

IF06-90-T
D 15169- D 15162
09 OCTOBER 2008

15169
PK



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: 9 October 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 9 October 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

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

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

Procedural History

1. On 20 February 2006, the Prosecution filed a motion submitting a proposed joint indictment in both the *Čermak and Markač* case and in the *Gotovina* case, whereby it sought to further amend the *Gotovina* Amended Indictment of 19 February 2004 and the Amended Indictment of 15 December 2005 against Čermak and Markač, and also requested that the three Accused be jointly charged.¹ The *Gotovina* Defence filed a preliminary motion pursuant to Rule 72 of the Rules on 28 April 2006.² On 14 July 2006, the Trial Chamber ordered the joinder of the *Gotovina* case with the *Čermak and Markač* case.³ The Joinder Indictment was filed on 24 July 2006, and contained a Schedule listing alleged killing incidents under Count 6 and 7 (“Schedule”). On 25 October 2006, the Appeals Chamber dismissed the Defence’s appeals on the Decision on Joinder.⁴ On 5 December 2006, a further appearance was held pursuant to Rule 50 (B) of the Rules of Procedure and Evidence (“Rules”), to allow the Accused to enter a plea on the new charges. On 18 January 2007, the *Gotovina* Defence filed a second preliminary motion alleging defects in the form of the Joinder Indictment.⁵

2. On 19 March 2007, Trial Chamber I rendered its Decision on the two *Gotovina* Defence preliminary motions alleging defects in the form of the Joinder Indictment, and ordered the Prosecution to provide information on the alleged victims that were once listed in the *Gotovina* Initial Indictment and/or Amended Indictment and later excluded from the proposed Joinder Indictment (save for the alleged killing victims in municipalities which the Prosecution was ordered not to proceed with).⁶ On 28 March 2007, the Prosecution filed a clarification and attached Schedule 2, containing a list of known alleged killing victims and

¹ *Prosecutor v. Ante Gotovina*, Case No.: IT-01-45-PT and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 20 February 2006 (“Consolidated Motion to Amend Indictment and for Joinder”).

² *Prosecutor v. Ante Gotovina*, 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.

³ *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; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No.: IT-06-90-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 17 July 2006.

⁴ *Prosecutor v. Ante Gotovina, Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-01-45-AR73.1, Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006.

⁵ 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.

⁶ Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Forms of the Joinder Indictment, 19 March 2007 (“Decision on Gotovina’s Preliminary Motions”), paras 2, 45 and Disposition. The initial Indictment against Gotovina was filed on 31 May 2001, Case No.: IT-01-45-I. The Amended Indictment against Gotovina was filed on 19 February 2004, Case No.: IT-01-45-I.

their basic identifying information.⁷ None of the Defence teams responded to this filing. On 16 July 2008, the Prosecution filed a Further Clarification concerning the identity of alleged killing victims by submitting an Amended Schedule 2.⁸ On 24 July 2008, the three Defence teams filed a joint motion to strike the Prosecution's Further Clarification.⁹ The Prosecution filed its response to the Motion on 1 August 2008.¹⁰ On 5 August 2008, the Defence jointly sought leave to reply to the Prosecution's response.¹¹ On 15 August 2008, the Chamber granted leave to reply, and informally communicated this to the parties. The Defence filed a reply on 22 August 2008.¹²

Submissions

3. In the Further Clarification, the Prosecution submits that since filing the Original Clarification, two substantial amendments to the Rule 65 *ter* exhibit list have triggered a comprehensive review of the material on this list related to the killings in the indictment area at the relevant time.¹³ It submits that it has now identified 59 victims currently listed in Schedule 2 attached to the Original Clarification, whose names should be removed due to the fact that 1) they are duplicate entries, 2) the killing occurred outside the indictment area or time frame, or 3) a reconsideration of the available witness and documentary evidence underlying the killing incidents has taken place.¹⁴ The Prosecution also submits that it has identified a further 189 victims that are the subject of the charges against the Accused.¹⁵ The total amount of names of victims in the Further Clarification (Amended Schedule 2) amounts to 337, whereas the Original Clarification (Schedule 2) listed 207 victims.¹⁶

4. In its Motion, the Defence submits that the Prosecution has not provided any notice to the Defence that it considered the 189 killing victims to be material facts that it intended to prove at trial, and that, by filing the Further Clarification, it is now unilaterally attempting to

⁷ Clarification of Indictment, 28 March 2007 ("Original Clarification").

⁸ Prosecution's Further Clarification of Identity of Victims, 16 July 2008 ("Further Clarification"), para. 1.

⁹ Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 24 July 2008 ("Motion").

¹⁰ Prosecution's Response to Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 1 August 2008 ("Response").

¹¹ 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.

¹² Reply to Prosecution's Response to Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 22 August 2008 ("Reply").

¹³ Further Clarification, para. 3.

¹⁴ Further Clarification, para. 3.

¹⁵ Further Clarification, para. 3.

¹⁶ Further Clarification, para. 4.

amend the Indictment, without leave from the Chamber.¹⁷ It is the Defence position that the Further Clarification violates the Accused's rights provided for in Articles 20 and 21 of the Statute to adequate time and facilities to prepare their defence, to be tried expeditiously, and to be informed promptly and in detail of the nature and the cause of the charges against them.¹⁸ It argues that the Prosecution has violated an order contained in the Decision on Gotovina's Preliminary Motions, which required the Prosecution to submit clarifications in relation to alleged killing victims once listed in the schedules to previous versions of the Indictments against Gotovina, but later excluded from the Schedule to the proposed Joinder Indictment.¹⁹ Further, the Defence submits that the Prosecution was in fact in a position to provide the names of the additional victims in March 2007 if not earlier, and that the Defence should not be prejudiced by the Prosecution's lack of diligence in this regard.²⁰ Finally, it submits that it would require an additional ten months to re-examine documents, conduct investigations, prepare a defence for each of the 189 additional killing incidents, and re-call witnesses, resulting in an unreasonable and undue delay in trial proceedings.²¹

5. In its Response, the Prosecution argues that the Defence Motion is based on an erroneous premise that the Further Clarification is an attempt to add new allegations to the Indictment and thereby constitutes an amendment to it.²² It adds that there is no violation of the Decision on Gotovina's Preliminary Motions, since the order contained therein pertained specifically to clarifications of alleged murder victims that were once listed in previous indictments against Gotovina but later excluded from the proposed Joinder Indictment.²³ It further submits that the issue of the requirements of the pleading of the identity of victims has already been litigated before the Pre-Trial Chamber, which found that the identity of each individual alleged murder victim does not constitute a material fact underpinning the charges of murder and persecution in the Indictment.²⁴ The Prosecution repeated its submission that the Further Clarification of identity of victims is the result of "substantial new" documentation received by the Prosecution since the filing of the Original Clarification and refers in particular to the lists of collected and buried bodies sent by Ivica Cetina, Chief of the

¹⁷ Motion, paras 1, 3, 5-7.

¹⁸ Motion, paras 2, 5-7, 8-12.

¹⁹ Motion, para. 4.

²⁰ Motion, paras 3, 4, 13-16.

²¹ Motion, para. 11.

²² Response, para. 2.

²³ Response, para. 6.

²⁴ Response, para. 3.

then Zadar-Knin Police, to the MUP Povratak command staff.²⁵ It is submitted that these lists were added to the Rule 65ter list by the Chamber's Decisions of 14 February 2008 and 15 May 2008, and that 138 out of 189 newly-specified victims listed in the Further Clarification are named or numbered on one of these lists.²⁶

6. According to the Prosecution, the Further Clarification would not cause unfair prejudice to the Accused, as the Accused could have been found liable in relation to the murder of victims specified in the Further Clarification even if the Prosecution had not filed it, and it remains open for the Chamber to find the Accused liable in relation to incidents of murder that have not been specified by the Prosecution.²⁷ It submits that in its Original Clarification, the Prosecution made clear that the list of killing victims in Schedule 2 was not an exhaustive list of all killings in the relevant indictment area.²⁸ In this respect, it also refers to paragraphs 38, 39 and 123 of its Pre-trial Brief, and to submissions made in its opening statement.²⁹ Further, the Prosecution submits that the record of the proceedings demonstrates that all parties have understood that the Accused's potential liability for murder is not restricted to the victims identified in the Schedule and the Original Clarification, and that the Defence have acted in accordance with this understanding as it has not distinguished between treatment of alleged murder victims who are identified in the Schedule and the Original Clarification, and those who are not.³⁰ In this context, the Prosecution states that none of the Accused objected to the admission of a statement of Witness 58 pursuant to Rule 92 *bis* of the Rules, whose evidence primarily related to the alleged murder of Predrag Simić, on the basis that the latter was not listed in the Indictment or in the Original Clarification.³¹ The Prosecution also refers to the cross-examination by the Gotovina Defence of Jovan Vujinović in relation to his evidence of the alleged killing of Stevo Vujinović, who is likewise not listed in the Schedule or the Original Clarification.³²

7. In the Reply, the Defence argues that the addition of 189 names and removal of 59 names constitute a "material change" to the Indictment.³³ With regard to the removal of 59 victims, the Defence argues that this is a result of the Prosecution's failure to sustain

²⁵ Response, para. 8.

²⁶ Response, para. 8.

²⁷ Response, para. 10.

²⁸ Response, para. 12.

²⁹ Response, para. 12.

³⁰ Response, paras 11-15.

³¹ Response, para. 13.

³² Response, para. 14.

³³ Reply, para. 5.

allegations related to those individuals and that the Prosecution should not be permitted to re-tailor the indictment according to the outcome of evidence adduced at trial.³⁴ The Defence repeats its argument that the Prosecution could have provided the names of the additional victims as early as March 2007, submitting that the Prosecution has made a “material misrepresentation of fact” in claiming that it had discovered the majority of the 189 newly specified alleged victims as a result of “substantial new documentation”.³⁵ The Defence further submits that the cross-examinations of Witnesses 58 and Jovan Vujinović do not amount to an affirmation that murder victims need not be named in the Indictment.³⁶

8. Finally, the Defence reiterates that it would require “a substantial period of time” to investigate the newly-specified alleged victims and may need to re-call witnesses already heard by the Chamber.³⁷ It is submitted that should the Chamber permit these “material changes” to the Indictment, the Defence will jointly apply for an adjournment of proceedings in order to “facilitate a joint examination of the underlying evidence and investigation of the yet unknown circumstances of death of each of these 189 alleged new murder victims.”³⁸

Discussion

9. The number of killing victims within the geographical and temporal scope of the Indictment was not limited to the 37 *representative* victims listed in the Schedule. Paragraph 52 of the Indictment charges the Accused with the murder of “Krajina Serb civilians and persons taking no part in hostilities”, in a number of specified municipalities, “particular incidents of which” are listed in the Schedule.³⁹ Not all the municipalities listed in paragraph 52 in which it is alleged that murders occurred are represented in the Schedule of the Indictment, clearly reflecting that the case against the Accused is not limited to 37 murder victims. In addition, submissions made by the Prosecution in its Pre-Trial Brief, and during the Opening statement, put the Defence on sufficient notice of the Prosecution’s case in this regard.⁴⁰

³⁴ Reply, para. 10.

³⁵ Reply, paras 11-13.

³⁶ Reply, para. 15.

³⁷ Reply, para. 19.

³⁸ Reply, para. 19.

³⁹ Indictment, para. 52.

⁴⁰ Prosecution Pre-Trial Brief, paras 38, 39, and para. 123, under the heading Counts 5 and 7: Murder, “From the beginning of Operation Storm to 30 September 1995, hundreds of civilians, persons taking no active part in hostilities, were killed by Croatian soldiers, military police, and Special Police, and other subordinates of the accused with the intent to kill or to inflict grievous bodily harm or serious injury, in the knowledge and with the acceptance that the act or omission was more likely than not to cause death”; T. 453-454.

10. The current Defence submissions are derived from the supposition that the identities of victims constitute material facts which need to be pleaded in the Indictment.⁴¹ The requirements of the pleading of the identities of victims have, however, already been litigated before the Pre-Trial Chamber, which, in its Decision on Gotovina's Preliminary Motions, found that the Prosecution did not need to identify each and every victim in the Indictment.⁴² It held that the way the Prosecution pleaded the killings in the Joinder Indictment, with 37 representative victims in the Schedule, does not violate the pleading principles.⁴³ Similarly, 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 the victims and their properties.⁴⁴ Neither of these Decisions was appealed by the Defence.

11. The Decision on Gotovina's Preliminary Motions ordered the Prosecution to provide additional information concerning victims not named in the Schedule of the Joinder Indictment, but included in earlier indictments against Gotovina. Accordingly, the Prosecution filed the Original Clarification on 28 March 2007, including a "Schedule 2", which listed 207 victims from a number of municipalities.⁴⁵ The order did not, as the Defence alleges in its Reply, oblige the Prosecution to list *all* the alleged killing victims. Moreover, the Prosecution explicitly stated in the Original Clarification that the list was not an "exhaustive list of all killings in the region."⁴⁶ The Defence did not object to the Original Clarification. In light of the Pre-Trial Chamber litigation on this issue, concluding that the Prosecution is not obliged to name every single victim of killings with which it charges the Accused due to, *inter alia*, the large scale of crimes alleged in the Joinder Indictment, the Chamber finds no merit in the Defence argument concerning the scope of the order.⁴⁷

12. While the Further Clarification seeks to add names of victims (in some cases, identified by numbers) to those already listed in Schedule 2, these killing victims are the subject of the existing charges of Count 1, Persecution, and Counts 6 and 7, Murder, in the Indictment. They do not form a new basis for conviction on their own. The Prosecution's

⁴¹ Motion, paras 6-7.

⁴² Decision on Gotovina's Preliminary Motions, paras 39-40.

⁴³ Decision on Gotovina's Preliminary Motions, para. 44.

⁴⁴ *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 ("Decision on Ivan Čermak and Mladen Markač's Preliminary Motions"), paras 6, 21-24; see first indictment against Čermak and Markač, filed 19 February 2004, para. 30.

⁴⁵ Original Clarification, paras 10, 11.

⁴⁶ Original Clarification, para. 11.

⁴⁷ Decision on Gotovina's Preliminary Motions, para. 44.

Further Clarification is therefore not an amendment to the Indictment, as suggested by the Defence. The Prosecution could have presented evidence of these killings without the Further Clarification, and the Accused could have been found criminally liable for those killings, provided that the required material elements are proven. The Chamber considers 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.

13. In conclusion, the Chamber does not find, in light of the above, that the Accused would be unfairly prejudiced by the Further Clarification. To the contrary, the Chamber considers that the information in the Further Clarification, identifying killing victims (by name or number), providing the approximate date and location at which they were allegedly killed, and in some instances, the method by which they were killed, is information of a kind that provides additional opportunities to the Defence to challenge the alleged additional killing incidents.

14. The Chamber acknowledges that as a consequence of this additional information, however, the Defence will have to conduct a review of already disclosed materials and may need to conduct further investigations. The need for, and nature of such further investigations cannot be determined by the Chamber in the abstract. Should the listing of additional names in the Further Clarification trigger a need for specific and substantial further investigations that go beyond a review of evidentiary materials already disclosed to the Defence, the Defence may address the Chamber to resolve any such issue.

15. For the foregoing reasons, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this 9th day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]