



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-AR73.4
Date: 7 May 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision of: 7 May 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON JOINT APPEAL AGAINST SECOND DECISION ON JOINT
DEFENCE MOTION TO STRIKE THE PROSECUTION'S FURTHER
CLARIFICATION OF IDENTITY OF VICTIMS**

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

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 appeal by Ante Gotovina, Ivan Čermak and Mladen 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 Joint Defence’s motion to strike the Prosecution’s Further Clarification (“24 July 2008 Motion”).⁷

3. On 12 November 2008, the Trial Chamber granted the three Defence Teams’ request for certification to appeal the 9 October 2008 Decision (“First Joint Appeal”).⁸ On 26 January 2009, the Appeals Chamber granted the First Joint Appeal and remanded the 9 October 2008 Decision to the Trial Chamber for reconsideration in light of the errors it identified.⁹ The Trial Chamber rendered the Impugned Decision, in which it again denied the 24 July 2008 Motion.¹⁰

¹ Joint Defence Appeal Against Second Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 26 March 2009 (“Joint Appeal”).

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; *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.

⁸ *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.

⁹ 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”), para. 23.

¹⁰ Impugned Decision, para. 9.

4. On 26 March 2009, with leave of the Trial Chamber under Rule 73(B) of the Rules of Procedure of Evidence (the “Rules”),¹¹ the Joint Defence filed its Joint Appeal. The Prosecution responded on 9 April 2009.¹² The Joint Defence replied on 17 April 2009.¹³

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that decisions on allegations of unauthorised modifications to schedules of an indictment are matters that fall within the discretion of the Trial Chamber.¹⁴ The Impugned Decision is such a discretionary decision to which the Appeals Chamber must accord deference. This 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”.¹⁵ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a “discernible error” resulting in prejudice to that party. The Appeals Chamber will only overturn a Trial Chamber’s discretionary decision 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.¹⁶

III. DISCUSSION

A. Arguments of the Parties

6. The Joint Defence argues that the Trial Chamber erred in fact and in law in the Impugned Decision “by not excluding the 189 alleged killing victims in the Further Clarification”.¹⁷ In particular, it contends that: (i) the Trial Chamber erred in fact by concluding that the Prosecution was in possession of the Ministry of Internal Affairs (“MUP”) lists on 27 July 2007 and not

¹¹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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 (“Certification Decision”).

¹² Prosecution Response to Joint Defence Appeal Against Second Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 April 2009 (“Response”).

¹³ Joint Defence Reply to Prosecution Response to Joint Defence Appeal Against Second Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 17 April 2009 (“Reply”).

¹⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 (“Galić Decision”), paras 11-12, 17.

¹⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.12, Decision on Slobodan Praljak’s Appeal of the Trial Chamber’s 13 October 2008 Order Limiting the Translation of Defence Evidence, 5 December 2008 (“Prlić et al. Decision”), para. 8 (internal quotation and citation omitted); *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, citing *Prosecutor v. Slobodan Milosević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3.

¹⁶ See, *inter alia*, *Prlić et al.* Decision, para. 8 and jurisprudence cited therein.

¹⁷ Joint Appeal, para. 1.

earlier;¹⁸ (ii) the Trial Chamber erred in law in not reassessing the 9 October 2008 Decision in light of the second error identified by the Appeals Chamber which required the Trial Chamber to determine whether the Prosecution could have provided notification of the Further Clarification earlier;¹⁹ and (iii) the Impugned Decision is

so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion in violation of Article 21(4)(a) [of the Statute of the International Tribunal ("Statute")] because the Defence's right to be informed promptly and in detail of the nature and cause of the charges against them cannot be met by the Prosecution notifying the Defence of the additional 189 alleged killing four months into the trial.²⁰

As a relief, the Joint Defence requests that the Appeals Chamber reverse the Impugned Decision and issue an order directing the Trial Chamber to preclude the Prosecution from including in its case in chief the 189 alleged victims identified in the Further Clarification.²¹

7. The Prosecution responds that the Joint Appeal should be dismissed, as the Joint Defence fails to demonstrate any discernible error resulting in prejudice to any member of the Joint Defence.²² More specifically, the Prosecution submits that the Joint Defence's argument with regard to the date at which the Prosecution came into possession of Exhibit D69 is misleading, and that the Trial Chamber did not err, since it limited itself to reviewing documentation received pursuant to a specific Request for Assistance.²³ Second, the Prosecution argues that the Joint Defence's argument that the Trial Chamber erred in law by not reassessing the 9 October 2008 Decision on whether the Prosecution could have provided earlier notification of the 189 killing victims is "baseless".²⁴ Finally, the Prosecution contends that the Trial Chamber properly exercised its discretion by addressing both errors identified by the Appeals Chamber.²⁵

8. The Joint Defence replies that since the Prosecution was in a position to provide notification of the additional 189 killing victims one year before the start of the trial, the failure to do so "violated the Defence's fundamental right to notice and resulted in prejudice to the Accused." As a consequence, the Joint Defence argues that the Further Clarification should be stricken.²⁶

¹⁸ Joint Appeal, paras 12(a), 13-23.

¹⁹ Joint Appeal, paras 12(b), 24-27.

²⁰ Joint Appeal, paras 12(c). *See also id.* paras 28-31.

²¹ Joint Appeal, para. 32.

²² Response, paras 1, 17-18.

²³ Response, para 1 (bullet 1), 3-9.

²⁴ Response, para 1 (bullet 2). *See also id.* paras 10-14.

²⁵ Response, para 1 (bullet 3), 15-16.

²⁶ Reply, para. 1.

B. Analysis

9. The Appeals Chamber found in the Appeals Chamber's Decision that: (i) the Trial Chamber erred in law in stating that the Prosecution was under no obligation to file the Further Clarification whereas the case-law of the International Tribunal states that the Prosecution should identify the victims to the extent possible;²⁷ and that as a result, (ii) the Trial Chamber failed to assess whether the Prosecution could have provided earlier notification of the additional 189 victims to the three Defence Teams in order to facilitate the preparation of an effective defence and thus failed to assess any potential prejudice to them.²⁸

10. In the Impugned Decision, the Trial Chamber clarified, with regard to the error identified by the Appeals Chamber, that it was aware that "the Prosecution must name the alleged victims to the extent possible".²⁹ Taking into account the Appeals Chamber's finding that "[t]he obligation resting upon the Prosecution to name the alleged victims to the extent possible logically implies that it should do so as soon as practicable after obtaining the information in order to facilitate the preparation of an effective defence",³⁰ the Trial Chamber then went on to assess "the level of prejudice that the Defence may suffer from the notice of information contained in the Further Clarification".³¹ To that effect, the Trial Chamber compared the list of victims in the Further Clarification with prior filings in that case, and found that "many of the newly listed alleged victims in the Further Clarification" were already listed in those prior filings, and that the Prosecution had submitted that those identified victims were relevant to counts 1, 6 and 7 of the Indictment. The Trial Chamber thus concluded that "the Prosecution disclosed information about the identity of some of the 189 newly identified victims to the Defence on 10 March 2008".³² Nevertheless, the Trial Chamber noted that it was not until the filing of the Further Clarification on 17 July 2008, that the Joint Defence was notified that many of the additional 189 victims were "indeed alleged victims of the crimes charged in the Indictment" and thus concluded that "the possibility of prejudice to the Defence cannot be discounted".³³ Thus, as the Joint Defence submits, the Trial Chamber found that the filing of the Further Clarification was a case of late notification.³⁴

²⁷ Appeals Chamber's Decision, para. 19.

²⁸ Appeals Chamber's Decision, para. 20.

²⁹ Impugned Decision, para. 4.

³⁰ Appeals Chamber's Decision, para. 20.

³¹ Impugned Decision, para. 5.

³² Impugned Decision, para. 6.

³³ Impugned Decision, para. 6.

³⁴ Joint Appeal, para. 27, referring to Impugned Decision, para. 7.

11 The Trial Chamber then turned to consider the possible remedies available and found that, whereas the notification took place well after the start of the Prosecution's case, there still remained "many months before its end".³⁵ In conformity with its previous practice in the case, it decided not to exclude the 189 newly identified victims but, considering that the newly identified victims would still have remained a part of the charges as unnamed victims if there had been no further identifying information, preferred to offer the possibility to the Joint Defence to benefit from "additional time for any further preparations, including investigations, should those be necessary" and granted them "an opportunity to address the Chamber" on this issue should they wish to do so.³⁶

12. The Appeals Chamber finds that the Trial Chamber considered that the filing of the Further Clarification on 17 July 2008 amounted to a "late notification". Based on that late notification of 17 July 2008, the Trial Chamber then assessed any potential prejudice to the Joint Defence. Thus, notwithstanding whether, as the Joint Defence argues, the most relevant MUP list was in the possession of the Prosecution on 8 January 2007 rather than on 27 July 2007 as the Trial Chamber found,³⁷ the Appeals Chamber finds that the Trial Chamber complied with the Appeals Chamber's Decision. The Appeals Chamber recalls that the issue certified under the present appeal is not whether the Trial Chamber erred in its assessment as to when the Prosecution could have notified the Joint Defence, but rather whether the Trial Chamber assessed whether the filing of the Further Clarification was a late notification and whether it assessed the potential prejudice to the Joint Defence.³⁸ In respect of the latter, the Appeals Chamber finds that the Trial Chamber not only considered whether there was any potential prejudice to the Joint Defence, but also provided a remedy to any such prejudice, offering the Joint Defence the possibility to receive additional time for preparation and investigation as a result of the admission of the Further Clarification. In fact, following a request from the Joint Defence,³⁹ the Trial Chamber ordered a stay of the proceedings of five weeks in order to allow the Joint Defence more time for preparations in relation to the victims identified in the Further Clarification.⁴⁰

13. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber complied with the Appeals Chamber's Decision in that it: (i) assessed whether the Prosecution could have

³⁵ Impugned Decision, para. 8.

³⁶ Impugned Decision, paras 8-9. *See also*, para. 9: "GRANTS the Defence an opportunity to address the Chamber should it want to request additional time for further preparations or recall witnesses."

³⁷ Joint Appeal, paras 13-14.

³⁸ Certification Decision, 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."

³⁹ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Joint Defence Request for a Stay of Proceedings, 4 March 2009.

provided earlier notification of the additional 189 victims to the Joint Defence and found that it was a case of late notification; and (ii) assessed the prejudice resulting from such late notification and offered a remedy.⁴¹

IV. DISPOSITION

14 On the basis of the foregoing, the Appeals Chamber

DISMISSES the Joint Appeal.

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



Judge Patrick Robinson
Presiding Judge

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

[Seal of the International Tribunal]

⁴⁰ The decision to grant additional time to the Joint Defence was announced in court on 19 March 2009 (T. 17216). The written decision was issued on 23 March 2009 (*Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Joint Defence Request for a Stay of the Proceedings, 23 March 2009).

⁴¹ See Appeals Chamber's Decision, paras 20-21.