



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: 26 January 2009
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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: 26 January 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON JOINT DEFENCE INTERLOCUTORY APPEAL AGAINST
TRIAL CHAMBER'S 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. Steven Kay, QC, Mr. Andrew Cayley and Ms. Gillian Higgins for Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mladen Markač

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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 seized of a joint appeal by Ante Gotovina ("Gotovina"), Ivan Čermak ("Čermak") and Mladen Markač ("Markač", collectively "Joint Defence" or "Accused")¹ against the "Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims" issued by Trial Chamber I ("Trial Chamber") on 9 October 2008 ("Impugned Decision"), in which the Trial Chamber denied the Joint Defence's motion to strike the Prosecution's further clarification on the identity of killing victims alleged in the operative indictment.²

I. PROCEDURAL BACKGROUND

2. On 24 July 2006, the Prosecution filed the Joinder Indictment joining the case against Gotovina and that against Čermak and Markač, and containing a Schedule to Joinder Indictment listing alleged killing incidents under Counts 6 and 7 ("Schedule").³ The Joinder Indictment specifies that the Schedule "sets forth only a small number of particular incidents for the purposes of specificity in pleading".⁴ On 19 March 2007, the Trial Chamber issued a decision⁵ on two Preliminary Motions by Gotovina alleging defects in the form of the Joinder Indictment.⁶ The Trial Chamber granted the Preliminary Motions in part, ordering the Prosecution to clarify whether it had information on the alleged victims that were once listed in the *Gotovina* Initial Indictment and/or Amended Indictment and later excluded from the Joinder Indictment, and to disclose the

¹ Joint Defence Appeal of the Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 19 November 2008 ("Joint Appeal"), and Confidential Appendices A and B.

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 ("Amended Joinder Indictment")).

³ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Joinder Indictment, 24 July 2006 ("Joinder Indictment"), paras 53, 61, and Schedule. See also *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, and *Prosecutor v. Ante Gotovina*, Case No. IT-06-90-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 17 July 2006, in which the Trial Chamber ordered the joinder of the two cases ("Decision on Joinder"). See also *Prosecutor v. Ante Gotovina*, *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, in which the Appeals Chamber dismissed the appeals filed respectively by each Accused against the Decision on Joinder.

⁴ Joinder Indictment, para. 61. See also Amended Joinder Indictment, para. 60.

⁵ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007 ("Decision on Gotovina's Preliminary Motions").

⁶ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-01-45-PT, Defendant Ante Gotovina's Preliminary Motion to Dismiss the Proposed Joinder Indictment Pursuant to Rule 72 of the Rules of Procedure and Evidence on the Basis of (1) Defects in the Form of the Indictment (Vagueness/Lack of Adequate Notice of Charges) and (2) Lack of Subject Matter Jurisdiction (*Ratione Materiae*), 28 April 2006; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Defendant Ante Gotovina's Preliminary Motion Pursuant to Rule 72(A)(ii) of the Rules of Procedure and Evidence Alleging Defects in the Form of the Joinder Indictment, 18 January 2007, (collectively, "Preliminary Motions").

identification of those victims regarding whom it had information.⁷ None of the parties appealed this decision. On 28 March 2007, the Prosecution filed a clarification and attached Schedule 2, containing a list of 207 known alleged killing victims and their basic identifying information.⁸ It specified that Schedule 2 was “not an exhaustive list of all killings in the region, but the Prosecution has made its best efforts to identify victims to the extent possible”.⁹

3. On 16 July 2008, the Prosecution filed the Prosecution’s Further Clarification of Identity of Victims to which was annexed an Amended Schedule 2.¹⁰ In addition to correcting minor mistakes and providing additional identifying information regarding the alleged known victims listed in Schedule 2,¹¹ the Prosecution identified 59 alleged victims to be removed from Schedule 2¹² and “a further 189 victims that are the subject of the charges against the Accused”.¹³ As a result, the number of identified alleged victims in the Amended Schedule 2 amounted to 337.¹⁴ On 9 October 2008, the Trial Chamber issued the Impugned Decision in which it denied the Joint Defence motion¹⁵ to strike the Further Clarification.¹⁶

4. On 11 November 2008, the Trial Chamber granted the Joint Defence request for certification to appeal the Impugned Decision.¹⁷ The Joint Appeal, seeking the reversal of the Impugned Decision and “for such other relief as this Appeals Chamber deems appropriate”, was filed on 19 November 2008.¹⁸ The Prosecution responded on 1 December 2008, requesting the dismissal of the Joint Appeal.¹⁹ The Joint Reply was filed on 5 December 2008.²⁰ On 9 December 2008, the Joint Defence confidentially filed a corrigendum to the Joint Reply, requesting the

⁷ Decision on Gotovina’s Preliminary Motions, para. 45, p. 25.

⁸ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Clarification of Indictment, 28 March 2007 (“Original Clarification”).

⁹ Original Clarification, para. 11 (footnote omitted).

¹⁰ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Further Clarification of Identity of Victims, 16 July 2008 (“Further Clarification”).

¹¹ Further Clarification, para. 3, Appendix A.

¹² Further Clarification, para. 3, Appendix B.

¹³ Further Clarification, para. 3, Appendix C, Amended Schedule 2.

¹⁴ Further Clarification, para. 4.

¹⁵ *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. See also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Response to Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 1 August 2008; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Joint Defence Motion Seeking Leave to Reply to Prosecution’s Response to Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 5 August 2008; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Reply to Prosecution’s Response to Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 22 August 2008.

¹⁶ Impugned Decision, p. 8.

¹⁷ *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 (“Certification Decision”).

¹⁸ Joint Appeal, para. 39.

¹⁹ Prosecution Response to Joint Defence Appeal against Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 1 December 2008 (“Response”), para. 37.

²⁰ Joint Defence Reply to the Prosecution Response to Joint Defence Appeal against Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 5 December 2008 (“Joint Reply”).

removal of paragraph 13 of the Joint Reply and the amendment of the first sentence of its paragraph 24.²¹

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.²² 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”.²³ 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.²⁴

III. DISCUSSION

A. Arguments of the Parties

6. The Joint Defence first submits that the Trial Chamber committed a discernible error of law in concluding that the Prosecution was under no legal obligation to file the Further Clarification.²⁵ In support of this allegation, the Joint Defence submits that both Articles 21(4)(a) and (b) of the

²¹ Corrigendum to Joint Defence Reply to the Prosecution Response to Joint Defence Appeal against Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 December 2008, filed confidentially (“Corrigendum”). In the Joint Reply, the Joint Defence seeks leave to exceed the word limit by 460 words “because detailed footnotes are required to address a number of submissions of the Prosecution” (Joint Reply, para. 3). The Appeals Chamber is not satisfied that this bare statement constitutes exceptional circumstances in the sense of paragraph C(7) of the Practice Direction on the Length of Briefs and Motions. The Appeals Chamber notes, however, that following the filing of the Corrigendum the number of words exceeding the word limit is reduced to 398 words. Considering that the Joint Reply emanates from three Accused, and with the view of judicial economy and a speedy resolution of this matter, the Appeals Chamber authorises the enlargement of word limit. It reiterates, however, that “the quality and effectiveness of a [submission] does not depend on the length but on the clarity and cogency of the presented arguments and that, therefore, excessively long [submissions] do not necessarily serve the cause of efficient administration of justice” (*Prosecutor v. Ljube Bošković et al.*, Case No. IT-04-82-A, Decision on Ljube Bošković’s Defence Motion for Extension of Word Limit, 25 November 2008, p. 4, and jurisprudence cited therein).

²² *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.

²³ *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 (footnote 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 Milošević*, 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.

²⁴ See, *inter alia*, *Prlić et al.* Decision, para. 8 and jurisprudence cited therein.

Tribunal's Statute ("Statute") and its jurisprudence instruct the Prosecution to provide, wherever possible, notice of the names of the victims who are the subject of the charges in the indictment.²⁶ It posits that in its Decision on Gotovina's Preliminary Motions, the Trial Chamber did not find otherwise, as it "put the Prosecution under an obligation to identify all victims *to the extent possible*".²⁷

7. The Joint Defence further alleges that the Prosecution has made a "material misrepresentation of fact" when claiming to have discovered 138 of 189 newly-specified alleged victims in the Further Clarification after receiving substantial new documentation relevant to alleged killing victims since the Original Clarification.²⁸ It claims that the Prosecution had the relevant documentation in its possession at the time of the Original Clarification, in March 2007.²⁹ It submits that the Prosecution was therefore in the position to add the additional 189 alleged killing victims at this stage, and that the Trial Chamber's failure to address this issue in the Impugned Decision amounts to a discernible error resulting in prejudice to the Joint Defence.³⁰

8. The Joint Defence further asserts that as a consequence of its error regarding the Prosecution's obligation to provide information in respect of alleged victims, the Trial Chamber failed to give any or sufficient weight to the lack of adequate notice and timing of the Further Clarification, resulting in prejudice to the Accused.³¹ It submits that the addition of 189 alleged killing incidents with only two months of the Prosecution's case-in-chief remaining impacts directly upon the right to a fair trial and the right to have adequate notice, time and facilities to prepare the defence.³² It notes, in this respect, that the Impugned Decision is relevant to the most serious charges in the Amended Joinder Indictment, namely persecution and murder.³³ Recalling Article 21 of the Statute and some related case-law,³⁴ it alleges that, while the 189 additional alleged killing victims do not form a new basis for conviction, they could, if reliable, significantly expand the evidential basis for the existing charges,³⁵ and suggests that schedules to an indictment form an

²⁵ Joint Appeal, paras 10, 12-18.

²⁶ Joint Appeal, paras 12-13, referring to *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("Kvočka et al. Decision"), para. 18, and para. 14, quoting *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreškić et al. Appeal Judgement"), para. 90.

²⁷ Joint Appeal, para. 15, referring to Decision on Gotovina's Preliminary Motions, para. 45.

²⁸ Joint Appeal, para. 16, referring to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution's Response to Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 1 August 2008, para. 8, and para. 17.

²⁹ Joint Appeal, para. 17.

³⁰ Joint Appeal, para. 18.

³¹ Joint Appeal, paras 10, 12 (referring to Impugned Decision, para. 12), and paras 19-31.

³² Joint Appeal, paras 19, 23, 25.

³³ Joint Appeal, para. 20.

³⁴ Joint Appeal, paras 22-24, 26-27.

³⁵ Joint Appeal, paras 21, 25.

integral part of the indictment.³⁶ It also argues that the Prosecution has failed to provide timely, clear and consistent information that these additional 189 alleged killing incidents form the evidential basis of the murder charges against the Accused.³⁷

9. The Joint Defence additionally contends that the Trial Chamber erred in law and in fact by failing to recognize that, four months into the trial, the Further Clarification amounts, in substance, to an amendment of the Amended Joinder Indictment.³⁸ In support of this allegation, the Joint Defence first submits that it planned the trial strategy around the killing incidents enclosed in the Schedule and in Schedule 2.³⁹ It further asserts that the removal of 59 alleged killing victims from Schedule 2 results directly or indirectly from the cross-examination of Prosecution witnesses by the Joint Defence.⁴⁰

10. The Joint Defence finally avers that the addition of 189 alleged killing victims at such a late stage of the proceedings causes “actual prejudice” to the Joint Defence, since it will be unable to cross-examine a number of witnesses who already completed their evidence with regard to the new alleged killing victims and to fully review and investigate these new alleged killing incidents.⁴¹ It re-emphasises, in this respect, that the Defence strategy also consists in challenging that the alleged killing incidents constitute murders.⁴² It additionally points out the alleged vagueness of the Further Clarification and the additional burden of analysing the Prosecution Expert Report of 13 November 2008.⁴³ It concludes that the Trial Chamber’s decision allowing the addition of 189 alleged killing incidents at this late stage of the proceedings is so unreasonable and unfair that it constitutes an abuse of discretion.⁴⁴

11. The Prosecution responds that the Joint Appeal is an improper attempt to expand the scope of the appeal to argue that the Further Clarification constitutes an amendment of the Amended Joinder Indictment,⁴⁵ and in effect to appeal the Decision on Gotovina’s Preliminary Motions.⁴⁶ It also submits that to the extent the Joint Appeal addresses “the real issue in this case” the Joint Defence has not established that the Trial Chamber abused its discretion.⁴⁷ According to the

³⁶ Joint Appeal, para. 27.

³⁷ Joint Appeal, paras 28-30.

³⁸ Joint Appeal, paras 10, 32-36.

³⁹ Joint Appeal, paras 33-35.

⁴⁰ Joint Appeal, para. 35.

⁴¹ Joint Appeal, paras 11, 25, 37-40.

⁴² Joint Appeal, paras 11, 37, 38, referring to Confidential Appendix B.

⁴³ Joint Appeal, paras 39, 40.

⁴⁴ Joint Appeal, paras 10, 11, 37.

⁴⁵ Response, para. 6.

⁴⁶ Response, paras 6-7, 11-23.

⁴⁷ Response, para. 8.

Prosecution, it was under no obligation to file the Further Clarification based on the unchallenged and binding Decision on Gotovina's Preliminary Motions which states that "the Prosecution did not need to identify every killing victim in the indictment, and that the pleading of 37 *representative* victims did not violate pleading principles".⁴⁸ The Prosecution draws from this that (1) "the identities of additional killing victims (other than those contained in the Schedule) are not material facts that must be pleaded in the indictment" in order for the Accused to be properly informed of the nature and cause of the charges against them;⁴⁹ (2) the addition or deletion of alleged killing victims do not constitute an amendment to the indictment;⁵⁰ (3) the addition of 189 names in the Further Clarification does not increase the evidential basis of existing charges;⁵¹ and (4) the jurisprudence on which the Joint Appeal relies is not relevant to the present case.⁵² The Prosecution submits therefore that the Joint Defence's arguments on these questions should be rejected as impermissible attempts to re-litigate a matter already decided by the Trial Chamber.⁵³

12. The Prosecution adds that even if the Joint Defence were permitted to appeal the Decision on Gotovina's Preliminary Motions, such an appeal would fail as this decision is consistent with the established jurisprudence that (1) determination of materiality in relation to the identity of victims depends on the alleged proximity of the accused to the events, and (2) each and every victim need not be identified in the indictment in the context of large-scale cases where the accused is relatively remote in proximity from the commission of the crimes.⁵⁴ It further claims that if the Joint Defence erroneously relied on the Schedule and Schedule 2 as an exhaustive list of incidents underlying the relevant charges in the Joinder Indictment, it did so despite clear and consistent notice to the contrary.⁵⁵ It also submits that the record shows that the Joint Defence actually did not rely on the alleged victims listed in these documents as an exhaustive list.⁵⁶

13. With respect to what it identifies as the "real issue in this case", the Prosecution asserts that the Trial Chamber did not abuse its discretion in determining that the timing of the Further Clarification did not violate the Accused's right to adequate time and facilities to prepare the

⁴⁸ Response, paras 9, 10, 12 (referring to Decision on Gotovina's Preliminary Motions, paras 39-40, 44), and para. 13 (emphasis in original).

⁴⁹ Response, paras 13(a) and (b), pp. 5-6 ("Under the first ground of appeal"), *see also* para. 13 (i), p. 8 ("Under the second ground of appeal"), para. 13(a), pp. 8-9 ("Under the third ground of appeal").

⁵⁰ Response, para. 13(a), p. 6 ("Under the first ground of appeal"); *see also* para. 13(b), p. 9 ("Under the third ground of appeal").

⁵¹ Response, paras 13(b) and (f), pp. 6-8 ("Under the second ground of appeal").

⁵² Response, paras 13(c) to (e), (g), (h), pp. 7-8 ("Under the second ground of appeal").

⁵³ Response, paras 13, 14.

⁵⁴ Response, para. 15, referring to Decision on Gotovina's Preliminary Motions, paras 39-41.

⁵⁵ Response, paras 16-19, referring to Impugned Decision, paras 9-11.

⁵⁶ Response, para. 18, referring to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution's Response to Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 1 August 2008, paras 13-14, and to T. 2233-2235.

defence.⁵⁷ It argues that the Joint Defence has failed to show how the provision of the Further Clarification unduly prejudiced it,⁵⁸ and notes that the Joint Defence failed to avail itself of the Trial Chamber's invitation to address it with any specific concerns in relation to further investigation it might require.⁵⁹ It specifically submits that the Joint Defence has failed to demonstrate missed cross-examination opportunities,⁶⁰ a lack of realistic opportunities to conduct further investigations,⁶¹ or undue prejudice arising from any vagueness in the Further Clarification,⁶² and claims that the filing of the Prosecution's Expert Report of 13 November 2008 is irrelevant to the matter before the Appeals Chamber.⁶³ The Prosecution finally denies having misrepresented facts in stating that it was not in a position to identify the additional killing victims at an earlier stage,⁶⁴ and argues that as it was under no obligation to file the Further Clarification, the timing of its filing is irrelevant.⁶⁵

14. In reply, the Joint Defence denies trying to appeal the Decision on Gotovina's Preliminary Motions.⁶⁶ It submits that, to the contrary, it seeks to rely on this decision which urged the Prosecution to identify victims to the extent possible.⁶⁷ It states that it never considered the Schedule and Schedule 2 to be exhaustive, but relied on them to direct its investigation and trial strategy.⁶⁸ It avers that because schedules of alleged killing victims attached to an indictment speak directly about the nature and cause of the charges against an accused, an unreliable schedule undermines the accused's basic right to be informed promptly and in detail of the nature and cause of the charges against him.⁶⁹ It further objects to the Prosecution's arguments in response regarding missed cross-examination opportunities,⁷⁰ pointing out that it has not yet requested the Trial Chamber to recall witnesses as this matter is under appeal,⁷¹ and that preparing cross-examination materials for 189 new alleged victims at this stage of the proceedings will require significant additional time and that the remedy offered by the Trial Chamber is therefore unrealistic.⁷²

⁵⁷ Response, paras 8, 9, 24-34.

⁵⁸ Response, paras 26-34.

⁵⁹ Response, paras 10, 25-26, 32.

⁶⁰ Response, para. 29.

⁶¹ Response, paras 30-32.

⁶² Response, para. 33.

⁶³ Response, para. 34.

⁶⁴ Response, para. 35.

⁶⁵ Response, para. 36; *see also* paras 9, 24.

⁶⁶ Joint Reply, paras 1, 4-8.

⁶⁷ Joint Reply, paras 1, 5.

⁶⁸ Joint Reply, paras 7, 18-19.

⁶⁹ Joint Reply, para. 7.

⁷⁰ Joint Reply, paras 9-15 (paragraph 13 was struck out (Corrigendum, para. 2)).

⁷¹ Joint Reply, para. 16.

⁷² Joint Reply, paras 20-21.

B. Analysis

15. In the Decision on Gotovina's Preliminary Motions, the Trial Chamber found that "the Prosecution is not obliged to name every single victim of killings with which it charges the Accused" due to the "very high level" at which the Accused are charged and the scale of the crimes alleged in the Joinder Indictment.⁷³ It then concluded that the "way the Prosecution pleads killings in the Joinder Indictment with the 37 representative victims in the Schedule does not in itself violate the pleading principles".⁷⁴ It recalled, however, that "the jurisprudence of the Tribunal has also urged the Prosecution to identify victims to the extent possible", and accordingly required the Prosecution to clarify whether it had information regarding the victims once listed in the *Gotovina* Initial Indictment and/or Amended Indictment and later excluded from the Joinder Indictment (save those who were allegedly victims of killings in municipalities regarding which the Prosecution had been ordered not to proceed), and, if so, to disclose the identification of those victims regarding whom it had information.⁷⁵

16. As properly pointed out by the Prosecution, the Appeals Chamber is not seized with an appeal against the Decision on Gotovina's Preliminary Motions. Indeed, neither this Decision nor the Original Clarification was challenged by the Parties.⁷⁶ Furthermore, the reading of the Certification Decision clearly indicates that the Trial Chamber excluded certifying the issues dealt with in the Decision on Gotovina's Preliminary Motions, including whether the identity of the alleged killing victims constitutes a material fact.⁷⁷ The Appeals Chamber is therefore not seized of the question as to whether the identity of alleged killing victims amounts to a material fact in the present case.

17. In this respect, the Appeals Chamber incidentally recalls that the materiality of a particular fact, including the identity of alleged victims, cannot be decided in the abstract. Such determination

⁷³ Decision on Gotovina's Preliminary Motions, para. 44.

⁷⁴ Decision on Gotovina's Preliminary Motions, para. 44.

⁷⁵ Decision on Gotovina's Preliminary Motions, para. 45.

⁷⁶ See Impugned Decision, para. 10, referring also to *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markač's Motions on Form of Indictment, 8 March 2005, paras 6, 21-24, in which the Pre-Trial Chamber in the *Čermak and Markač* case found that the indictment, "which only included identifying information on 32 of the 'at least 150 Krajina Serbs' that were alleged to have been murdered by Croatian forces in that case, sufficiently plead[ed] the victims and their properties", and which was not subject to an appeal by Čermak or Markač, and para. 11.

⁷⁷ Certification Decision, paras. 2, 6, which states, *inter alia*, that "[n]one of the three Defence teams appealed the [Decision on Gotovina's Preliminary Motions]. [The Impugned Decision,] rather, involves the issue of whether at this stage of the trial, in particular as a result of 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. [...] The [Trial] Chamber understands the issue to be whether this additional burden upon the Defence should be the prevailing factor in

is dependent on the nature of the Prosecution case and is to be made on a case-by-case basis, considering, *inter alia*, the “sheer scale of the alleged crimes” and the subsequent impracticability to require a high degree of specificity,⁷⁸ and the proximity of the accused person to the events for which he is alleged to be criminally responsible.⁷⁹

18. Nevertheless, it remains that even in cases where a high degree of specificity is impractical or where the accused is relatively remote in proximity from the events for which he is alleged to be criminally responsible, “since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in the position to name the victims, it should do so”.⁸⁰ Indeed, even if in a given case the identity of victims does not qualify as a material fact required to be pleaded in the indictment, there can be little doubt that it constitutes a fact or information relevant for the preparation of an effective defence.

19. In the Impugned Decision, the Trial Chamber found that “the Prosecution was under no obligation to file” the Further Clarification,⁸¹ meaning that the Prosecution was under no obligation to name the alleged killing victims it had identified. This statement is in patent contradiction with the established jurisprudence that the Prosecution should identify the victims to the extent possible and constitutes therefore an error of law.⁸²

20. The Appeals Chamber further notes that the Trial Chamber rejected the Joint Defence argument regarding the late provision of the Further Clarification on the premise of this erroneous statement of law,⁸³ and accordingly did not address the question as to whether the Prosecution could

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”. See also Impugned Decision, paras 10-11.

⁷⁸ *Kupreškić et al.* Appeal Judgement, paras 89-90, citing *Kvočka et al.* Decision, para. 17, and *Prosecutor v. Radoslav Brdanin et al.*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 61; *Prosecutor v. Mladen Naletilić et al.*, Case No. IT-98-34-A, Judgement, 3 May 2006 (“*Naletilić et al.* Appeal Judgement”), para. 24; *Prosecutor v. Elizaphan Ntakirutimana et al.*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (“*Ntakirutimana Appeal Judgement*”), paras 25 and 73; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (“*Gacumbitsi Appeal Judgement*”), para. 50.

⁷⁹ *Galić Appeal Decision*, paras 15-16; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, paras 212-213; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al. Appeal Judgement*”), para. 65; *Naletilić et al. Appeal Judgement*, para. 24; *Gacumbitsi Appeal Judgement*, para. 89.

⁸⁰ *Ntakirutimana Appeal Judgement*, para. 25, citing *Kupreškić et al. Appeal Judgement*, para. 90. See also, *Kvočka et al. Appeal Judgement*, para. 62 (referring to the “necessity to provide information, to the extent possible, about the identity of the victims”); *Kvočka et al. Decision*, para. 23.

⁸¹ Impugned Decision, para. 12.

⁸² The Appeals Chamber also notes that this holding appears to contradict the Trial Chamber’s own finding in the Decision on Gotovina’s Preliminary Motions to the effect that “the jurisprudence of the Tribunal has also urged the Prosecution to identify victims to the extent possible” (Decision on Gotovina’s Preliminary Motions, para. 45).

⁸³ Impugned Decision, para. 12, which states that “the Prosecution was under no legal obligation to file this document, and as a consequence, the Defence argument concerning the late provision of the Further Clarification fails”, and paras 13 and 14.

have provided notification of the additional 189 alleged killing victims earlier, as alleged by the Joint Defence.⁸⁴ The 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. It was therefore incumbent on the Trial Chamber to ensure that the Prosecution notified the information on the newly-identified 189 alleged killing victims diligently after obtaining it, as the Prosecution's failure to do so could result in prejudice to the Joint Defence. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to address this issue.

21. The Appeals Chamber also notes that the assessment of the Prosecution's diligence in notifying this information is connected to the assessment of any potential prejudice to the Defence resulting from any possible impact such information might have on the nature and cause of the Prosecution's case, and/or from the timing of the notification. Therefore, given its organic familiarity with the day-to-day conduct of the parties and practical demands of the case,⁸⁵ the Appeal Chamber considers that the Trial Chamber is best placed to assess, on the premise of the positive obligation incumbent on the Prosecution analysed above, any potential prejudice caused to the Joint Defence by the Further Clarification.

22. The Appeals Chamber finally notes that the other arguments raised by the parties are either linked to the issues dealt within the four preceding paragraphs or to the question of material facts of which the Appeals Chamber is not seized. Accordingly, the Appeals Chamber will not address them.

⁸⁴ Joint Appeal, paras 16-18; Joint Reply, paras 27-31.

⁸⁵ See *supra* para. 5.

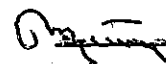
IV. DISPOSITION

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

GRANTS the Joint Appeal,

REMANDS the Impugned Decision to the Trial Chamber for reconsideration in light of the two errors identified by the Appeals Chamber.

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



Judge Mehmet Güney
Presiding Judge

Dated this 26th day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

