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D 8124 - D 8127
10 April 2008

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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: 10 April 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķinis
Judge Elisabeth Gwaunza
Registrar: Mr Hans Holthuis
Date filed: 10 April 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ANTE GOTOVINA'S REQUEST FOR CERTIFICATION TO
APPEAL THE DECISION ON RULE 73 MOTION TO STRIKE PARTS OF
PRE-TRIAL BRIEF

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Counsel for Ante Gotovina

Mr Luka S. 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 a request by the Gotovina Defence for certification to appeal the Chamber's Decision of 14 February 2008.¹ Pursuant to that Decision, the Chamber denied the Defence's motion of 26 March 2007 to strike parts of the Prosecution's pre-trial brief.² On 7 March 2008, the Prosecution filed a response asking the Chamber to deny the Request.³ On 13 March 2008, the Defence requested leave to file a reply to the Prosecution's response.⁴ On 18 March 2008, the Chamber denied the Defence leave to reply and informally communicated this to the parties.

2. Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") states that certification may be granted by a Chamber if the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. With respect to the first requirement of Rule 73 (B), that the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Gotovina Defence asserts that the Decision results in unfair prejudice to Ante Gotovina. It argues that the Chamber erred in its holding by not requiring the Prosecution to specifically charge "unlawful attacks on civilians and civilian objects", as an *actus reus* of the crime of persecution, thereby transforming Count 1 of the indictment to a "catch-all charge".⁵ It submits that the Decision therefore fails to set forth a clear and specific indictment that would allow the Accused an opportunity to "tailor [his] preparations to an indictment that more accurately reflects the case [he] will meet, thus resulting in a more effective defence".⁶ The Gotovina Defence further asserts that as a consequence of the purported omission, it is left to speculate as to the legal basis for the persecution charges against Ante Gotovina.⁷

¹ Ante Gotovina's Request for a Certificate to Appeal the Decision on Rule 73 Motion to Strike Parts of Pre-trial Brief, 21 February 2008 ("Request").

² Decision on Ante Gotovina's Motion Pursuant to Rule 73 Requesting Pre-Trial Chamber to Strike Parts of Prosecution Pre-Trial Brief Constituting Effective Amendment of the Joinder Indictment, and on Prosecution's Motion to Amend the Indictment, 14 February 2008 ("Decision").

³ Prosecution's Response to Gotovina's Request for Certification to Appeal the Decision on Rule 73 Motion to Strike Parts of the Prosecution's Pre-trial brief, 7 March 2008 ("Response").

⁴ Defendant Ante Gotovina's Motion for Leave to File a Reply to Prosecution's Response to Gotovina's Request for Certification to Appeal the Decision on Rule 73 Motion to Strike Parts of the Prosecution's Pre-Trial Brief, 13 March 2008.

⁵ Request, para. 7.

⁶ Ibid., para. 5 (citing *Prosecutor v. Édouard Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III decision of 8 October 2003 denying leave to file an amended indictment, 19 December 1993, para. 15.

⁷ Ibid., para. 5.


4. The Decision dealt with two motions, namely the Defence's motion to strike parts of the pre-trial brief and the Prosecution's motion to amend the indictment. The Chamber infers from the title page of the Request and the issues raised therein that the Defence seeks a certificate to appeal only that part of the Decision which disposes of the Gotovina Defence's motion to strike parts of the pre-trial brief. However, the Chamber does not follow the suggestion by the Prosecution to therefore declare the request moot. The two motions dealt with in the Decision are clearly linked and judicial economy favours that the matters dealt with therein not be settled in an incomplete fashion, leaving the parties to speculate on the entirety of the Chamber's views. The Decision relates to the question of what charges are exactly set out against the Accused in the present case. The Trial Chamber acknowledges that the details with which the charges are outlined may, by its very nature, involve issues that could affect the fair and expeditious conduct of the proceedings. The Chamber need not further explore this first prong of the test in Rule 73 (B) in view of its finding in relation to the second prong.

5. With respect to the second requirement in Rule 73 (B) that an immediate resolution by the Appeals Chamber may materially advance the proceedings, the Gotovina Defence submits that it is in the interests of justice that the issue of whether there has been an addition of a new charge be resolved before the trial commences.⁸ Notably, the Gotovina Defence appears to apply a different test than the one set out in Rule 73 (B). Consequently, the Gotovina Defence has not shown, and the Chamber does not find, that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. For the foregoing reasons, the Trial Chamber **DENIES** the Request.

⁸ Request, para. 11.

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



Judge Alphons Orie
Presiding Judge

Dated this tenth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]