

IT-06-90-T
D 30892 - D 30888
18 December 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: 18 December 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Reasons of: 18 December 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

REASONS FOR DECISION ON GOTOVINA DEFENCE'S MOTION TO SUBPOENA
SERGE BRAMMERTZ AND ENSURE MLADEN BAJIĆ'S PRESENCE AT A
HEARING SCHEDULED FOR 16 DECEMBER 2009

Office of the Prosecutor

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Mr Goran Mikuličić
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I. PROCEDURAL HISTORY

1. On 10 December 2009, the Gotovina Defence filed a motion requesting the issuance of a *subpoena duces tecum* upon Mr Serge Brammertz to appear at a hearing scheduled for 16 December 2009.¹ The Gotovina Defence also requested an order to Mr Brammertz to bring with him all documents wherein he instructed the Croatian government on how to conduct its investigation into the documents sought in the Prosecution's pending Rule 54 *bis* application.² On the same day, the Gotovina Defence extended its motion by requesting that Mr Brammertz also appear with a letter that he sent to the Croatian Minister of Justice dated 27 October 2009, as referenced in a filing by Croatia of 9 December 2009.³ The Gotovina Defence also requested the Chamber to consider asking Mr Mladen Bajić to appear at the 16 December 2009 hearing and to bring all relevant information he received from Mr Brammertz with him.⁴

2. On 10 December 2009 and pursuant to Rule 126 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Chamber ordered the Prosecution to respond to the Motion by noon of 11 December 2009.⁵ The Prosecution responded on 11 December 2009, objecting to the Motion.⁶

3. On 10 and 11 December 2009, the Chamber explored with the Prosecution and Croatian representatives respectively, whether Mr Brammertz or Mr Bajić would be willing or were planning in any event to attend the 16 December 2009 hearing.⁷ On 10 December 2009, the Prosecution stated that Mr Brammertz would not appear and referred to its response to be filed the next day.⁸ On 11 December 2009, Croatian representatives informed the Chamber that Mr Bajić would only appear on 16 December 2009, if Mr Brammertz were to appear as well.⁹ The Croatian representatives also offered to provide the Chamber with the complete correspondence between the Prosecution and the Croatian government sought by the Gotovina

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 ("Motion"), paras 1, 8-9.

² *Ibid.*

³ T. 26039.

⁴ Motion, para. 8; T. 26023, 26025-26026.

⁵ T. 26039.

⁶ Prosecution's Response to Gotovina's Motion for a *Subpoena Duces Tecum*, 11 December 2009 ("Response"), paras 1, 17.

⁷ T. 26016-26019, 26025-26027, 26044, 26077-26078, 26080.

⁸ T. 26044-26045.

⁹ T. 26152.

Defence, and the Chamber accepted this offer and asked Croatia to provide the parties with these documents.¹⁰

4. On 14 December 2009, the Chamber denied the Motion, with reasons to follow.¹¹

II. SUBMISSIONS OF THE PARTIES

5. The Gotovina Defence submitted that two high-level witnesses in the Croatian government have confirmed to the Gotovina Defence that on or about 1 October 2009, Mr Brammertz sought the investigation and prosecution of various persons, including members of the Gotovina Defence.¹² The Gotovina Defence stated that it was prepared to disclose the identity of these two witnesses to the Chamber, if necessary.¹³ The Gotovina Defence further submitted that individuals present at a government meeting on 9 November 2009 heard Mr Mladen Bajić state that Mr Brammertz was putting great pressure on him to bring indictments against certain persons.¹⁴ Based on this, the Gotovina Defence submitted that such behaviour of Mr Brammertz would amount to serious professional misconduct.¹⁵ The Gotovina Defence contended that the searches and seizures of Gotovina Defence offices and Gotovina Defence team members that took place on 9 December 2009 violated Rules 70 (A) and 97 of the Rules and were a direct consequence of Mr Brammertz's pressure on Croatia to comply with the Chamber's order of 16 September 2008.¹⁶

6. The Prosecution submitted that the bare assertions of "secret" witnesses cannot constitute a legitimate basis for the Prosecutor to appear before the Chamber and produce documents.¹⁷ The Prosecution interpreted the Motion, when expanded by way of further oral submissions by the Gotovina Defence on 10 December 2009, to be one for a *subpoena ad testificandum* in addition to a *subpoena duces tecum*.¹⁸ The Prosecution rejected the allegations of professional misconduct and pointed to various public statements where Mr

¹⁰ T. 26089, 26159. The Chamber notes that parts of the Motion may have become moot following subsequent developments, such as the Prosecution's Submission of Correspondence Relevant to the Missing Artillery Documents, 11 December 2009, and further discussions and assurances from Croatia in court on 16 December 2009, see T. 26419-26420.

¹¹ T. 26249.

¹² Motion, para. 2; T. 26032-26033.

¹³ Ibid.

¹⁴ Motion, para. 3.

¹⁵ Motion, para. 4.

¹⁶ Motion, paras 4-6.

¹⁷ Response, paras 1, 14-16.

¹⁸ Response, footnote 1.

Bajić denies that any pressure was put on him by Mr Brammertz.¹⁹ The Prosecution submitted that an applicant for a subpoena must make an evidentiary showing on the need for a subpoena and that mere assertions without supporting documents do not meet this threshold.²⁰ Based on this, the Prosecution also objected to the Motion as it pertains to seeking Chamber action on securing Mr Bajić's presence for the 16 December 2009 hearing.²¹

7. On 11 December 2009, the Gotovina Defence and the Prosecution made further oral submissions in relation to the Motion.²²

III. APPLICABLE LAW

8. Article 20 (1) of the Tribunal's Statute states that a Trial 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. According to Rule 54 of the Rules, a Trial 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.

10. An evidentiary hearing before a Trial Chamber requires the prior submission of sufficient factual and legal substantiations of the alleged conduct.²³ Furthermore, an evidentiary hearing is justified if the alleged conduct is of such a nature as to negatively affect a fair and expeditious trial.²⁴

IV. DISCUSSION

11. The Chamber recalls that the 16 December 2009 hearing had a very specific purpose namely discussing the list of outstanding documents sought by the Prosecution as set out in Appendix C of its Application for an Order Pursuant to Rule 54 *bis* Directing the Government

¹⁹ Response, paras 3-4, Appendices A-B.

²⁰ Response, paras 7, 9-10, 14-16.

²¹ Response, paras 15-16.

²² T. 26137-26148.

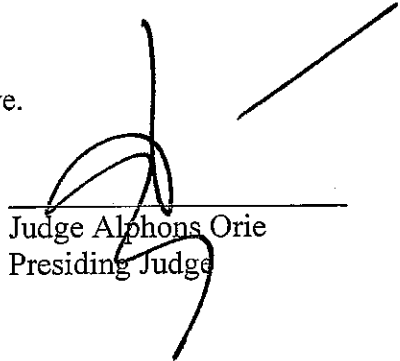
²³ *Prosecutor v. Simić et al.*, Case no. IT-95-9-PT, Decision Stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion for an Evidentiary Hearing on the Arrest of the Accused Todorović, 25 March 1999, p. 3.

of the Republic of Croatia to Produce Documents or Information, of 13 June 2008. For this specific purpose, the Chamber did not consider the presence of either Mr Brammertz or Mr Bajić necessary for the hearing of 16 December 2009. Nevertheless, the Chamber interpreted the Motion as a request to have an evidentiary hearing on the matters raised therein, and ensure the presence of Mr Brammertz and Mr Bajić at such a hearing.

12. The Gotovina Defence did not substantiate its allegations for the Chamber to make a proper assessment of their *prima facie* accuracy. It merely submitted allegations of misconduct without factual corroboration. The Chamber noted that the Gotovina Defence offered to disclose the names of the two witnesses it relies on, however, disclosure of names does not constitute sufficient substantiation as required to justify an evidentiary hearing. It was further unclear to the Chamber what restrictions would apply and what requirements would have to be met in order for the Chamber to receive the evidence of those witnesses. In addition, the Gotovina Defence's contention that the Croatian searches and seizures of Gotovina Defence documents and objects, which allegedly took place upon instigation by Mr Brammertz, violated Rules 70 (A) and 97 of the Rules is a matter that is currently still under consideration by the Chamber. Since the Gotovina Defence did not sufficiently substantiate the factual and legal grounds, the Chamber was not in a position to verify whether the alleged misconduct is of such a nature as to negatively affect a fair and expeditious trial. Accordingly, the Chamber was convinced that an evidentiary hearing was not justified under these circumstances, and as a consequence saw no merit in subpoenaing Mr Brammertz or requiring the presence of Mr Bajić.

13. For these reasons the Chamber **DENIED** the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this eighteenth of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ *Prosecutor v. Haradinaj et al.*, Case no. IT-04-84-T, Decision on Idriz Balaj's Request for Evidentiary Hearing Regarding Interview of Carla Del Ponte, 29 January 2008, para. 9.