

Y-06-90-T
D 21561 - D 21554
23 March 2009

21561 HB



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: 23 March 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 23 March 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON JOINT DEFENCE REQUEST FOR A STAY OF PROCEEDINGS

Office of the Prosecutor

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PROCEDURAL HISTORY

1. Subsequent to the joinder of the *Gotovina* case with the *Čermak and Markač* case,¹ the Prosecution filed a Joinder Indictment on 24 July 2006 which contained a Schedule that listed 37 representative alleged killing victims under Counts 6 and 7 (“Schedule 1”). Seized with two motions by the *Gotovina* Defence, the Pre-Trial Chamber found that the Joinder Indictment did not violate the pleading principles by listing a number of identified representative murder victims, and that the Prosecution did not need to identify each and every victim in the Joinder Indictment.² None of the three Defence teams (“Defence”) appealed this decision. Also in this decision, the Pre-Trial Chamber ordered the Prosecution to file additional information concerning victims not named in Schedule 1, which it did on 28 March 2007, attaching Schedule 2 to the Joinder Indictment.³ At this time, the Prosecution explicitly stated that the list was not an “exhaustive list of all killings in the region”.⁴ The Defence did not respond to this filing.

2. On 17 July 2008, the Prosecution filed a Further Clarification concerning the identity of alleged killing victims by submitting an Amended Schedule 2 to the Indictment in the present case.⁵ On 24 July 2008, the Defence filed a motion to strike the Prosecution’s Further Clarification.⁶ On 9 October 2008, the Chamber issued its Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims (“First Decision”) in which it denied that motion. On 12 November 2008, the Chamber granted a joint Defence request for certification to appeal the First Decision.⁷ On 26 January 2009, the Appeals Chamber issued its decision and remanded the matter to the Chamber for

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, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 17 July 2006.

² Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Forms of the Joinder Indictment, 19 March 2007, paras 39-40, 44, being seized of *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, and 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.

³ Clarification of Indictment, 28 March 2007 (“Original Clarification”).

⁴ *Ibid.*, para. 11.

⁵ Prosecution’s Further Clarification of Identity of Victims, 17 July 2008 (“Further Clarification”), para. 1.

⁶ Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 24 July 2008.

⁷ Decision on Joint Defence Request for Certification to Appeal the Trial Chamber’s Decision of 9 October 2008, 12 November 2008.

reconsideration in light of two errors it had identified in the First Decision.⁸ On 2 March 2009, the Chamber issued its Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims ("Second Decision"). The Chamber found that the Prosecution had notified the Defence of information about the identity of some of the 189 newly identified killing victims in the Further Clarification in March 2008 and of many of them in July 2008 and that the possibility of prejudice to the Defence therefore could not be discounted.⁹ It considered that the appropriate course of action in this case would be to grant the Defence additional time for any further preparations, including investigations, should those be necessary, and invited the Defence to make submissions to the Chamber in this respect.¹⁰

3. On 4 March 2009, the Defence filed a Joint Defence Request for a Stay of Proceedings ("Request"), asking to stay the proceedings for 90 days to conduct further investigations with regard to 189 newly identified killing victims which the Prosecution had listed in its Further Clarification. In this filing, the Defence further reserved its position with regard to recalling Prosecution witnesses.¹¹ On 9 March 2009, the Prosecution filed its response to the Request asking that it be denied.¹² On the same day, the Defence sought leave to reply to the Prosecution's Response.¹³ The Chamber granted the Defence leave to reply on 9 March 2009 and communicated this informally to the parties. The Joint Defence Reply to Prosecution's Response to Joint Defence Request for a Stay of Proceedings ("Reply") was filed on 11 March 2009, in further support of the Request.

4. On 19 March 2009, the Chamber decided to grant the Defence five additional weeks for investigative and preparatory purposes, to be used after the Rule 98 *bis* proceedings, and communicated this decision to the Parties in court, announcing that its written decision would follow.¹⁴

⁸ 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, 26 January 2009 ("Appeal Decision").

⁹ Second Decision, para. 6.

¹⁰ *Ibid.*, paras 8-9.

¹¹ Request, para. 9.

¹² Prosecution's Response to Joint Defence Request for a Stay of Proceedings, 9 March 2009 ("Response").

¹³ Joint Defence Request to Reply to Prosecution's Response to Joint Defence Request for a Stay of Proceedings, 9 March 2009.

ARGUMENTS OF THE PARTIES

5. The Defence based its Request on the Second Decision, wherein the Chamber granted the Defence an opportunity to request additional time for further preparations with regard to the 189 newly identified alleged killing victims.¹⁵ The Defence submitted that by its Second Decision, the Chamber had allowed the Prosecution to add these 189 killing victims to the Amended Joinder Indictment.¹⁶ The Defence substantiated its request for an additional 90 days by providing information regarding its previous experience in this case concerning the time and resources required for investigations of alleged killing incidents, and by pointing to further factors that demonstrate the burdensome nature of such investigations.¹⁷ According to the Defence, since the filing of the Further Clarification, it has not been in a position to conduct the necessary investigations with respect to the 189 newly identified victims, and it currently is preparing for the Rule 98 *bis* proceedings and possible Defence cases.¹⁸

6. The Prosecution responded that the Defence has had clear notice from the outset of this case that the Accused could be held liable for unscheduled murder victims, and that the Defence had acted accordingly, even before the Further Clarification was filed.¹⁹ It argued that the Further Clarification was filed over seven months ago.²⁰ It also contended that the Defence had not adequately responded to the Chamber's invitation in the Second Decision but had submitted only generalized assertions.²¹ According to the Prosecution, it is unrealistic to assume that the Defence needs to investigate each of the 189 newly identified killing victims from scratch, particularly because the Defence has previously specifically explored and challenged many of the incidents relevant to these victims and because it now knows precisely what the Prosecution's case is.²² In addition, the Prosecution regarded the requested period of 90 days to be excessive.²³

7. In its Reply, the Defence, *inter alia*, contested the Prosecution's argument that the Defence had already explored and challenged many of the 189 newly identified killing victims.²⁴ Referring to the incidents cited by the Prosecution in its Response, the Defence

¹⁴ T. 17216.

¹⁵ Request, para. 2.

¹⁶ *Ibid.*, para. 1.

¹⁷ *Ibid.*, paras 4-8.

¹⁸ *Ibid.*, para. 5.

¹⁹ Response, paras 1-4, 6.

²⁰ *Ibid.*, paras 1, 6.

²¹ *Ibid.*, paras 1, 5.

²² *Ibid.*, para. 6.

²³ *Ibid.*, para. 6.

²⁴ Reply, para. 4.

argued that it had challenged these cases of unscheduled killing victims merely due to existing obligations under the Tribunal's Rules of Procedure and Evidence ("Rules"), namely Rule 92 bis (A) and Rule 90 (H) (i) [*sic*] of the Rules, which oblige the Defence during cross-examination to put its case to a witness if it "is in contradiction of the evidence given by that witness".²⁵ It added that the fulfilment of these obligations was without prejudice to its objections to the pleading and disclosure practices of the Prosecution.²⁶ The Defence also asserted that the Prosecution was in a position to identify the 189 killing victims in the Original Schedule, and could have disclosed some incidents even earlier.²⁷ It further submitted that the Defence could not reasonably have been expected to launch extensive investigations into the newly listed killing victims while the issue of late disclosure of the identity of these victims and, consequently, the admissibility of the evidence relating to these killings, was subject to challenge.²⁸ The Defence asserted that these issues were only settled with the Second Decision.²⁹ It also stated that most of the information relating to the 189 newly identified killing victims was disclosed to the Defence at the end of the Prosecution's case.³⁰ It again addressed the issue of potential missed cross-examination opportunities.³¹

DISCUSSION

8. The present decision deals with the question whether the Defence should be granted time for further preparations, including investigations, as a result of the findings in the Second Decision and, if so, how much time. The Chamber accepts, on the basis of its findings in the Second Decision and the submissions of the Defence, that the Defence should be granted time for further preparations, including investigations.

9. As for the question how much time should be granted, the Chamber considers that the number of newly identified alleged killing victims is not insignificant and that the trial has been conducted with very few interruptions since its commencement in March 2008, leaving relatively little time for investigations. However, the Prosecution asserted, and the Defence confirmed, that the Defence has been in a position to challenge a number of killing incidents that were not included in Schedule 1 of the Indictment or the Original Clarification. In

²⁵ Ibid., paras 4-7.

²⁶ Ibid., paras 5-6.

²⁷ Ibid., para. 13.

²⁸ Ibid., para. 9.

²⁹ Ibid., para. 9.

³⁰ Ibid., paras 10-11.

³¹ Ibid., para. 14.

conclusion, the Chamber accepts that the Defence had not been able to sufficiently investigate all of the newly identified killing incidents at an earlier stage.

10. Another important consideration when determining the time to be granted to the Defence is the current stage of the proceedings. The Prosecution has at this time presented virtually all of its evidence.³² After a review of the evidence with regard to the additional killing incidents, the Defence will be able to determine which incidents require further investigation so as to allow it to meaningfully challenge the Prosecution's case in this respect. Further, it will be able to exclude from further investigation or preparation such incidents for which no, or insufficient evidence has been presented. In other words, the current stage of the proceedings provides the Defence with the opportunity to better focus its investigations and preparation compared to before the start of, or earlier in the trial.

11. Having considered all the submissions of the parties, the Chamber is satisfied that five weeks would be an appropriate period of time to grant to the Defence for further preparations, including investigations.

12. The Chamber also considered whether the time should be granted before or after hearing and deciding on the Rule 98 *bis* submissions. In court, the Defence requested that the time be granted prior to the Rule 98 *bis* proceedings.³³ In this respect, the Chamber is faced with two uncertainties. The first uncertainty is the outcome of the Rule 98 *bis* proceedings, which were due to begin, and meanwhile have now commenced, on 19 March 2009. The second uncertainty is what the results of the Defence investigations yet to be conducted will be.

13. If, without the further investigations having been conducted, the outcome of the Rule 98 *bis* proceedings were to be an acquittal of the Accused on all counts, the granting of time for additional investigations prior to these proceedings would not have been in the interests of the Accused and would have placed unnecessary strain on the Defence's and the Tribunal's resources.

14. Granting time for additional investigations after the Rule 98 *bis* proceedings does entail a risk of lost opportunities for the Defence at the time of making the Rule 98 *bis* submissions. If the - still unknown - results of the investigations were ultimately to have a potentially decisive effect on the Rule 98 *bis* decision, the Chamber considers it appropriate to

³² At the time of reaching the decision, decisions on admission were pending only with regard to Rule 65 *ter* Nos 7160 and 2422.

³³ T. 17212-17214.

provide a remedy for any such situation. In this context, the Chamber considers which results it might reasonably expect of the Defence's investigations and what consequences those results might have. In the view of the Chamber, these results could be the identification of potential witnesses or the discovery of evidentiary material.

15. As for any identified potential witnesses, they would appropriately have to be called during the Defence case. If the investigations were to result in the discovery of evidentiary material that could have been presented to a particular Prosecution witness during cross-examination, the Defence may seek leave from the Chamber to recall that witness. The Chamber would then consider whether the evidentiary material discovered warranted the recalling of that particular witness. The Defence has reserved its position with regard to recalling Prosecution witnesses and the Chamber is not presently faced with any such Defence request, nor is there any clear indication that such a request will be forthcoming. The Defence has also acknowledged that it can only determine whether to make such a request once its investigations are complete.³⁴

16. The evidence elicited from a recalled witness could potentially have had a decisive effect on the Rule 98 *bis* decision had it been available to the Chamber at the time of considering the Rule 98 *bis* submissions. This is one situation which, as mentioned above, would call for a remedy. Under these circumstances, the Chamber would entertain any motion seeking such a remedy, including a request to reconsider the Rule 98 *bis* decision with regard to one or more counts.

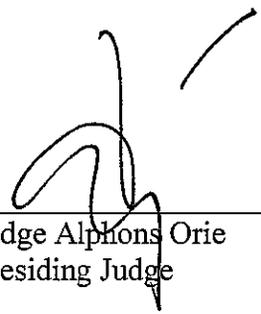
17. For the foregoing reasons, the Chamber decides that the additional time will be granted after the Rule 98 *bis* proceedings. The Chamber has set out the remedies potentially available to the Defence.

DISPOSITION

The Chamber

GRANTS the Defence an additional five weeks for preparations in relation to the newly listed killing victims in the Further Clarification, starting from the previously envisaged starting date of a possible Defence case according to the Scheduling Order of 6 February 2009, that is, 23 April 2009.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-third day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁴ Request, para. 9.