

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-AR73.3
Date: 27 March 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision of: 27 March 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON JOINT REQUEST OF ANTE GOTOVINA AND MLADEN
MARKAČ FOR A WRIT OF MANDAMUS**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Stefan Waespi

Counsel for the Accused:

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

A handwritten signature in black ink, appearing to be a stylized name.

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 “International Tribunal”, respectively) is seized of a joint request by Ante Gotovina (“Gotovina”) and Mladen Markač (“Markač”, collectively “Joint Defence”)¹ against the “Second Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims”, issued by Trial Chamber I (“Trial Chamber”) on 2 March 2009 (“Impugned Decision”).

I. PROCEDURAL BACKGROUND

2. On 17 July 2008, the Prosecution filed the “Prosecution’s Further Clarification of Identity of Victims” (“Further Clarification”) to which was annexed an Amended Schedule 2 to the operative indictment.² In addition to correcting minor mistakes and providing additional identifying information regarding the alleged known victims listed in the original Schedule 2,³ the Prosecution identified 59 alleged victims to be removed from Schedule 2⁴ and “a further 189 victims that are the subject of the charges against the Accused”.⁵ As a result, the number of alleged victims identified in the Amended Schedule 2 amounted to 337.⁶ On 9 October 2008, the Trial Chamber issued its “Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims” (“9 October 2008 Decision”), in which the Trial Chamber denied the Defence⁷ for Gotovina, Markač and Ivan Čermak’s (collectively, “the Three Defence Teams”) joint motion to strike the Prosecution’s Further Clarification (“24 July 2008 Motion”).⁸

3. On 12 November 2008, the Trial Chamber granted the Three Defence Teams’ request for certification to appeal the Impugned Decision (“Joint Appeal”).⁹ On 26 January 2009, the Appeals Chamber granted the Joint Appeal and remanded the 9 October 2008 Decision to the Trial Chamber for reconsideration in light of the errors it identified.¹⁰ On 2 March 2009, the Trial Chamber

¹ Defendant Ante Gotovina’s and Defendant Mladen Markač’s Request for a Writ of *Mandamus*, 4 March 2009 (“Joint Request”).

² The operative indictment in this case is the Amended Joinder Indictment (*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Amended Joinder Indictment, 12 March 2008 (“Indictment”).

³ Further Clarification, para. 3, Appendix A. The original Schedule 2 (“Schedule 2”) was filed on 28 March 2007 (*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Clarification of Indictment, 28 March 2007, Schedule 2).

⁴ Further Clarification, para. 3, Appendix B.

⁵ Further Clarification, para. 3, Appendix C; Amended Schedule 2.

⁶ Further Clarification, para. 4.

⁷ 9 October 2008 Decision, p. 8.

⁸ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 24 July 2008.

⁹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Joint Defence Request for Certification to Appeal the Trial Chamber’s Decision of 9 October 2008, 12 November 2008.

¹⁰ Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber’s Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 26 January 2009 (“Appeals Chamber’s Decision”).

rendered the Impugned Decision, in which it denied the 24 July 2008 Motion.¹¹ The Joint Request, seeking that the Appeals Chamber order the Trial Chamber to comply with the Appeals Chamber's Decision, was filed on 4 March 2009. The Prosecution responded on 16 March 2009, requesting that the Appeals Chamber deny the Joint Request.¹² The Joint Defence did not reply.

II. DISCUSSION

4. The Joint Defence requests that the Appeals Chamber issue a writ of *mandamus*,¹³ a written order whereby "a superior court [may] compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly".¹⁴ It requests the Appeals Chamber to "order the Trial Chamber to comply with the [Appeals Chamber's Decision]" and mentions that the Joint Request is filed exceptionally under Rule 54 of the Rules of Procedure and Evidence (the "Rules").¹⁵ The Prosecution responds that the Joint Defence cannot request a writ of *mandamus* as it is not an available remedy for decisions under Rule 73 of the Rules.¹⁶ Further, it argues that the proper avenue to appeal a decision under Rule 73 of the Rules is to request certification to appeal, that the Joint Defence did so on 5 March 2009, and that the Joint Request is thus "an improper attempt to circumvent the certification process provided for by the Rules".¹⁷ Should the Appeals Chamber consider that issuing a writ of *mandamus* is an appropriate remedy, the Prosecution submits that it is not warranted in the present case as the Trial Chamber complied with the Appeals Chamber's Decision.¹⁸

5. The Appeals Chamber considers that the issue in the present case is not whether it is competent to issue a writ of *mandamus* but rather whether the Trial Chamber complied with the Appeals Chamber's Decision. It is established case-law before the International Tribunal that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers".¹⁹ When remanding the 9 October 2008 Decision to the Trial Chamber for reconsideration, the Appeals Chamber did not request that the Trial Chamber review its entire decision, but rather that it review it in light of the two errors identified by the Appeals Chamber. To the extent that the Joint Defence now submits that the Trial Chamber failed to address the two errors identified by the Appeals Chamber and thus challenges the same issues for which leave to appeal the 9 October 2008 Decision was originally granted, the Appeals Chamber remains

¹¹ Impugned Decision, para. 9.

¹² Prosecution's Response to Gotovina and Markač's Request for a Writ of *Mandamus*, 16 March 2009 ("Response").

¹³ Joint Request, para. 3.

¹⁴ Black's Law Dictionary, 8th Edition (St. Paul, West Group, 2004).

¹⁵ Joint Request, para. 3.

¹⁶ Response, para. 2.

¹⁷ Response, para. 3.

¹⁸ Response, paras 4-7.

¹⁹ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 113.

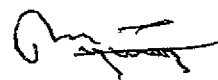
competent to address the Joint Request.²⁰ However, the Appeals Chamber notes that, on 5 March 2009, the Three Defence Teams also sought to appeal the Impugned Decision on the same grounds by filing a request for certification to appeal it under Rule 73(B) of the Rules.²¹ Such certification was granted on 19 March 2009.²² The Appeals Chamber thus declines to address the merits of the Joint Request in the present Decision. Rather, it considers that it is in the interests of judicial economy to address the issues raised in the Joint Request together with the issues raised by the Three Defence Teams in the certified appeal when seized of that appeal.

III. DISPOSITION

6. On the basis of the foregoing, the Appeals Chamber

DECLINES to address the merits of the Joint Request in the present Decision.

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



Judge Mehmet Güney
Presiding Judge

Dated this 27th day of March 2009
At The Hague
The Netherlands

[Seal of the International Tribunal]

²⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution's Appeal Following Trial Chamber's Decision on Remand and Further Clarification, 11 May 2007, para. 18.

²¹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Joint Defence Request for Certificate to Appeal the Trial Chamber's Second Decision of 2 March 2009, 5 March 2009.

²² Decision on Joint Defence Request for Certificate to Appeal the Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 19 March 2009, para. 3 ("The Chamber has already found that the subject matter of the First Decision [of 9 October 2008], namely the question of possible prejudice to the Defence which may have resulted from the Further Clarification, involved an issue which satisfied both requirements of Rule 73 (B) of the Rules. The Second Decision [of 2 March 2009] is a reconsideration of a part of the First Decision, within the scope determined by the Appeals Chamber, but it still concerns the same subject matter. The Chamber therefore maintains its finding that the issue involved could significantly affect the fair and expeditious conduct of the proceedings and that the immediate resolution by the Appeals Chamber will materially advance the proceedings.").