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UNITED
NATIONS



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 July 2009

Original:

English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 23 July 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON DEFENDANT ANTE GOTOVINA'S MOTION FOR A
RESTRAINING ORDER AGAINST THE REPUBLIC OF CROATIA

Office of the Prosecutor

Mr Alan Tieger
Mr Stefan Waespi

Republic of Croatia

Per: the Embassy of the Republic of Croatia
to the Kingdom of the Netherlands

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

I. PROCEDURAL HISTORY

1. On 1 April 2009, the Gotovina Defence requested the Chamber to issue a restraining order against the Government, the State Prosecutor's Office, and the courts of the Republic of Croatia ("Croatia") to cease all criminal proceedings and prosecutions that emanate from acts related to the Gotovina Defence's fulfilment of its function before the Tribunal, including those against Mr Marin Ivanović, an attorney employed by the Gotovina Defence, and against Mr Jurica Šare, a possible witness for the Gotovina Defence.¹ The Gotovina Defence supplemented its Motion on 2 and 3 April 2009.²

2. On 9 April 2009, the Prosecution requested the Chamber to dismiss the Motion.³ On 29 April 2009, following an invitation by the Chamber, Croatia filed written submissions with regard to the Motion.⁴ On 5 May 2009, the Chamber granted requests by the Gotovina Defence to reply to the Response and the Submission and to exceed the word limit to 3,500 words, and informed the parties accordingly through an informal communication.⁵ On 12 May 2009, the Gotovina Defence replied to the Response and the Submission.⁶ On 9 June 2009, the Chamber denied a request for leave to appear as an *amicus curiae* from the Association of Defence Counsel of the Tribunal.⁷ On 12 June 2009 the Chamber scheduled a hearing and on 26 June 2009 the Chamber heard further oral submissions from the parties and Croatia with regard to the Motion.⁸

¹ Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 1 April 2009 ("Motion"), paras 1, 21.

² Defendant Ante Gotovina's Additional Submission in Support of His Motion for Restraining Order against the Republic of Croatia, 2 April 2009 ("Additional Submission"); Submission of Registry Accreditation Letter for Mr. Marin Ivanović, 3 April 2009 ("Accreditation Letter").

³ Prosecution Response to Gotovina's Motion for Restraining Order against the Republic of Croatia, 9 April 2009 ("Response"), paras 4, 16.

⁴ Invitation to Croatia to File a Submission in Relation to Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia, 15 April 2009; Correspondence from Croatia in Relation to Defendant Ante Gotovina's Motion for a Restraining Order, 29 April 2009 ("Submission").

⁵ See Defendant Ante Gotovina's Motion for Leave to Reply to Prosecution's Response to General Gotovina's Motion for Restraining Order against the Republic of Croatia, 14 April 2009; Gotovina Defence Motion for Leave to Reply to the Republic of Croatia's Response to General Gotovina's Motion for a Restraining Order against the Republic of Croatia, 1 May 2009.

⁶ Defendant Ante Gotovina's Reply in Support of the Motion for a Restraining Order against the Republic of Croatia Pursuant to Rule 54 ("Reply"), 12 May 2009.

⁷ Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 9 June 2009, paras 4-5.

⁸ Order Scheduling a Hearing, 12 June 2009; T. 19365-19445.

II. SUBMISSIONS

3. The Gotovina Defence submits that the County State Prosecutor's Office in Zagreb has filed a proposed indictment against Mr Ivanović, which alleges that he concealed archival material after receiving two documents from Mr Ante Kardum in 2007.⁹ The Gotovina Defence also submits that Mr Šare has been indicted in Croatia for e-mailing a document to the Gotovina Defence.¹⁰ The Gotovina Defence submits that, as an accredited member of the Gotovina Defence, Mr Ivanović should enjoy immunity from criminal prosecution in Croatia for acts which are connected to the performance of the Defence in its official function before the Tribunal.¹¹ The Gotovina Defence further submits that the Chamber should enforce the immunity of Mr Ivanović and Mr Šare in order to protect Mr Gotovina's right to a fair trial.¹² The Gotovina Defence additionally submits a legal opinion from the United Nations Assistant Secretary-General for Legal Affairs, Mr Larry Johnson, addressed to the Registrar of the International Criminal Tribunal for Rwanda ("Johnson Legal Opinion"), in support of its contention that Mr Ivanović enjoys immunity from legal process.¹³

4. In its Response, the Prosecution submits that the Croatian proceedings are separate from Mr Gotovina's case before the Tribunal.¹⁴ The Prosecution further submits that the Chamber lacks jurisdiction to order a Croatian court to terminate criminal proceedings against a person who is not accused of serious violations of international humanitarian law.¹⁵ The Prosecution finally submits that a restraining order is not necessary for the purposes of the trial, because the Gotovina Defence has already gathered a substantial amount of materials, and Mr Ivanović remains at liberty to assist the Gotovina Defence.¹⁶

5. In its Submission, Croatia confirms that Mr Ivanović has been charged with the criminal offence of destruction and concealment of archives under Article 327 of the Croatian Criminal Code and submits that the criminal proceedings are being conducted in Croatia's

⁹ Motion, para. 2.

¹⁰ Motion, para. 10.

¹¹ Motion, paras 2, 13-14, 20; Accreditation Letter.

¹² Motion, para. 20.

¹³ Additional Submission, paras 1-5.

¹⁴ Response, para. 5.

¹⁵ Response, paras 2, 7-11.

¹⁶ Response, paras 3, 12.

national interest.¹⁷ Croatia further submits that the criminal proceedings before its national courts are fully independent from the proceedings conducted before the Tribunal.¹⁸

6. In its Reply, the Gotovina Defence submits that Mr Gotovina's rights to a fair trial and to equality of arms are directly threatened by the indictment of one of his investigators.¹⁹ The Gotovina Defence further submits that a Defence investigator enjoys functional immunity as a derivative of the rights of an accused, which the Chamber is obliged to protect under Article 20(1) of the Statute.²⁰ The Gotovina Defence finally submits that the practice of issuing orders for safe conduct illustrates that Chambers have the power to stop prosecutions in domestic jurisdictions where this is necessary for a fair trial.²¹

7. At the hearing, Croatia submitted that defence counsel do not enjoy immunity under Croatian law.²² Croatia further submitted that Mr Ivanović had not raised an issue of immunity in the Croatian criminal proceedings.²³ Croatia also submitted that immunity for a Croatian person residing in Croatia cannot exist, unless it is created by a bilateral agreement between Croatia and another state or international organization.²⁴ Croatia finally submitted that the investigations into the missing documents had been initiated in order to comply fully with the Chamber's order to investigate the whereabouts of documents requested by the Prosecution.²⁵

8. At the hearing, the Gotovina Defence responded that immunity existed under the Statute as part of international law, irrespective of Croatian national provisions.²⁶ The Gotovina Defence further submitted that it would have been superfluous to raise the immunity issue before a Croatian court, because this would have clearly resulted in a rejection.²⁷ The Gotovina Defence also submitted that raising the immunity issue before a Croatian court would have resulted in needless delays, as the Chamber would still have been called upon to resolve the matter in the end.²⁸ The Gotovina Defence finally submitted that Croatian persons

¹⁷ Submission, pp. 3-4.

¹⁸ Submission, p. 3.

¹⁹ Reply, para. 13.

²⁰ Reply, paras 14-15, 17-19.

²¹ Reply, paras 18-19.

²² T. 19369-19370, 19375-19378, 19380, 19382-19383, 19418.

²³ T. 19370-19371, 19379.

²⁴ T. 19412-19416, 19424-19425.

²⁵ T. 19443; see Order in Relation to the Prosecution's Application for an Order Pursuant to Rule 54 *bis*, 16 September 2008.

²⁶ T. 19371.

²⁷ T. 19372-19374.

²⁸ *Ibid*; T. 19380.

employed in the Prosecution liaison office enjoy functional immunity within Croatia, pursuant to an agreement between Croatia and the United Nations.²⁹

9. At the hearing, the Prosecution submitted that the Motion was an improper attempt to “forum-shop” the issue of immunity to the Chamber.³⁰ The Prosecution also submitted that the Croatian proceedings, which are currently adjourned until September 2009, do not infringe on the Gotovina Defence’s preparations for its case.³¹

III. APPLICABLE LAW

10. Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that a Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

11. Article 9 (1) of the Statute sets out that the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. Article 9 (2) of the Statute sets out that the Tribunal shall have primacy over national courts and that, at any stage of the procedure, the Tribunal may formally request national courts to defer to the competence of the Tribunal.

12. Article 20 (1) of the Statute provides that a Chamber shall ensure that trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

13. Article 29 (1) of the Statute provides that States shall co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. Article 29 (2) of the Statute sets out that States shall comply without undue delay with any request for assistance or an order issued by a Chamber.

14. Article 30 of the Statute provides:

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

²⁹ T. 19418-19420.

³⁰ T. 19400-19402.

³¹ T. 19438.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

15. Article XIX of the Agreement Between the United Nations and the Kingdom of The Netherlands Concerning the Headquarters of the International Tribunal ("Host State Agreement"), sets out, in relevant parts:

1. The counsel of a suspect or an accused who has been admitted as such by the Tribunal shall not be subjected by the host country to any measure which may affect the free and independent exercise of his or her functions under the Statute.

2. In particular, the counsel shall, when holding a certificate that he or she has been admitted as a counsel by the Tribunal, be accorded:

(c) immunity from criminal and civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel.

16. The Appeals Chamber has set out that the parties are not required to go through the official channels of the States or entities of the former Yugoslavia for identifying, summoning and interviewing witnesses, or conducting on-site investigations.³² The States and entities of the former Yugoslavia are obliged to cooperate with the Tribunal in such a manner as to enable the Tribunal to discharge its functions.³³ This obligation also requires them to allow the Prosecution and the defence to fulfil their tasks free from any possible impediment or hindrance.³⁴

IV. DISCUSSION

17. Under Article 9 (2) of the Statute, the Tribunal has primacy over national courts with regard to prosecutions of persons for certain serious violations of international humanitarian law. Under Rule 54, a Chamber may at its discretion issue such orders as may

³² *Prosecutor v. Blaskić*, IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 53.

³³ *Ibid.*

be necessary for the purposes of the conduct of trial. Under Article 29 of the Statute, States are obliged to cooperate with the Tribunal and comply with orders issued by a Chamber. Therefore, the Chamber is cognizant that, in these two separate respects, its orders may have an effect on the exercise of domestic jurisdiction by a state.

18. In the case against Mr Ivanović, Croatia is exercising its domestic jurisdiction to prosecute acts which do not fall within the Tribunal's jurisdiction. As a result, the Chamber lacks primacy. The requested intervention in the domestic criminal proceedings must be considered under Rule 54. When considering whether it would be appropriate to exercise its discretion pursuant to this Rule in the present case, the Chamber notes on the one hand that domestic criminal proceedings against the members of a defence team of an accused before the Tribunal for acts which are closely connected to the performance of the defence in its official function may impede and hinder the defence's fulfilment of its tasks. In certain circumstances, this can result in the infringement of the accused's right to a fair trial. Under Article 20 of the Statute, the Chamber shall ensure that a trial is fair. As a result, the Chamber finds that it has the competence to consider the requested measure. On the other hand, the Chamber considers that the requested restraining order would amount to a significant intervention in the domestic jurisdiction of Croatia. Only in exceptional circumstances will the exercise of domestic jurisdiction amount to such interference with the work of the Tribunal, that it would justify an intervention as the one requested. In this respect, a Chamber should also consider what other measures, if any, have been or may be taken to resolve the issue before it.

19. The Motion raises the matter of functional immunity for defence counsel and their staff. The Chamber notes generally that the text of Article 30 of the Statute does not explicitly mention defence counsel, whereas Article XIX of the Host State Agreement does not explicitly mention staff employed by such counsel. The Johnson Legal Opinion addresses relevant aspects of this matter, although it was prepared under different factual circumstances. The issue of functional immunity is complicated in the present circumstances, because Mr Ivanović is a resident citizen of Croatia seeking functional immunity against Croatian proceedings for acts allegedly committed in violation of a Croatian criminal statute, on Croatian territory, and contrary to Croatian state interests.³⁵ Apart from the issue of functional

³⁴ Ibid.

³⁵ See T. 19409.

immunity of Defence counsel, with regard to which the Chamber is inclined to accept that a legal basis exists, and the issue whether counsel staff enjoy such immunity as a derivative of the possible immunity of counsel, the Motion further raises the question as to who would have the authority to lift such functional immunity.

20. The Chamber is mindful that the observance of functional immunity for defence counsel would primarily be a matter to be resolved between said counsel, Croatia, and the United Nations. The Chamber focuses on the matter only insofar as and if it impacts on the fairness of the proceedings before it. In the Croatian proceedings, Mr Ivanović stated the circumstances under which he allegedly committed the offence, and in particular that the acts were in performance of his duties as a member of the Gotovina Defence team. However, he has not invoked functional immunity as a ground for dismissal. Nor has he argued the legal basis for enjoying such immunity as an obstacle to the legal process initiated against him by Croatia. The Gotovina Defence has acknowledged this and explained the reasons for not doing so.³⁶

21. The reasons offered by the Gotovina Defence for not raising the immunity issue in Croatia are unconvincing. The Gotovina Defence has failed to establish that raising this issue before the Croatian courts would necessarily result in a rejection. As a result, the time required for the Croatian judiciary and possibly the Chamber to pronounce on the issue cannot be considered a needless delay. For these reasons, the Chamber concludes that the Gotovina Defence has not demonstrated the exceptional circumstances necessary to justify the requested intervention in the Croatian proceedings against either Mr Ivanović or Mr Šare. The Chamber further notes that, should it turn out that Croatian law insufficiently allows for the observance of possible functional immunity of defence counsel, the Chamber will then primarily focus on whether this impacts the fairness of the proceedings before it. The Chamber further notes that it has the option to bring the matter to the attention of the authority competent to address concerns of non-compliance with state's obligations in respect of the functioning of the Tribunal, and the authority competent to lift immunities under the Statute.

³⁶ T. 19372-19374, 19380.

V. DISPOSITION

22. For the foregoing reasons, the Chamber hereby **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-third day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]