



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: 21 April 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 21 April 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON DEFENCE REQUEST FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER DECISION OF 12 MARCH 2010

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

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Ms Gillian Higgins

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

PROCEDURAL HISTORY

1. On 12 March 2010, the Chamber issued the Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia (“Decision”).¹ On 18 March 2010, the Gotovina Defence filed a request for certification to appeal the Decision (“Request”).² On 1 April 2010, the Prosecution responded (“Response”), opposing the Request.³ On 6 April 2010, the Gotovina Defence requested leave to reply to the Response.⁴ On the same day, the Chamber decided to grant the Gotovina Defence leave to reply and informed the parties of this decision through an informal communication. On 8 April 2010, the Gotovina Defence replied to the Response (“Reply”).⁵ On the same day, the Markač Defence filed a motion (“Markač Defence Motion”) to join the Request.⁶ Under Rule 73 (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), a request for certification shall be filed within seven days of the filing of the impugned decision. The Markač Defence Motion was filed 27 days after the filing of the Decision and the Chamber will dismiss it for this reason.

APPLICABLE LAW

2. Rule 73 (B) of the Rules requires two cumulative criteria to be satisfied to allow a Trial Chamber to grant a request for certification to appeal: 1) that the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that, in the opinion of a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

SUBMISSIONS OF THE PARTIES

3. With regard to the first requirement of Rule 73 (B) of the Rules, the Gotovina Defence submits that the Chamber has acknowledged that the Decision affects Mr Gotovina’s

¹ Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 12 March 2010.

² Gotovina Defence Request for Certificate to Appeal the Trial Chamber’s Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 18 March 2010.

³ Prosecution’s Opposition to the Gotovina Defence’s Request for Certification to Appeal the Trial Chamber’s Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 1 April 2010.

⁴ Gotovina Defence Request to Reply to Prosecution’s Opposition to the Gotovina Defence’s Request for Certification to Appeal the Trial Chamber’s Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 6 April 2010.

⁵ Gotovina Defence Reply in Support of Request for Certificate to Appeal the Trial Chamber’s Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 8 April 2010.

fair trial rights and the proper functioning of the Defence.⁷ The Gotovina Defence submits that it has no obligation to identify errors in the Decision.⁸ The Gotovina Defence submits that the Chamber's application of a standard requiring actual, rather than possible, impediment or hindrance to the fulfilment of Defence tasks, is one of the issues it seeks to challenge on appeal.⁹ According to the Gotovina Defence, this issue affects the fair and expeditious conduct of the proceedings.¹⁰ The Gotovina Defence further submits that the Chamber erred in failing to inquire whether the Gotovina Defence had encountered actual impediments or hindrances, and that the Gotovina Defence had in fact stopped attempting to obtain evidence in the field, in order to protect investigators and witnesses from potential criminal charges.¹¹ This resulted, according to the Gotovina Defence, in actual injury to Mr Gotovina, by denying him access to evidence.¹² The Gotovina Defence finally submits that the Chamber's envisaged procedure for the protection of seized materials resulted in violations, in particular, of the right to counsel, the right against self-incrimination and the right to an appeal, which are issues that significantly affect the fair and expeditious conduct of proceedings.¹³

4. Prior to the filing of the Reply, the Prosecution argued that the Gotovina Defence had failed to allege any legal or factual error in the Decision, or identify which aspects of the Decision it challenged.¹⁴ The Prosecution submitted that in its Decision, the Chamber found no serious impediment to the functioning of the Gotovina Defence resulting from the Republic of Croatia's ("Croatia") domestic proceedings.¹⁵ The Prosecution submitted further that the Gotovina Defence had made no submissions prior to the Decision on the extent to which Croatia's domestic proceedings in fact impede or hinder the fulfilment of Defence tasks.¹⁶

5. With regard to the second requirement of Rule 73 (B) of the Rules, the Gotovina Defence submits that over the past 18 months, Croatia has persistently taken investigative steps against Gotovina Defence members, including by indicting Mr Ivanović in November

⁶ Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Request for Certificate to Appeal the Trial Chamber's Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 8 April 2010.

⁷ Request, para. 5.

⁸ Reply, paras 1-3, 11.

⁹ Ibid., paras 5-10.

¹⁰ Ibid., para. 11.

¹¹ Ibid., para. 12.

¹² Ibid.

¹³ Ibid.

¹⁴ Response, paras 1-4.

¹⁵ Ibid., para. 4.

¹⁶ Ibid., para. 5.

2008; compelling Gotovina Defence members to attend police interviews in March and June 2009; and arresting Mr Ivanović, Mr Ribičić and Mr Hučić and seizing privileged materials from them in December 2009.¹⁷ The Gotovina Defence submits that the Croatian court proceedings against Mr Ivanović are ongoing and are likely to continue for the foreseeable future and that Croatian authorities will undertake additional actions against Gotovina Defence members.¹⁸ The Gotovina Defence submits that it will file additional motions before the Chamber seeking relief pursuant to the standard set out in the Decision.¹⁹

6. The Gotovina Defence further submits that the second requirement of Rule 73 (B) is not limited to the trial, but includes post-trial proceedings as well as those before the President of the Tribunal (“President”) and before the independent body to which the Decision refers.²⁰ The Gotovina Defence submits that the President’s involvement in the Chamber’s envisaged procedure for the protection of seized materials may force him to recuse himself from hearing any appeal from Judgement in the *Gotovina et al.* case and that the President may refer the matter back to the Chamber on this basis, or for lack of jurisdiction.²¹ The Gotovina Defence submits that an immediate resolution by the Appeals Chamber would (i) prevent further litigation before the Chamber, the President and the independent body; (ii) eliminate the possible disqualification of the President from sitting on an appeal in the *Gotovina et al.* case; and (iii) obviate the possibility that the President will refer the matter back to the Chamber.²²

7. The Prosecution argues that the Gotovina Defence’s claim that future Croatian actions will result in further litigation before the Chamber is speculative and lacks a concrete factual basis.²³ The Prosecution submits that the risk of further litigation before the Chamber is reduced by the late stage of the trial.²⁴ The Prosecution submits that a successful appeal of the Decision on the Gotovina Defence’s request for Croatia to cease all investigative steps against Gotovina Defence members without a prior order of the Chamber could increase litigation before the Chamber, by forcing Croatia to litigate all investigative steps before the Chamber.²⁵ The Prosecution finally submits that the issues involved in the Decision are

¹⁷ Request, para. 9.

¹⁸ *Ibid.*, paras 9-10.

¹⁹ *Ibid.*, para. 10; Reply, para. 16.

²⁰ Reply, paras 1, 13, 16.

²¹ *Ibid.*, para. 14.

²² Request, para. 11; Reply, paras 15-16.

²³ Response, paras 1, 6, 8.

²⁴ *Ibid.*, para. 8.

²⁵ *Ibid.*, para. 9.

peripheral to the proceedings and that an immediate resolution by the Appeals Chamber would have little, if any, impact, particularly at this late stage of the proceedings.²⁶

DISCUSSION

8. With regard to the first requirement of Rule 73 (B) of the Rules, the Chamber notes that the Decision concerned, firstly, the protection of internal documents prepared by a party and of lawyer-client communications under Rules 70 (A) and 97 of the Rules. The Chamber recalls that Croatia's search and seizure of materials from the Gotovina Defence can, in certain circumstances, lead to a situation in which the protections under Rule 70 (A) and/or 97 of the Rules are not ensured.²⁷ In its Decision, the Chamber issued orders to the Gotovina Defence and Croatia, so as to ensure the protections of Rules 70 (A) and 97 of the Rules.²⁸ Secondly, the Decision concerned the treatment to be accorded to Defence members under the Statute. Croatia has initiated preliminary investigations and criminal proceedings against Gotovina Defence members. Such proceedings relating to acts which are closely connected to the performance of the defence members' functions can impede or hinder the fulfilment of those functions.²⁹ That could in turn, in certain circumstances, result in the infringement of an accused's right to a fair trial.³⁰ For these reasons, the Chamber finds that the Decision involves issues that could significantly affect the fair and expeditious conduct of the proceedings. The first requirement of Rule 73 (B) of the Rules is met.

9. With regard to the second requirement of Rule 73 (B) of the Rules, the Chamber considers that the submissions before it indicate that the preliminary investigations and criminal proceedings against Gotovina Defence members in Croatia are ongoing. These investigations and proceedings may in the future present practical obstacles to the performance of their functions, as well as possibly having a chilling effect on some or all Gotovina Defence members, during the remainder of the *Gotovina et al.* case, including proceedings on appeal of the Judgement, if such an appeal is filed.³¹ Consequently, the situation for which the Gotovina Defence requested relief may further develop and present

²⁶ Ibid., para. 10.

²⁷ Decision, paras 37-38; Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber's Order of 11 December 2009, 18 December 2009 ("Decision of 18 December 2009"), paras 16-17.

²⁸ Decision, paras 40-43, 77 (4).

²⁹ Ibid., para. 64; Decision on Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia, 23 July 2009 ("Decision of 23 July 2009"), para. 18.

³⁰ Ibid.

issues that could significantly affect the fair and expeditious conduct of the proceedings in the *Gotovina et al.* case. Should the Appeals Chamber find that the Chamber has erred in its Decision, there may be a better opportunity to provide a remedy for any such errors during trial following an interlocutory appeal, rather than on appeal after the Judgement has been rendered. Moreover, the Gotovina Defence has indicated that it will seek further relief before the Chamber in relation to the issue dealt with in the Decision. Consequently, this issue is likely to give rise to further time-consuming litigation before the Chamber, which has already issued three related decisions, in July and December 2009 and in March 2010.³² Considering the complexity of the issue of the treatment to be accorded to Defence members under the Statute, a determination by the Appeals Chamber could expedite, prevent, simplify and/or clarify any further litigation before the Chamber.

10. The Chamber further considers with regard to the second requirement of Rule 73 (B) of the Rules, that the Decision ordered Croatia and the Gotovina Defence to communicate with each other with a view to reaching an agreement with regard to the seized materials.³³ The Decision further ordered the Gotovina Defence, if it could not reach an agreement with Croatia on certain materials, to contact the President with a view to seeking a determination by an independent body.³⁴ The issues dealt with in the Decision will require further actions by Croatia, the Gotovina Defence, and possibly the President, and may give rise to further litigation before an independent body possibly to be set up by the President. A determination by the Appeals Chamber of the issues dealt with in the Decision may confirm, obviate or otherwise adjust the need for such further actions. In light of the novel, complex and time-consuming nature of the further actions ordered or proposed in the Decision, the Chamber considers that it is necessary for all parties concerned to proceed on grounds not open to a future challenge on an appeal after the Judgement has been rendered, which may come after many or all of the actions have been undertaken. A possible determination by the Appeals Chamber on appeal of the Judgement could, at that late stage, cause serious delays and/or affect significant portions of the actions taken on the basis of the Chamber's orders. For these reasons, the Chamber finds that the immediate resolution by the Appeals Chamber will materially advance the proceedings. The second requirement of Rule 73 (B) of the Rules is also met.

³¹ See Decision, para. 72.

³² See Decision of 23 July 2009; Decision of 18 December 2009; Decision.

³³ Decision, para. 77 (4) (c)-(d).

³⁴ *Ibid.*, para. 77 (4) (e).

DISPOSITION

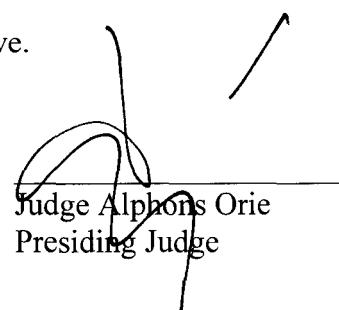
11. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber:

DISMISSES the Markač Defence Motion;

GRANTS the Gotovina Defence's Request; and

SUSPENDS the deadlines set out in relation to the orders directed to the Gotovina Defence and to Croatia, in paragraph 77 (4) (c) through (f) of the Decision, pending a final resolution by the Appeals Chamber.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-first day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]