

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:

11 November 2008

Original:

English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 11 November 2008

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

DECISION ON JOINT DEFENCE REQUEST FOR CERTIFICATION TO APPEAL  
THE TRIAL CHAMBER'S DECISION OF 9 OCTOBER 2008

**Office of the Prosecutor**

Mr Alan Tieger  
Mr Stefan Waespi

**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

1. The Chamber is seized of the joint Defence request for a certification to appeal the Chamber's Decision of 9 October 2008 ("Decision"), concerning the Prosecution's submission of a further clarification on the identity of victims in this case ("Further Clarification").<sup>1</sup> The Prosecution did not respond to the Request.

2. The Decision set out that the Defence submissions with regards to the additionally named victims listed in the Further Clarification had already been litigated at the pre-trial stage, and concerned an issue relating to the pleading of the Indictment and its scope.<sup>2</sup> The Chamber held that the Prosecution could have presented evidence of the additionally named victims without submitting the Further Clarification, and that the Accused could have been found criminally liable for those killings, provided that the required material elements are proven.<sup>3</sup> The Chamber acknowledged that the clarification of additionally named victims could require the Defence to review already disclosed materials, and in some cases, could entail a need to conduct further specific investigations.<sup>4</sup> Since the Chamber was not in a position to know the nature and extent of such possible further investigations, it provided the Defence with an opportunity to address the Chamber in resolving any such requirement.<sup>5</sup>

3. 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.

4. According to the Defence, the issue in question is whether the Prosecution can seek to clarify the Indictment, "seven months into trial by specifying 189 additional killing incidents".<sup>6</sup> It submits that this is an issue that affects the fair and expeditious conduct of the proceedings, and that it is not "unreasonable to conclude that the addition of 189 killing incidents could materially affect the outcome of trial".<sup>7</sup> It further submits that the Decision relates to the most serious charges in the Indictment, namely the counts of persecution and

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<sup>1</sup> Joint Defence Request for Certificate to Appeal the Trial Chamber's Decision of 9 October 2008, 16 October 2008 ("Request"); Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 9 October 2008; Prosecution's Further Clarification on Identity of Victims, 16 July 2008.

<sup>2</sup> Decision, paras 9-10.

<sup>3</sup> Decision, para. 12.

<sup>4</sup> Decision, para. 14.

<sup>5</sup> Decision, para. 14.

<sup>6</sup> Request, para. 3.

<sup>7</sup> Request, paras 3, 5.

murder, and that all accused are entitled to know the nature and cause of the charges against them at the beginning of trial.<sup>8</sup> The Defence argues that while the charges may remain the same, the addition of 189 killing victims changes the nature and cause of those charges.<sup>9</sup>

5. The Defence submits that “[t]his issue must be settled as soon as possible”, and that the immediate resolution of the disputed issue by the Appeals Chamber will materially advance the proceedings. According to the Defence, it is now faced with 189 additional victims to investigate, with only two months of the Prosecution case remaining. It adds that if the Chamber were to decide not to grant the certification, the Defence’s only recourse would be to seek an adjournment in order to investigate the 189 additional killings victims, which would result in a significant delay of the proceedings.

6. While the Further Clarification added names of victims to those listed in Schedule 2, these killing victims are already subject to the charges of murder and persecution to the Indictment and do not form a basis for conviction on their own. The Indictment, listing 37 representative killings, was found by the Pre-Trial Chamber in this case to have been sufficiently pled. The Accused, none of whom were charged with the personal perpetration of any of the acts of murder and persecution, were therefore put on notice of the nature and cause of the charges against them in this regard. None of the three Defence teams appealed the Pre-Trial Chamber’s decision. The present Decision, rather, involves the issue of whether at this stage of the trial, in particular as a result of the additional investigation and verification efforts which the Defence considers its duty to perform, the Defence is unduly prejudiced in their fundamental right to adequate time and facilities to prepare their defence, and in fully using the newly obtained information in their favour. In this respect, the Chamber found that the Further Clarification in fact provided additional opportunities to the Defence to challenge the alleged additional killing incidents. Furthermore, the Defence had not substantiated the possible need for and nature of further investigations as a result of the Further Clarification and the Chamber invited the Defence to do so and request an appropriate remedy. The Chamber understands the issue to be whether this additional burden upon the Defence should be the prevailing factor in disallowing the Prosecution to submit a Further Clarification on the identity of 189 victims which it considers to be the subject of the charges against the Accused. The Chamber finds, in the specific circumstances of this case, that the Decision involves an

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<sup>8</sup> Request, para. 4.

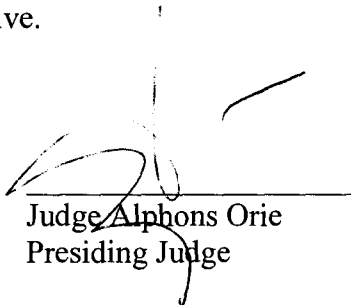
<sup>9</sup> Request, para. 4.

issue that could significantly affect the fair and expeditious conduct of the proceedings. The first requirement of Rule 73 (B) of the Rules is met.

7. Concerning the second requirement of Rule 73 (B) of the Rules, the Chamber considers that to leave this matter relating to the fair trial of the Accused for a possible appeal of a Judgement in the present case, could create procedural difficulties with serious delays as a result. The Chamber finds that the immediate resolution by the Appeals Chamber will materially advance the proceedings, and is therefore satisfied that the second requirement of Rule 73 (B) of the Rules is also met.

8. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **GRANTS** the Request.

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



Judge Alphons Orié  
Presiding Judge

Dated this 11th day of November 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**