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D 21317 - D 21312
02 March 2009

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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: 2 March 2009
Original: English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 2 March 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

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

Office of the Prosecutor

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1. On 16 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.¹ On 24 July 2008, the three Defence teams (“Defence”) filed a motion to strike the Prosecution’s Further Clarification.² The Prosecution filed its response to the Motion on 1 August 2008.³ On 5 August 2008, the Defence jointly sought leave to reply to the Response.⁴ 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 2008.⁵ On 9 October 2008, the Chamber issued its decision in which it denied the Motion.⁶ On 12 November 2008, the Chamber granted a joint Defence request for certification to appeal the Trial Chamber’s Decision.⁷ On 26 January 2009, the Appeals Chamber issued its decision and held, amongst other, that:

19. In the Impugned Decision, the Trial Chamber found that “the Prosecution was under no obligation to file” the Further Clarification, 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.

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, and accordingly did not address the question as to whether the Prosecution could have provided notification of the additional 189 alleged killing victims earlier, as alleged by the Joint Defence. 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,

¹ Prosecution’s Further Clarification of Identity of Victims, 16 July 2008 (“Further Clarification”), para. 1.

² Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 24 July 2008 (“Motion”).

³ Prosecution’s Response to Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 1 August 2008 (“Response”).

⁴ 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.

⁵ Reply to Prosecution’s Response to Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 22 August 2008 (“Reply”).

⁶ Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 October 2008 (“Trial Chamber’s Decision”).

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

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.⁸

2. The Appeals Chamber remanded the matter to the Chamber for reconsideration in light of the two errors it had identified in the Trial Chamber's Decision.⁹ This decision is limited to the reconsideration of the Trial Chamber's Decision in relation to those aspects. All other parts of the Trial Chamber's Decision retain their validity.

3. As set out above, the Appeals Chamber found that the Chamber erred in law when it held that the Prosecution was not under an obligation to file the Further Clarification. According to the Appeals Chamber, the finding by the Chamber meant "that the Prosecution was under no obligation to name the alleged killing victims it had identified".¹⁰ The Chamber did not explicitly limit its finding to the specific procedural mechanism used by the Prosecution - the *filing* of the Further Clarification - and understandably, and due to this ambiguous language, the Appeals Chamber understood the Chamber's reasoning as entirely denying the existence of an obligation for the Prosecution to notify the Defence of the identity of victims. The Appeals Chamber's interpretation of the Chamber's decision clarified that the issue at stake is the notification to the Defence of the identity of the victims and not necessarily the manner in which such a notification is given.

4. The existing case law, including this Chamber's own Decision on Gotovina's Preliminary Motions, sets out that the Prosecution must name the alleged killing victims to the extent possible.¹¹ The Chamber takes this obligation of the Prosecution as a starting point in its consideration of the Motion. The case law does not impose any formal requirements as to how the relevant notification should be made. In particular, considering the framework of the Indictment in this case, as discussed in paragraphs 9-12 of the Trial Chamber's Decision, this notification need not have been given through the filing of the Further Clarification. For example, a request to amend the Rule 65 *ter* exhibit list, accompanied by a specification of which charges the content of the proposed new exhibits aim to prove, may serve as sufficient notice of the identity of victims. The Chamber further reiterates that on the basis of the Indictment, the Accused may be found criminally liable of murder of an individual who was

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 ("Appeals Chamber's Decision"), paras 19-21.

⁹ *Ibid.*, para. 23.

¹⁰ *Ibid.*, para. 19.

not listed in the Schedule to the Indictment nor in any of the two Clarifications, provided that all required material elements are proven.¹²

5. The Appeals Chamber found that the Chamber failed to address whether the Prosecution had provided notification of the newly-identified 189 alleged killing victims diligently after obtaining it, and, if this was the case, whether the Prosecution's failure in this respect resulted in any prejudice to the Defence. Importantly, the Appeals Chamber pointed out that "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".¹³ Based on this, an assessment of any prejudice must focus on when, that is at which stage of the proceedings, the notification took place. In other words, did the notification take place so late that the preparation of an effective defence was prejudiced? The Chamber will therefore focus on the level of prejudice that the Defence may suffer from the notice of information contained in the Further Clarification.

6. The Chamber again carefully examined and compared the Prosecution's exhibit list of 16 March 2007,¹⁴ the filings pertaining to the Trial Chamber's Decision, the filings related to the two decisions to amend the Prosecution's exhibit list,¹⁵ as well as the Ivica Cetina¹⁶ and MUP Povratak lists.¹⁷ The Chamber found that many of the newly listed alleged victims in the Further Clarification were listed in the Ivica Cetina lists, in the MUP Povratak lists, or both, which were provided to the Prosecution on 27 July 2007, pursuant to its Request for Assistance no. 739, and which were disclosed to the Defence at the latest on 10 March 2008 as part of the Prosecution's Second Motion to Amend the Exhibit List.¹⁸ In relation to a number of documents containing names of deceased persons that the Prosecution sought to add to its Rule 65 *ter* exhibit list at that time, the Prosecution submitted that they were "relevant to prove the killing of Serb civilians during Operation Storm and its immediate aftermath, and probative for the allegations set out in Counts 1, 6 and 7 of the indictment".¹⁹

¹¹ See Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Forms of the Joinder Indictment, 19 March 2007, para. 45.

¹² Trial Chamber's Decision, para. 12.

¹³ Appeals Chamber's Decision, para. 20.

¹⁴ Prosecution's List of Exhibits, 16 March 2007.

¹⁵ Decision on Prosecution's Motion to Amend the Exhibit List, 14 February 2008 and the Decision on Prosecution's Second Motion to Amend the Exhibit List, 15 May 2008.

¹⁶ Exhibits D355, D356, D357, D358, D360, D361, D363, D365 and D371.

¹⁷ Exhibits D69 and D382.

¹⁸ See Appendix A to the Prosecution's Second Motion to Amend the Exhibit List, 10 March 2008.

¹⁹ Prosecution's Second Motion to Amend the Exhibit List, 10 March 2008, para. 9.

These documents concerned, amongst other, death certificates of individuals who are also listed as newly identified victims in the Further Clarification.²⁰ The Chamber has previously found that the addition of these documents to the Prosecution's exhibit list put only a limited additional burden on the Defence.²¹ The Chamber concludes that the Prosecution disclosed information about the identity of some of the 189 newly identified victims to the Defence on 10 March 2008.²² However, it was not until the filing of the Further Clarification on 16 July 2008, four months after the start of the trial, that the Defence was notified by the Prosecution that many of the 189 persons listed in the Further Clarification were indeed alleged victims of the crimes charged in the Indictment. Under these circumstances, the Chamber finds that the possibility of prejudice to the Defence cannot be discounted.

7. In the Motion, the Defence requested that the Further Clarification be struck. The Chamber has considered what the consequences of the requested remedy would be. As was clarified in the Trial Chamber's Decision, the Further Clarification is not an amendment to the Indictment and therefore the newly identified 189 alleged victims are not additional charges against the Accused.²³ The Indictment, as it is set out, includes not only a number of named victims in its Schedule but also includes unnamed victims. A finding of guilt or innocence is to be based on the Indictment as it stands. Therefore, the Chamber considers that the striking of the Further Clarification would not have an impact on the overall scope of the Indictment, and thereby the case that the Defence needs to meet. The Chamber considers that the avenues that the Chamber could take in this case of late notification of the victims' identities are to either decide not to consider the 189 newly identified victims in the Further Clarification as part of the charges against the Accused, or to grant the Defence additional time to conduct any further preparations, including investigations, should those be necessary.

8. The Defence was notified of the 189 alleged victims no later than 16 July 2008, which was well after the start of the Prosecution's case but, at the same time, many months before its end. The Chamber has held that identification of victims can provide the Defence with additional opportunities to challenge the allegations against the Accused and the Defence

²⁰ See Appendix A to the Prosecution's Second Motion to Amend the Exhibit List, 10 March 2008, Category 2 and 3 documents, pp. 9-18.

²¹ Decision on Prosecution's Second Motion to Amend the Exhibit List, 15 May 2008, paras 9-10.

²² Certain documents concerning the identity of some of the newly identified victims were disclosed to the Defence prior to this date. See for example the Prosecution's Second Motion to Amend the Exhibit List, 10 March 2008, paras 4, 9, and Decision on Prosecution's Second Motion to Amend the Exhibit List, 15 May 2008, para. 9. Despite this, the context of such disclosure may not have been of such nature as to constitute notice of identification of victims. For the purposes of this decision the Chamber therefore decided that it was on 10 March 2008 that the Defence received notice of the identification of some of the 189 newly identified victims.

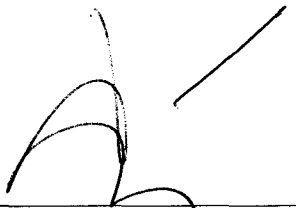
²³ Trial Chamber's Decision, para. 12.

has, on some occasions, taken this opportunity to its advantage.²⁴ It would be contrary to the nature of the charges in the Indictment, and also contrary to the previous litigation on the scope and particulars of the Indictment, to conclude that the newly identified victims named in the Further Clarification are to be excluded from the charges, whereas they would have remained a part of the charges as unnamed victims if there would have been no further identifying information about those victims.²⁵ For these reasons, the Chamber considers that the appropriate course of action in this case is to grant the Defence additional time for any further preparations, including investigations, should those be necessary.

9. On the basis of the foregoing, the Chamber:

- **DENIES** the Motion;
- **GRANTS** the Defence an opportunity to address the Chamber should it want to request additional time for further preparations or recall witnesses. Any such request should be accompanied with clear and detailed information that will assist the Chamber in making its decision on such a request.

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



Judge Alphons Orie
Presiding Judge

Dated this 2nd day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ Trial Chamber's Decision, para. 13. For example see Gotovina Defence's cross-examination of Witness John Clark, T. 14203-14204, 14208-14209.

²⁵ See Trial Chamber's Decision, paras 1-2, 9-12.