



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

Case No. IT-06-90-PT
Date: 9 October 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge O-Gon Kwon, Presiding
Judge Kimberly Prost
Judge Judge Ole Bjørn Støle, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 9 October 2006

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON “PROSECUTION’S MOTION
FOR EXTENSION OF TIME AND FOR CLARIFICATION”
AND ON “COMBINED PROSECUTION’S NOTICE OF
COMPLIANCE WITH THE CHAMBER’S ORDER OF 14 JULY
2006, AND MOTION FOR PROTECTIVE MEASURES”**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms Laurie Sartorio

Counsel for the Accused:

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Čedo Prodanović and Ms Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

THIS 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”),

BEING SEIZED OF the “Prosecution’s Motion for Extension of Time and for Clarification”, filed on 31 August 2006 (“Motion of 31 August 2006”), whereby the Office of the Prosecutor (“Prosecution”) requests that the Trial Chamber (1) grant an extension of time within which to comply with the Trial Chamber’s “Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, filed on 14 July 2006 in the case *Prosecutor v. Ante Gotovina* (“Decision of 14 July 2006”);¹ and (2) provide clarification on one aspect of the Decision, namely the order in paragraph 7 of the Decision,

BEING FURTHER SEIZED OF the “Combined Prosecution’s Notice of Compliance with the Chamber’s Order of 14 July 2006, and Motion for Protective Measures”, filed confidentially on 18 September 2006 (“Motion of 18 September 2006”), in which the Prosecution submits a notification of compliance with paragraph 7(a) of the Decision of 14 July 2006 and submits a motion for protective measures with regard to the statements of six witnesses,

1. Introduction

NOTING the “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder”, issued on 14 July 2006, in which the Trial Chamber ordered, *inter alia*, that the case of *Prosecutor v. Ante Gotovina*, and the case of *Prosecutor v. Ivan Čermak and Mladen Markač* be joined,²

NOTING the Certificate dated 17 July 2006, whereby the Registrar assigned a new case number to the joined case,³

NOTING the Order regarding the composition of Trial Chamber II in the case of *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*,⁴ and the Order appointing a Pre-Trial Judge in the present case, both dated 16 August 2006,⁵

¹ *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, 14 July 2006.

² *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 (re-filed on 17 July 2006 with the new case number IT-06-90-PT).

³ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Registrar’s Certificate, 17 July 2006. The Registrar decided that the joined case should be assigned the new case number IT-06-90-PT, and that all documents filed from the date of 14 July 2006 in the joined case shall bear this new number.

2. Brief procedural history

NOTING that on 11 January 2006 the Prosecution filed “Prosecution’s Motion for Non-disclosure to Public of Materials Disclosed pursuant to Rules 66 and 68” (“Prosecution’s Motion for non-disclosure”), requesting that the Trial Chamber enter an order of non-disclosure to the public of all supporting and other materials disclosed to the Defence for Ante Gotovina (“Defence” and “Accused” respectively) pursuant to Rule 66 (A) and 68 of the Rules with certain redactions in order to ensure the protection of the security, confidentiality and integrity of victims and witnesses,⁶

NOTING that the redactions sought by the Prosecution concern information which would lead to the identification of the current whereabouts of witnesses or potential witnesses,⁷

NOTING that on 11 January 2006 the Prosecution disclosed to the Defence for Ante Gotovina the supporting materials in redacted form,⁸

NOTING that, in the case of *Prosecutor v. Ante Gotovina*, the Trial Chamber, by Decision of 14 July 2006, partly granted the Prosecution Motion for non-disclosure and ordered the Prosecution to perform one of the three actions enumerated in paragraph 7, namely:

“(a) comply within fourteen days with its obligation under Rule 66(A)(i) of the Rules to supply to the Accused copies in an unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statement obtained by the Prosecutor from the Accused;

or

(b) in the alternative, file a document with the Chamber within seven days of this order confirming that it has fulfilled its obligations under Rules 66 and 68 of the Rules and that no redactions have been made to the material already disclosed to the Defence;

or

(c) file a motion for protective measures within fourteen days, in relation to particular statements or other material or particular victims or witnesses; in that case, the Prosecution need not supply unredacted copies of those statements or material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the term of any order made upon that motion;”;

⁴ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Order regarding composition of Trial Chamber, filed on 16 August 2006.

⁵ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Order appointing a Pre-Trial Judge, filed on 16 August 2006.

⁶ Prosecution’s Motion for non-disclosure, p. 2.

⁷ Prosecution’s Motion for non-disclosure, p. 6, letter (F); Prosecution’s Reply to Defendant Ante Gotovina’s Response in Opposition to Prosecution’s Motion for Non-disclosure, 11 April 2006, para 11.

⁸ *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Status Conference, 7 April 2006, T. 46. The Defence received the supporting materials on 22 March 2006. *Ibid.*

3. Motion of 31 August 2006

NOTING that in the Motion of 31 August 2006, the Prosecution states that it was unable to meet the deadline set out in paragraph 7 of the Decision of 14 July 2006, due to a failure in the transmission of court filings within the team assigned to the case, and therefore seeks an extension of time such that a response may be filed by 18 September 2006,⁹

NOTING that the Prosecution further states that it is unclear what specific material is referred to throughout paragraph 7 of the Decision of 14 July 2006, and that the uncertainty arises from the fact that subparagraph 7(a) is limited to materials falling within Rule 66(A)(i) of the Rules of Procedure and Evidence (“Rules”), while the remaining subparagraphs may be read as relating to different material,¹⁰

NOTING that in the Motion of 31 August 2006, the Prosecution submits that it has already disclosed to the Defence over 500 statements and approximately 2500 documents, without specifying which material was disclosed under Rule 66 (A)(i), Rule 66 (A)(ii) or Rule 68,¹¹

NOTING that during the Status Conference of 7 September 2006, the Pre-Trial Judge informed the parties that a decision on the Motion of 31 August 2006 would be taken shortly, and that the sufficiency of an extension of time to 18 September 2006 as proposed by the Prosecution would be considered,¹²

NOTING that the Defence did not object to the Motion of 31 August 2006,¹³

4. Motion of 18 September 2006

NOTING that in the Motion of 18 September 2006 the Prosecution submits that, pursuant to paragraph 7(a) of the Decision of 14 July 2006,¹⁴ on 18 September 2006 all witness statements that

⁹ Motion of 31 August 2006, paras 2 and 10-11.

¹⁰ Motion of 31 August 2006, paras 3-8.

¹¹ These documents include material attached to, and disclosed as part of, witness statements. See Motion of 31 August 2006, para. 13. In the Status Conference of 7 September 2006, the Prosecution stated that it has disclosed up to that date to the Defence Counsel of the three Accused, approximately 520 statements from approximately 415 witnesses, as some witnesses provided more than one statement. Approximately 2700 documents were disclosed in connection with those witness statements. See *Prosecutor v. Ante Gotovina Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Status Conference, 7 September 2006, T. 6.

¹² Status Conference, 7 September 2006, T.4.

¹³ Motion of 31 August 2006, para. 2. See also Status Conference, 7 September 2006, T. 3-4.

¹⁴ The Prosecution states that “[i]n order to file the present document within the time frame requested by the Prosecution (18 September 2006) and simultaneously avoid rendering the clarification moot, the Prosecution is interpreting the Chamber’s Decision narrowly in order not to extend the ruling beyond what the Trial Chamber may have intended”. See Motion of 18 September 2006, para. 5.

were included in the supporting materials were disclosed to the Defence in unredacted form, with the exception of the statements of six witnesses,¹⁵

NOTING that in the Motion of 18 September 2006, the Prosecution seeks protective measures in the form of redaction from the witnesses' statements of specific information that would lead to the identification of the current whereabouts of the six witnesses,¹⁶

NOTING that the Prosecution specifies that the six witnesses are "civilian crime base witness[es]" and indicates for each of them the reasons justifying the redaction sought,¹⁷

NOTING, in particular, that the Prosecution submits that, from information included in their statements, the six witnesses have security concerns and therefore do not wish to have their address revealed outside the Office of the Prosecutor, most of them having indicated that if they were called to testify at trial they would request special protective measures,¹⁸

NOTING that in the Motion of 18 September 2006, the Prosecution submits that, "[v]ictims and witnesses are entitled to safety measures, fair treatment, respect and due process" and that "[s]teps should be taken to ensure their privacy and safety, as well as that of their families, and to protect victims and witnesses and their families from intimidation and retaliation",¹⁹

NOTING that, according to what is stated in the Motion of 18 September 2006, the Prosecution has contacted the Defence with respect to these six witnesses, and the Defence has no objection to the proposed redactions,²⁰

NOTING that the Defence has not filed any response to the Motion of 18 September 2006,

5. Discussion

CONSIDERING Articles 20, 21 and 22 of the Statute and Rules 53(A), 66(A), 68 and 69(A) of the Rules, which the Trial Chamber already analysed and considered in the Decision of 14 July 2006,²¹

¹⁵ Motion of 18 September 2006, paras 5-6.

¹⁶ Motion of 18 September 2006, paras 7-10.

¹⁷ Motion of 18 September 2006, para. 9 (a) to (f).

¹⁸ *Ibid.* Four witnesses, if they were called to testify at trial, requested special protective measures. One witness requested to have his/her name to be kept confidential. One witness requested to be contacted through a non-governmental organization.

¹⁹ Motion of 18 September 2006, para. 10.

²⁰ Motion of 18 September 2006, para. 11.

²¹ Decision of 14 July 2006, pp. 4-5.

CONSIDERING that Rule 75(A) of the Rules, provides that “[a] Judge or a Chamber may, *proprio motu* or at the request of either party, [...] order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”,

CONSIDERING that it is clear from the Decision of 14 July 2006 that any redaction in the material disclosed by the Prosecution to the Defence should be justified by specific protective measures,²²

CONSIDERING therefore that in order to comply with its disclosure obligation under Rules 66(A) and 68 of the Rules, the Prosecution must provide the accused with all relevant material in unredacted form,²³

CONSIDERING that the Prosecution, to be allowed to redact information from such materials, is required to file motions for protective measures with respect to each witness and for each document sought to be redacted,²⁴

CONSIDERING that Rule 75 (F) provides that “[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures: (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule”,

CONSIDERING, however, that Rule 75 (F) (ii) provides that protective measures ordered in the first proceedings “shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings”,

CONSIDERING that, in the present case, the Prosecution had originally formulated the request for protective measures in the most general of terms, without justifying each measure sought,²⁵

CONSIDERING that following the Motion of 18 September 2006, the Prosecution provided the Accused with copies in unredacted form of all material disclosed pursuant to Rule 66(A)(i), except for the statements of six witnesses in respect of whom the Prosecution seeks protective measures in the form of redactions of specific information that could lead to the whereabouts of those six witnesses,

²² Decision of 14 July 2006, pp. 5-7, referring, *inter alia*, to *Brđanin* Decision and *Milošević* Decision.

²³ Decision of 14 July 2006, p.7.

CONSIDERING that the Defence has no objection to the proposed redactions,

CONSIDERING that the purpose of the requested redactions of information relating to the six witnesses' current whereabouts is to maintain the safety and security of those witnesses, and that the Trial Chamber is satisfied that these measures are appropriate and necessary to safeguard the privacy and protection of those witnesses and the integrity of the evidence and the proceedings, and are consistent with the rights of the Accused in this case,

CONSIDERING that, in addition to the material disclosed under Rule 66(A)(i) of the Rules, the Prosecution had disclosed to the Defence additional material under Rules 66 and 68 of the Rules ("other disclosed material"),²⁶

FOR THE FOREGOING REASONS, the Trial Chamber

HEREBY GRANTS the Motion of 31 August 2006 and, pursuant to Rules 54, 69(A) and 75(A) of the Rules, **ORDERS** as follows:

(1) in complying with its obligation under Rules 66(A)(ii) and 68 of the Rules, the Prosecution shall provide the Accused within fourteen (14) days with copies in unredacted form of all material already disclosed to the Defence,

(2) in the event that, in relation to material already disclosed to the Defence, the Prosecution seeks protective measures with respect to particular witness statements or other material or particular victims or witnesses, the Prosecution shall file a motion for protective measures within such period of fourteen days. In this case, the Prosecution need not provide unredacted copies of those statements or material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the term of any order made upon that motion,

(3) in complying with its obligation under Rules 66 and 68 of the Rules, the Prosecution will continue to disclose to the Defence any relevant material in unredacted form, and if need be, it will file a motion for protective measures with respect to particular witness statements or other material or particular victims or witnesses,

FURTHER GRANTS the Motion of 18 September 2006 and **ORDERS** pursuant to Rules 54, 69(A) and 75(A) of the Rules that:

²⁴ Decision of 14 July 2006, p.5.

²⁵ Decision of 14 July 2006, p.7.

²⁶ See Motion of 31 August 2006, para. 13; Status Conference of 7 September 2006, T.6.


the Prosecution may redact from the above-mentioned six witness' statements, which are to be disclosed to the Defence, any information which discloses the current whereabouts of the witness and/or his or her family.

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

Dated this ninth day of October 2006

At The Hague

The Netherlands



Judge O-Gon Kwon
Presiding Judge

[Seal of the Tribunal]