

IT-06-90-T 30880
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18 DECEMBER 2009



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: 18 December 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 18 December 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON REQUESTS FOR TEMPORARY RESTRAINING ORDERS
DIRECTED TO THE REPUBLIC OF CROATIA
AND
REASONS FOR THE CHAMBER'S ORDER OF 11 DECEMBER 2009

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
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Mr Steven Kay, QC
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY AND SUBMISSIONS

1. On 10 December 2009, the Gotovina Defence informed the Chamber that on 9 and 10 December 2009 Croatian police had executed search warrants against the premises of Mr Ivanović, Mr Ribičić (current members of the Gotovina Defence), and Mr Hučić (a former member of the Gotovina Defence), and searched an office of the Gotovina Defence in Zagreb, seizing documents and computers of the Gotovina Defence from the office and from Ribičić.¹ According to the Gotovina Defence, police detained and then released Ribičić and Hučić on 9 December 2009, and arrested Ivanović on 9 December 2009, releasing him on 10 December 2009.² The Gotovina Defence further stated that the police seized from Ivanović a laptop computer and documents.³ The Gotovina Defence stated that it did not know what was on the hard drives of the seized computers, but that they might contain work-product documents and information subject to lawyer-client privilege.⁴ It argued that the Croatian Government might turn this over to the Prosecution.⁵ The Gotovina Defence further stated that it had a second office in Zagreb, which had not yet been searched.⁶ The Gotovina Defence requested the Chamber to issue temporary restraining orders, at least until a final decision of the Chamber, directed to the Republic of Croatia (“Croatia”), firstly, to cease and desist from all actions against Ivanović (“first request”); secondly, to stop all searches of records and computers in its custody which were seized from Gotovina Defence offices or members (“second request”); and thirdly, to desist from any future searches against Gotovina Defence offices or members (“third request”).⁷

2. Also on 10 December 2009, the Markač Defence submitted that it shared information with the Gotovina Defence and that if the seized computers of the Gotovina Defence contained such information, then its lawyer-client privilege would be compromised too.⁸ Consequently, the Markač Defence joined the motions of the Gotovina Defence.⁹ It further submitted that one of its members had been “discussed” by the Prosecution and by Croatian officials, and that what had happened to the Gotovina Defence could also happen to the

¹ Defendant Ante Gotovina’s Motion for *Subpoena Duces Tecum* to Prosecutor Serge Brammertz to Appear at the Hearing of 16 December 2009, 10 December 2009, para. 5; T. 26009, 26011-26013, 26028-26029. See also T. 26096, 26098.

² T. 26009-26012, 26023, 26041.

³ T. 26009-26010, 26012, 26028-26029.

⁴ T. 26010-26011, 26051.

⁵ T. 26010.

⁶ T. 26011.

⁷ T. 26023-26024, 26028-26030.

⁸ T. 26019-26020.

⁹ T. 26024.

Markač Defence.¹⁰ It therefore requested a restraining order against similar future actions against its members and offices, as a preventive measure (“fourth request”).¹¹

3. On 10 December 2009, the Chamber announced in court that there would be a hearing on the matter on the following day.¹² Also on 10 December 2009, the Senior Legal Officer of Trial Chamber I informed the Croatian embassy to the Netherlands of the opportunity to address the Chamber at this hearing.¹³ On 11 December 2009, the Chamber formally scheduled a hearing on the matter for the same day, and requested Croatia to appear at the hearing through one or more authorized and informed representatives.¹⁴

4. At the hearing, Croatia was represented by Ambassador Paro and Deputy State Prosecutor Čule.¹⁵ They stated that on 9 December 2009, police apprehended Ivanović in his car, seized and immediately sealed his vehicle, took it away to be searched, and brought him to the police administration of Zagreb county.¹⁶ They further stated that the police seized from Ivanović military documents pertaining to Operation Storm and a laptop computer, which they sealed, and which had not been searched.¹⁷ Ambassador Paro stated that on 10 December 2009, the police searched Ivanović’s apartment, his parents’ apartment, another vehicle, and Ivanović’s office.¹⁸ During these searches, the police found and seized relevant materials in Ivanović’s apartment only.¹⁹ Ambassador Paro also stated that Ivanović was interviewed and then released.²⁰ Deputy Prosecutor Čule stated that Hučić’s apartment and Ribičić’s home had been searched, and that a computer had been seized from Ribičić and searched.²¹ According to Čule, apart from the above-mentioned laptop computer taken from Ivanović, all seized materials had been subjected to a preliminary analysis.²² He stated that only Ivanović was a member of the legal profession.²³ Čule further stated that if he would find among the seized

¹⁰ T. 26024. See also T. 26116.

¹¹ T. 26024.

¹² T. 26046, 26049-26050.

¹³ Letter of the Senior Legal Officer to the Embassy of the Republic of Croatia to the Kingdom of the Netherlands, 10 December 2009; T. 26075, 26081.

¹⁴ Order Scheduling a Hearing, 11 December 2009.

¹⁵ T. 26075, 26077, 26091.

¹⁶ T. 26087-26088, 26100-26101.

¹⁷ T. 26087-26088, 26100-26101, 26150.

¹⁸ T. 26087-26088.

¹⁹ T. 26088-26089.

²⁰ T. 26089.

²¹ T. 26098.

²² T. 26150.

²³ T. 26101.

materials any documents sought by the Prosecution, he would consider handing them over to the Tribunal.²⁴

5. The Prosecution stated that it did not object to a freezing of the situation as suggested by the Chamber, and would accept not receiving from Croatia any materials found during the search until the Chamber and the parties had been given a fair opportunity to address the issue.²⁵ Croatia objected to the second request.²⁶

6. The Gotovina Defence submitted that the Chamber is competent to issue the requested order, as the matter was directly related to the exercise of the jurisdiction of the Tribunal and its competence to enforce its own orders, rules, and the rights of the accused.²⁷ The Markač Defence agreed that the Tribunal is competent to issue the requested order, for the purpose of preventing any privileged information from being obtained by any other party, including the Croatian Government and the Prosecution.²⁸ The Prosecution submitted that the Tribunal should pursue the least restrictive measure, and that the Chamber had already indicated that it should only intrude in exceptional circumstances.²⁹

7. The Chamber asked the representatives of Croatia whether Croatia would agree to temporarily freeze all actions with regard to the seized material and endeavour to find with the Tribunal a solution that would prevent any violation of lawyer-client privilege.³⁰ Croatia responded that the matter was in the hands of the Croatian judiciary, but did not dispute that the investigative activities of the police were under the supervision and control of the Ministry of the Interior.³¹ On 11 December 2009, the Chamber issued an interim order, with reasons to follow, for Croatia to stop, until further notice, all inspections of the contents of all documents and other objects, including computers, in Croatia's custody, which were seized and removed from the possession of the Gotovina Defence, or from present or former members of the Gotovina Defence, provisionally identified as Mr Ivanović, Mr Ribičić and Mr Hučić, or from their relatives.³² The Chamber specifically ordered Croatia to seal these seized items, to the extent it had not already done so, and keep them in its possession until further notice.³³

²⁴ T. 26109.

²⁵ T. 26118-26120, 26127.

²⁶ T. 26150, 26152.

²⁷ T. 26120-26122. See also T. 26142.

²⁸ T. 26128-26131.

²⁹ T. 26119-26120, 26123-26127.

³⁰ T. 26110-26111, 26115, 26153-26154.

³¹ T. 26158.

³² T. 26160-26161.

³³ T. 26160.

APPLICABLE LAW

8. Article 20 (1) of the Statute provides that a Chamber shall ensure that a 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.

9. 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. Article 29 provides the Chamber with a legal basis to issue orders to sovereign States.³⁴

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. When faced with a request for a significant intervention in a domestic jurisdiction, which is being exercised in a way that would infringe the right to a fair trial of an accused before this Tribunal, the Chamber is, in exceptional circumstances, competent to make such an intervention under Rule 54.³⁵

11. Rule 97 of the Rules provides that all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless the client consents to such disclosure, or has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

DISCUSSION

12. The Chamber is concerned here only with the requests for temporary restraining orders. Such requests imply an urgency necessitating a preliminary decision, pending final decisions. Final decisions on the requests for permanent restraining orders will follow in due course, and those requests are the subject of a separate invitation to the parties and to Croatia. Consequently, in the present decision all ensuing references to requests refer solely to

³⁴ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement 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. 26.

remedies requested on a temporary basis, and all findings are made in the context of deciding upon requests for urgent temporary relief.

Decisions on the first, third, and fourth requests

13. The first request concerns a matter of which the Chamber was already seised.³⁶ According to the facts placed before the Chamber, on 9 and 10 December 2009 Croatian police arrested Ivanović, seized certain items from his possession, and released him. As for his arrest, the Chamber finds that, since he was released again, there is no such urgency as to justify the granting of temporary relief. As for actions pertaining to the seizures, the first request is made redundant by the granting of the second request. As a result, there are no new developments in this matter creating an urgency that would justify granting temporary relief in the form of the first request. Consequently, the Chamber finds that the first request does not meet the requirements under Rule 54 of the Rules, as previously interpreted by this Chamber.³⁷

14. As for the third and fourth requests, the Gotovina Defence and the Markač Defence did not provide a sufficient factual basis demonstrating the likelihood of further searches against their offices or members, so as to justify granting the remedy sought. If such searches were to be carried out, the Defence could apply to the Chamber for orders similar to the one issued with regard to the second request. Consequently, the Chamber finds that neither Defence has shown that the third and fourth requests meet the requirements under Rule 54 of the Rules, as previously interpreted by this Chamber.³⁸

Reasons for the decision on the second request

15. The Chamber was informed by the Gotovina Defence that Croatian police had seized computers and documents of the Gotovina Defence from two of its members, Ivanović and Ribičić, and that the computers may contain information subject to lawyer-client privilege. The Markač Defence informed the Chamber that it had shared information with the Gotovina Defence which may also be contained on the seized computers. The representatives of Croatia confirmed that police had seized possessions from Ivanović, including documents and a laptop computer, and further seized and searched a computer from Ribičić, who was not

³⁵ Decision on Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia, 23 July 2009, paras 17-18; T. 26045-26046.

³⁶ See, in particular, Defendant Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia Pursuant to Rule 54, 29 September 2009.

³⁷ See paragraph 10 above.

³⁸ Ibid.

considered a member of the legal profession. Deputy Prosecutor Čule stated that all seized materials except Ivanović's laptop computer had been subjected to a preliminary analysis. He also confirmed that information found in the seized materials may be handed over to the Tribunal.

16. Rule 97 of the Rules enshrines the principle that all communications between lawyer and client are privileged. This privilege is central to the functioning of the defence of an accused. Čule provided the Chamber with some information about the guarantees under Croatian law of the lawyer-client privilege. However, he also stated that police had searched the computer of Ribičić, whom the Gotovina Defence identified as one of its members. This illustrates the risks inherent in different scopes and interpretations of the lawyer-client privilege in different jurisdictions. The Chamber therefore found that, depending on the procedures applied, searches of some of the materials seized from Gotovina Defence members or offices could result in a violation of lawyer-client privilege under Rule 97 of the Rules, which could impact on the fairness of the proceedings before the Chamber. Although neither the Gotovina Defence nor the Markač Defence could confirm that privileged information was actually contained on the seized computers, the Chamber considered a certain level of speculation to be understandable in the circumstances and found that the likelihood of privileged information being contained on the seized Gotovina Defence computers had been sufficiently established for the purpose of seeking temporary relief.

17. Under Article 20 of the Statute, the Chamber shall ensure that a trial is fair. The Chamber found that the above-mentioned developments, if not immediately addressed by a temporary order of the Chamber, could lead to an infringement of the right to a fair trial of the Accused Gotovina and Markač, and constituted exceptional circumstances in which the Chamber is competent to grant a request for a significant intervention in a domestic jurisdiction. The Chamber further considered that the temporal scope of the intervention would be limited and that the order was necessary for the purposes of the conduct of trial, until the Chamber issues a final decision, based on the serious risk of infringing the right to a fair trial of the Accused Gotovina and Markač. The Chamber had considered what other measures could be taken to resolve the issue before it, and initially sought a consensual solution, which Croatia did not accept.

DISPOSITION

18. For the foregoing reasons, and pursuant to Article 29 of the Statute and Rule 54 of the Rules, the Chamber

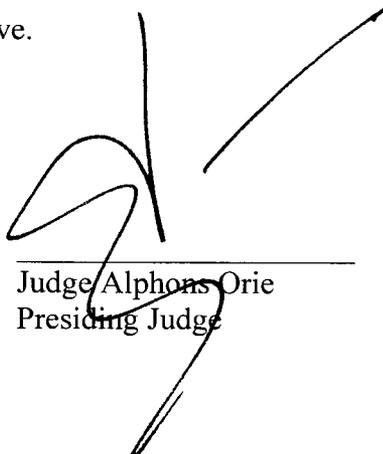
DENIES the first request;

GRANTED the second request;

DENIES the third request; and

DENIES the fourth request.

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



Judge Alphons Orie
Presiding Judge

Dated this 18th day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]