Impugned Decision is upheld, he will seek to reopen his case by calling at least nine witnesses.[56] This in his view would further delay the proceedings, infringing upon his right to be tried without undue delay.[57] In his Notice, however, Markač informed the Appeals Chamber that, he will not seek to reopen his case by calling witnesses, should the Impugned Decision be upheld.[58]

19. In sum, Markač argues that allowing the Prosecution to reopen its case would be prejudicial to him as it would (i) "dramatically" affect his right to be tried without undue delay, and (ii) consume more time, effort, and resources in order to review the disclosed material and to conduct investigations in the field.[59]

20. In response, the Prosecution submits that Markač's first ground of appeal should be summarily dismissed as he fails to meet the required standard of appellate review.[60] Concerning Markač's second ground of appeal, the Prosecution avers that the Trial Chamber took into account the consequences that reopening the Prosecution's case-in-chief would have on the Defence case, and correctly found that it would not result in any undue delay in the proceedings[61]

21. The Prosecution further argues that Markač fails to explain why allowing him to respond to the fresh evidence will not be sufficient to guarantee his right to a fair trial.[62] As to Markač's arguments concerning the admissibility of the proposed evidence, the Prosecution argues that they

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[52] *Ibid.*, para. 27.
[53] *Ibid.*, para. 28, referring to Article 21(4)(b) of the Statute.
[54] Markač Appeal, para. 29.
[55] *Ibid.*, para. 30
[56] *Ibid.*, para. 32.
[57] *Ibid.*
[58] Notice, para. 1.
[59] Markač Appeal, para. 33. See also Notice, para. 1.
[60] Response, para. 17.
[61] *Ibid.*, paras 18-19.
[62] *Ibid.*, para. 20, citing *Popović* Decision of 24 September 2008, para. 24; Rules 115 and 119 of the Rules.

are premature as the Trial Chamber examined only "the anticipated probative value" of the evidence in the Impugned Decision rather than its admissibility.[63]

22. Finally, the Prosecution contends that Markač's challenge to the Scheduling Order should be dismissed as it falls outside the scope of the present appeal.[64]

C. Analysis

1. Whether the Trial Chamber applied the correct legal standard (Čermak's first ground of appeal)

23. Relying upon the Appeals Chamber's holding in the *Čelebići* Appeal Judgement, the Trial Chamber stated the law applicable to a request for reopening a party's case as follows:

> [W]hen 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 the case-in-chief of the party making the application. 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. 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.[65]

24. The Appeals Chamber finds that the Trial Chamber correctly articulated the applicable legal standard. It is well established in the jurisprudence of the Tribunal that Trial Chambers are bound by the *ratio decidendi* of the Appeals Chamber.[66] Whereas a Trial Chamber may follow a decision of another Trial Chamber, should it find it persuasive, Trial Chambers' decisions have no binding force upon each other.[67] Accordingly, the Appeals Chamber finds no error in the Trial Chamber's decision not to follow precedents of earlier Trial Chambers as suggested by Čermak.[68] Moreover, the Appeals Chamber notes that an evaluation of what constitutes fresh evidence and whether the Prosecution has met its obligation of reasonable diligence is highly contextual, depending on the factual circumstances of each case. Thus, any assessment in this respect should be carried out on a case-by-case basis.[69]

25. As to the standard applied by the Trial Chamber with respect to what constitutes fresh evidence, Čermak and Markač seem to argue that because the Prosecution had evidence in its possession showing that Bilobrk was a forensic technician involved in the work of the sanitation teams at Knin, his testimony could not constitute fresh evidence for the purposes of reopening the

[63] Response para. 21.
[64] *Ibid.*, para. 19.
[65] Impugned Decision, para. 10 (footnotes omitted).
[66] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 113.
[67] *Ibid.*, para. 114.
[68] See Čermak Appeal, paras 10, 12, 17, referring, *inter alia*, to Čermak's Consolidated Response, paras 5-13, 16.
[69] *Popović* Decision of 24 September 2008, para. 10.

Prosecution's case-in-chief.[70] The Appeals Chamber does not agree with this interpretation. The evidence that the Prosecution seeks to introduce is Bilobrk's specific testimony concerning Čermak's or someone else's alleged suggestion to plant weapons by the bodies of the victims in Grubori. In this respect, the fact that the Prosecution was unaware of this part of Bilobrk's testimony until the results of the investigation conducted by the Croatian authorities became known, is uncontested by the parties.[71] Accordingly, the Trial Chamber correctly focused its assessment on whether the specific testimony of Bilobrk may constitute fresh evidence for the purposes of reopening the Prosecution's case-in-chief. Čermak's first ground of appeal is thus dismissed.

2. Whether the Trial Chamber erred in finding that the Prosecution acted with reasonable diligence (Čermak's second and part of his third grounds of appeal, and Markač's first ground of appeal)

26. At the outset, the Appeals Chamber observes that, contrary to Čermak's assertion, in examining the matters before them Trial Chambers are entitled to take into account the totality of the parties' oral and written submissions. Accordingly, Čermak fails to show any error in the Trial Chamber's consideration of the Prosecution's arguments in reply.[72]

27. The Appeals Chamber further notes that the arguments raised by Čermak and Markač on appeal focus on the length of the Prosecution's investigation in Grubori; Bilobrk's participation in the sanitation work at the Knin cemetery which was known to the Prosecution; and the alleged involvement of such teams in the concealment of crimes.[73] The Appeals Chamber recalls that the Trial Chamber was satisfied with the Prosecution's explanation as to why forensic technicians involved in the sanitation work in Grubori were not a promising lead in its investigation.[74] It found 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".[75] The Appeals Chamber notes in this respect that the Prosecution explained at great length, with extensive reference to the evidence, its investigative efforts with respect to the crimes allegedly committed in Grubori. The Prosecution submitted that it had conducted at least 18 suspect interviews and over 20 witness

[70] Čermak Appeal, paras 11, 18; Markač Appeal, para. 27.
[71] The Appeals Chamber further notes that the category of fresh evidence could include evidence in a party's possession, which becomes significant only in the light of other fresh evidence (*Popović* Decision of 24 September 2008, para. 11).
[72] See Čermak Appeal, paras 25-26. Moreover, the Appeals Chamber notes that on 25 March 2010 the Trial Chamber granted Čermak's request for leave to file a surreply to the Prosecution's Reply to Consolidated Responses (see Impugned Decision, para. 1). Čermak filed the surreply on 29 March 2010 (*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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). Accordingly, the Appeals Chamber finds that Čermak was afforded a proper opportunity to fully respond to the Prosecution's arguments.
[73] See Čermak Appeal, paras 17-18; Markač Appeal, paras 23, 25-27.
[74] Impugned Decision, para. 11.
[75] *Ibid.*

interviews in connection with the Grubori incident.[76] The evidence gathered suggested that "the role of the forensic technicians during the sanitation process was limited to documenting the collection and burial of the bodies to allow for potential identification",[77] and that the meeting at which a decision was allegedly taken not to conduct an on-site investigation in Grubori did not involve forensic technicians.[78] The Prosecution thus argued that none of the gathered evidence indicated that Čermak communicated with the forensic technicians, or that anyone had suggested that weapons be planted at the scene.[79]

28. The Trial Chamber accepted this explanation, finding that despite the Prosecution's extensive investigation there were no prior leads to the newly proposed evidence.[80] It reasoned that an indication that Bilobrk was involved in sanitation work at the Knin cemetery did not constitute a lead that would have put the Prosecution on notice.[81] The Appeals Chamber is satisfied that the Trial Chamber did not abuse its discretion in reaching the impugned finding. Indeed, the length of an investigation does not *per se* imply that the Prosecution should have pursued all imaginable directions and interviewed an unlimited number of witnesses. In the circumstances of the case, it was within the discretion of the Trial Chamber to infer that there were "no clear leads" to the evidence which the Prosecution currently seeks to introduce. The Appeals Chamber further finds that it was open to the Trial Chamber to conclude that the Prosecution had successfully discharged its burden of showing that it had exercised reasonable diligence. Accordingly, Čermak's and Markač's arguments in this regard are dismissed.

29. Further, having found that the Prosecution acted with reasonable diligence with respect to Bilobrk's testimony, the Trial Chamber correctly established that the Prosecution could not have identified and presented the testimony of Gerovac and Mikulić during its case-in-chief.[82] Indeed, the Appeals Chamber is satisfied that the testimony of the two witnesses became significant only in light of the expected testimony of witness Bilobrk.[83] Čermak's argument in this regard is therefore dismissed.

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[76] Motion to Reopen, paras 15-16.
[77] Prosecution's Reply to Consolidated Responses, para. 5.
[78] *Ibid.*, para. 6.
[79] Motion to Reopen, para. 14.
[80] Impugned Decision, para. 11.
[81] *Ibid.*
[82] *Ibid.*
[83] See Prosecution's Further Submission, para. 7.

3. Whether the Trial Chamber failed to provide a reasoned opinion in relation to its finding that the Prosecution acted with reasonable diligence (remainder of Čermak's third ground of appeal)

30. In the alternative, Čermak argues that the Trial Chamber failed to provide a reasoned opinion.[84] The Appeals Chamber recalls that while a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning.[85] In the instant case, the Trial Chamber clearly explained why it considered that the Prosecution had acted with reasonable diligence. It reasoned that Bilobrk's involvement in sanitation work at the Knin cemetery did not constitute a promising lead "in light of the number of persons involved in sanitation work".[86] While it would have been desirable for the Trial Chamber to refer explicitly to Čermak's arguments, the Appeals Chamber is not convinced that the Trial Chamber's reasoning, taken as a whole, was insufficient. Accordingly, Čermak's ground of appeal in this regard is dismissed.

4. Whether the Trial Chamber erred in finding that the probative value of the proposed evidence is not substantially outweighed by the need to ensure a fair trial (Markač's second ground of appeal)

31. The Appeals Chamber recalls that once a Trial Chamber finds that the fresh evidence could not, with reasonable diligence, have been identified and presented during the case-in-chief of the party requesting the reopening of its case, the Trial Chamber should consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial.[87] Relevant considerations in this respect are the stage in the trial at which the evidence is sought to be adduced and any potential delay in the proceedings.[88]

32. In the instant case, the Trial Chamber was satisfied with the anticipated probative value of the testimony of Bilobrk, Gerovac and Mikulić.[89] Further, the Trial Chamber was mindful that the Prosecution's request to reopen its case was filed at an advanced stage of the trial proceedings.[90] As recalled above, this consideration was relevant to the Trial Chamber's assessment as to whether the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair

[84] Čermak Appeal, para. 27.
[85] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.1-3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III-Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 30, referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 39, citing *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 18.
[86] Impugned Decision, para. 11.
[87] *Čelebići* Appeal Judgement, para. 283.
[88] *Ibid.*, para. 290.
[89] Impugned Decision, para. 12. Concerning Markač's suggestion that the official notes authored by Gerovac and Mikulić lack probative value, the Appeals Chamber notes that the Impugned Decision dealt only with the Prosecution's request to call Bilobrk, Gerovac and Mikulić, and did not deal with a request for admission of documentary evidence (see *Ibid.*, para. 12).
[90] *Ibid.*, para. 13.

trial. The Trial Chamber was satisfied in this respect that the evidence dealt with a "limited and discrete set of facts", and therefore "[t]he time required for hearing the proposed witnesses and for the Defence, to the extent needed, to research and reopen their cases would [...] be limited".[91]

33. The Appeals Chamber recalls that it must accord deference to a Trial Chamber's decision concerning the management of the trial proceedings. Such deference is based on the Trial Chamber's familiarity with the case and the conduct of the parties.[92] In the instant case, the trial proceedings have been ongoing for over two years which suggests that the Trial Chamber has a clear grasp of the major issues in contention between the parties and of the evidence adduced so far in the proceedings. Moreover, the Trial Chamber called a number of witnesses to testify specifically with regard to the Grubori incident,[93] which further suggests that the Trial Chamber is best placed to assess the potential amount, scope, and need for additional evidence that the Defence may seek to present, and the time and resources that this may entail. The Trial Chamber explicitly took all these factors into consideration when reaching the impugned finding.[94]

34. In light of these considerations and taking into account the specific circumstances of the case, the Appeals Chamber finds that the Trial Chamber's conclusion that the reopening of the Prosecution's case would not result in undue delay constituted a reasonable exercise of its discretion. Further, the Appeals Chamber is not persuaded that Markač's right to a fair trial would be adversely affected merely as a result of the reopening of the Prosecution's case.[95] What is important for the Trial Chamber is to ascertain that following the reopening of the Prosecution's case, the proceedings are indeed conducted with full respect for the principle of equality of arms. Accordingly, Markač's second ground of appeal is dismissed.

35. In addition, the Appeals Chamber recalls that in a case where the evidence is sought to be presented at a very advanced stage of the proceedings, the Prosecution should establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial.[96] The Appeals Chamber notes in this respect that neither Čermak nor Markač argue that the Prosecution did not exercise reasonable diligence in the steps it took following the receipt of the investigation file from the Croatian authorities.

36. Concerning Markač's argument that the Scheduling Order violated his right to have adequate time for the preparation of his defence, the Appeals Chamber notes that Markač did not

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[91] *Ibid.*
[92] See *supra* para. 5.
[93] Impugned Decision, para. 12.
[94] *Ibid.*, para. 13.
[95] Markač Appeal, para. 29.

seek certification to appeal the Scheduling Order. Accordingly, the Appeals Chamber finds that it is not properly seised of the matter.

IV. DISPOSITION

37. For the foregoing reasons, the Appeals Chamber,

DISMISSES the Čermak Appeal;

DISMISSES the Markač Appeal; and

AFFIRMS the Impugned Decision.

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

Done this first day of July 2010

At The Hague,
The Netherlands.

Judge Mehmet Güney, Presiding

[Seal of the Tribunal]

[96] *Čelebići* Appeal Judgement, para. 286.