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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:	12 March 2010
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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 12 March 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON REQUESTS FOR PERMANENT RESTRAINING ORDERS DIRECTED TO THE REPUBLIC OF CROATIA

Office of the Prosecutor

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Republic of Croatia

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

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I. PROCEDURAL HISTORY

1. On 1 April 2009, the Gotovina Defence filed a motion ("Motion of 1 April 2009") requesting the Chamber to issue a restraining order to the Republic of Croatia ("Croatia") to cease all criminal proceedings and prosecutions, including those against a Gotovina Defence member, Mr Marin Ivanović (charged with concealment of Croatian archival materials), that emanate from acts related to the Gotovina Defence's fulfilment of its function before the Tribunal.[1] On 23 July 2009, the Chamber denied the request for a restraining order, considering among other things that Mr Ivanović had not invoked functional immunity in the Croatian proceedings.[2]

2. On 29 September 2009, the Gotovina Defence submitted that the Croatian Municipal Criminal Court had denied Mr Ivanović's counsel's motion seeking to discontinue proceedings on the basis of functional immunity and filed a motion ("Renewed Motion") again requesting the Chamber to issue a restraining order directed to Croatia to cease the criminal proceedings against Mr Ivanović.[3] On 13 October 2009, the Prosecution responded to the Renewed Motion.[4] On 29 October 2009, the Gotovina Defence requested the Chamber to strike the Prosecution's response for lack of standing ("Motion to Strike").[5] On 30 October 2009, Croatia filed written submissions with regard to the Renewed Motion.[6] On 3 November 2009, the Chamber granted a Gotovina Defence request for leave to reply to Croatia's written

[1] Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 1 April 2009; Defendant Ante Gotovina's Additional Submission in Support of His Motion for Restraining Order against the Republic of Croatia, 2 April 2009 ("Additional Submission of 2 April 2009"); Submission of Registry Accreditation Letter for Mr. Marin Ivanović, 3 April 2009 ("Accreditation Letter"). For further submissions, see Prosecution Response to Gotovina's Motion for Restraining Order against the Republic of Croatia, 9 April 2009 ("Response of 9 April 2009"); Correspondence from Croatia in Relation to the Motion for a Restraining Order, 29 April 2009 ("Submission of 29 April 2009"); Defendant Ante Gotovina's Reply in Support of the Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 12 May 2009 ("Reply of 12 May 2009"); Order Scheduling a Hearing, 12 June 2009; Hearing of 26 June 2009, T. 19365-19445.

[2] Decision on Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia, 23 July 2009 ("Decision of 23 July 2009"), paras 21-22.

[3] Defendant Ante Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 29 September 2009.

[4] Prosecution Response to Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 13 October 2009 ("Response to Renewed Motion").

[5] Gotovina Defence Motion to Strike Prosecution's Response to Gotovina's Renewed Motion for Restraining Order against the Republic of Croatia pursuant to Rule 54, 29 October 2009.

[6] Correspondence from Croatia in Relation to the Renewed Motion for a Restraining Order, 30 October 2009 ("Submission to Renewed Motion"). See also Invitation to the Republic of Croatia to File a Submission in Relation to Defendant Ante Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 15 October 2009.

submissions, and informed the parties accordingly through an informal communication.[7] On 6 November 2009, the Gotovina Defence replied to Croatia's submissions.[8] On 12 November 2009, the Prosecution requested the Chamber to dismiss the Motion to Strike.[9]

3. On 9 and 10 December 2009, Croatian authorities arrested and/or detained several persons, including Mr Ivanović (for concealing or destroying Croatian archival materials), and searched several locations affiliated with the Gotovina Defence, seizing a number of items.[10] On 10 December 2009, the Gotovina Defence requested the Chamber to issue temporary and permanent restraining orders, directed to Croatia, firstly, to cease and desist from all actions against Mr Ivanović; secondly, to stop all searches of records and computers in its custody which were seized from Gotovina Defence offices or members; and thirdly, to desist from any future searches against Gotovina Defence offices or members ("Oral Request of 10 December 2009").[11] Also on 10 December 2009, the Markač Defence joined the Gotovina Defence motions and requested the Chamber to issue a temporary and a permanent restraining order to Croatia to cease and desist from any future actions against its own members and offices, as a preventive measure.[12] On 11 December 2009, the Chamber formally scheduled a hearing for the same day, at which Croatia and the parties made oral submissions.[13] The Prosecution did not object to a temporary freezing of the situation.[14] Croatia objected to the request for a temporary restraining order to stop all searches of records and computers in its custody which were seized from Gotovina Defence offices or members.[15]

4. 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

[7] See Gotovina Defence Request to Reply to Government of Croatia's Response to Ante Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 2 November 2009.
[8] Gotovina Defence Reply to Government of Croatia's Response to Ante Gotovina's Renewed Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 6 November 2009 ("Reply to Renewed Motion").
[9] Prosecution Response to Gotovina's 'Motion to Strike Prosecution Response', 12 November 2009 ("Response to Motion to Strike").
[10] See paragraphs 13, 15-16, 19 below.
[11] T. 26023-26024, 26028-26030.
[12] T. 26024.
[13] Order Scheduling a Hearing, 11 December 2009; Hearing of 11 December 2009, T. 26075-26163.
[14] T. 26118-26120, 26127.
[15] T. 26150, 26152.

relatives.[16] 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.[17] On 18 December 2009, the Chamber denied the remaining requests for temporary restraining orders and provided the reasons for its interim order.[18] On the same day, the Chamber invited and set a schedule for written submissions, from Croatia, the Gotovina Defence, and the Prosecution on the requests for permanent restraining orders, including submissions with regard to the potential involvement of an independent body, such as the Tribunal's Advisory Panel ("Chamber's Invitation"), and noted that the Markač and Čermak Defence were not prevented from making written submissions by the same deadlines.[19]

5. On 4 January 2010, the Gotovina Defence filed submissions pursuant to the Chamber's Invitation, requesting the Chamber to issue a restraining order precluding Croatia from taking investigative steps against any member of the Gotovina Defence without a prior order of the Chamber, and seeking leave to exceed the word limit.[20] On 11 January 2010, the Prosecution filed submissions pursuant to the Chamber's Invitation, asking that the Gotovina Defence's requests be denied, and seeking leave to exceed the word limit.[21] On 14 January 2010, Croatia filed written submissions pursuant to the Chamber's Invitation.[22] The Chamber then extended the deadline for the filings still outstanding under the Chamber's Invitation.[23] On 21 January 2010, the Gotovina Defence filed additional submissions, repeating the request contained in its 4 January 2010 Submission, and again seeking leave to exceed the word limit.[24] Also on 21 January 2010, the Prosecution filed further submissions, repeating the request contained in its 11 January 2010 Submission, proposing a procedural mechanism to ensure that searches of seized Defence materials did not conflict with the rights of the

[16] T. 26160-26161.
[17] T. 26160.
[18] 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 and Reasons of 18 December 2009").
[19] Invitations to the Republic of Croatia, the Gotovina Defence, and the Prosecution in Relation to the Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 18 December 2009.
[20] Defendant Ante Gotovina's Response to the Trial Chamber's Invitation of 18 December 2009, 4 January 2010 ("Gotovina Defence 4 January 2010 Submission").
[21] Prosecution's Response to Gotovina's Submission of 4 January 2010, 11 January 2010 and Corrigendum to Prosecution's Response to Gotovina's Submission of 4 January 2010, 12 January 2010 ("Prosecution 11 January 2010 Submission").
[22] Croatian Correspondence in Relation to the Trial Chamber's Invitation of 18 December 2009, 14 January 2010 ("Croatia 14 January 2010 Submission").
[23] T. 26737-26738, 26903-26904.
[24] Defendant Ante Gotovina's Additional Submission in Response to the Trial Chamber's Invitation of 18 December 2009, 21 January 2010 ("Gotovina Defence 21 January 2010 Submission").

Accused, and again seeking leave to exceed the word limit.[25] On 22 January 2010, the Gotovina Defence submitted a written statement of Mr Ivanović on the factual circumstances of his arrest on 9 December 2009.[26] On 26 January 2010, the Markač Defence joined the Gotovina Defence's 21 January 2010 Submission, and requested the Chamber to issue a restraining order precluding Croatia from taking investigative steps against any members of the Markač Defence, their offices, computers and files, without a prior order of the Chamber.[27] On 27 January 2010, the Chamber indicated that it did not expect any further submissions on the matter.[28]

II. SUBMISSIONS

(i) Submissions with regard to standing

6. In relation to its Renewed Motion, the Gotovina Defence submitted that the Prosecution lacked standing to respond with regard to the question of Mr Gotovina's right to a restraining order.[29] The Prosecution submitted that it had a right to be heard on issues related to the fairness of the trial and related to matters to which the Prosecution is a party, and that the Chamber had previously recognized its standing to respond.[30]

(ii) Submissions with regard to the significance of the requested intervention

7. The Gotovina Defence argued that the Prosecution exercised, through coercion, substantial influence on Croatia, thereby directing its actions and using it as the Prosecution's quasi-police force.[31] The actions, according to the Gotovina Defence, amount to prosecutorial misconduct, violating Articles 20 and 21 of the Statute of the Tribunal ("Statute"), and Rules 67 (A), 70 (A) and 97 of the Rules of Procedure and Evidence ("Rules").[32] Arguing that these actions are attributable to the Prosecution, the Gotovina Defence submitted that a restraining order directed to Croatia would not amount to a significant intervention in its domestic

[25] Prosecution's Submissions pursuant to the Trial Chamber's 18 December 2009 Invitation, 21 January 2010 ("Prosecution 21 January 2010 Submission").
[26] Submission of Witness Statement of Marin Ivanović, 22 January 2010 ("Statement of Mr Ivanović").
[27] Defendant Mladen Markač's Joinder and Supplement to Defendant Ante Gotovina's Additional Submission in Response to the Trial Chamber's Invitation of 18 December 2009, 26 January 2010 ("Markač Defence 26 January 2010 Submission").
[28] T. 27113.
[29] Motion to Strike, para. 1.
[30] Response to Motion to Strike, paras 1-3.
[31] Gotovina Defence 4 January 2010 Submission, paras 2-8, 10-11, 13-17, 19, 21-27, 29-37, 42, 45; Annexes B-G; Gotovina Defence 21 January 2010 Submission, paras 1, 3, 5-11, 19-21, 33.
[32] Gotovina Defence 4 January 2010 Submission, paras 2-3, 8, 11, 13, 17, 23-24, 38, 42-43, 45; Gotovina Defence 21 January 2010 Submission, paras 1, 3, 7, 19-20, 33.

jurisdiction.[33] The Gotovina Defence further submitted that Mr Brammertz ordered Croatia to take action against Mr Ivanović specifically.[34]

8. The Prosecution submitted that the claims that it has directed and controlled Croatia's actions are unsubstantiated and untrue.[35] The Prosecution acknowledged that it had encouraged Croatia to pursue a genuine investigation in order to obtain and produce missing artillery documents and had made several suggestions regarding the focus of the administrative investigation.[36] It argued that it had done nothing improper.[37] The Prosecution further submitted that it had encouraged Croatia to follow up on information indicating that Mr Ivanović possessed contemporaneous military documentation, but noted that the first time it had done so was months after Mr Ivanović was first indicted in Croatia and that it had not sought any criminal prosecutions in relation to the missing documents.[38]

9. In relation to the Renewed Motion, Croatia submitted that the investigations into the missing documents had been initiated in order to comply with the Chamber's order to investigate the whereabouts of missing documents and that, based on the administrative investigation conducted by the Ministries of Justice, of Defence, and of the Interior, the State Attorney's Office initiated criminal proceedings against Mr Ivanović *ex officio*.[39] In relation to the Oral Request of 10 December 2009, Croatia further emphasized that the administrative investigation and the activities of the Task Force that was set up in the context of that administrative investigation had been directed towards complying with the Chamber's order of 16 September 2008 ("Order of 16 September 2008"), the Prosecution's request for assistance, and Croatia's own need to locate its missing archival material.[40] According to Croatia, any criminal proceedings for the concealment or destruction of archival material were conducted by the State Prosecutor's Office *ex officio*.[41] Croatia finally submitted that the State

[33] Gotovina Defence 4 January 2010 Submission, paras 2-4, 8-9, 45.
[34] Ibid., paras 10, 15-16, 19-23, 27-28, 30-34, 36; Gotovina Defence 21 January 2010 Submission, paras 3, 5, 8-17, 21.
[35] Prosecution 11 January 2010 Submission, paras 1-3, 5-9, 11-13, 21, 24-30, 33.
[36] Ibid., paras 4, 8, 14, 18, 20.
[37] Ibid., paras 8, 14-15, 20.
[38] Ibid., paras 4, 10-11, 20.
[39] T. 19393-19395, 19443-19444.
[40] T. 26084-26085, 26089-26090, 26150. See Order in Relation to the Prosecution's Application for an Order Pursuant to Rule 54 *bis*, 16 September 2008.
[41] T. 26151.

Prosecutor's Office had not acted at the orders or instigation of the Croatian Government or the Chief Prosecutor of the Tribunal.[42]

(iii) Submissions with regard to preliminary investigations and criminal proceedings

10. In its Renewed Motion, the Gotovina Defence submitted that on 4 September 2009, the Municipal Criminal Court in Zagreb denied Mr Ivanović's counsel's motion seeking to discontinue proceedings on the basis of functional immunity.[43] The Gotovina Defence incorporated its previous submissions in support of its Motion of 1 April 2009.[44] The Gotovina Defence previously submitted that on 17 November 2008, the County State Prosecutor's Office in Zagreb filed a proposed indictment against Mr Ivanović which alleged that he had concealed archival material after receiving two documents from Mr Ante Kardum in 2007, and recommended a suspended sentence of one year imprisonment pursuant to Articles 67 and 327 of the Croatian Criminal Code.[45] The Gotovina Defence further previously submitted 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.[46] A defence investigator enjoys, according to the Gotovina Defence, such immunity as a derivative of the rights of an accused, which the Chamber is obliged to protect under Article 20 (1) of the Statute.[47] The Gotovina Defence further submitted that the Chamber should enforce the immunity of Mr Ivanović in order to protect Mr Gotovina's right to a fair trial.[48] Mr Gotovina's rights to a fair trial and to equality of arms are, according to the Gotovina Defence, directly threatened by the indictment of one of his investigators.[49]

11. In relation to its Motion of 1 April 2009, in support of its contention that Mr Ivanović enjoys immunity from legal process, the Gotovina Defence additionally submitted a legal opinion from the United Nations Assistant Secretary-General for Legal Affairs, Mr Larry Johnson ("Johnson Legal Opinion"), addressed to the Registrar of the International Criminal

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[42] Ibid.
[43] Renewed Motion, para. 2; Annex A, Record of the Main Hearing Held before the Municipal Criminal Court in Zagreb, dated 4 September 2009.
[44] Renewed Motion, para. 3; Reply to Renewed Motion, para. 10.
[45] Motion of 1 April 2009, para. 2, Annex A, Bill of Indictment against the Accused Mr Marin Ivanović, 17 November 2009, pp. 1-2, Amendment to the Indictment against Marin Ivanović, 17 February 2009, p. 1.
[46] Motion of 1 April 2009, paras 2, 13-14, 20; Accreditation Letter.
[47] Reply of 12 May 2009, paras 14-15, 17-19.
[48] Motion of 1 April 2009, para. 20.
[49] Reply of 12 May 2009, para. 13.

Tribunal for Rwanda.[50] The Gotovina Defence contended that such immunity exists under the Statute as part of international law, irrespective of Croatian national provisions.[51] It also pointed out that Croatian citizens employed in the Prosecution Liaison Office enjoy functional immunity within Croatia, pursuant to an agreement between Croatia and the United Nations.[52] The Gotovina Defence further submitted that in March 2009 Croatia had compelled Mr Ivanović to give a police interview, and that in the three weeks prior to 26 June 2009 at least five members of the Gotovina Defence had been compelled to give police interviews at police stations in Zagreb, and that some of them had been called more than once.[53]

12. In relation to its Renewed Motion, the Gotovina Defence further submitted that Mr Ivanović had been working as a member of the Gotovina Defence since December 2005; that the Gotovina Defence identified Mr Ivanović as a member of the Gotovina Defence to the Registrar pursuant to a Chamber order dated 14 July 2006; and that decisions of the Croatian Minister of Defence of 3 February and 4 August 2006 establish that Croatia was aware of Mr Ivanović's status as a member of the Gotovina Defence at those times.[54] Mr Ivanović was officially accredited by the Registry on 6 March 2008, prior to the start of trial, to enable attendance of court proceedings.[55] The Gotovina Defence also submitted that the Chamber is mandated to ensure that the Defence is able to fulfil its task free from any possible impediment or hindrance from Croatia and that the arrest and trial of a defence investigator is *per se* such a possible impediment or hindrance, even if it takes place after the evidence has been secured.[56] The Gotovina Defence additionally submitted that the practice of issuing orders for safe conduct illustrates that the Chamber has the power to provide immunity from prosecution in domestic jurisdictions where this is necessary for a fair trial.[57]

13. In support of its Oral Request of 10 December 2009, the Gotovina Defence submitted that Croatian police detained and then released Mr Ribičić and Mr Hučić on 9 December

[50] Additional Submission of 2 April 2009, paras 1-5; Annex A, Johnson Legal Opinion.
[51] T. 19371.
[52] T. 19418-19420; Additional Submission of 2 April 2009, Annex B, Agreement between the Republic of Croatia and the United Nations on the Status of the Liaison Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and Its Personnel.
[53] T. 19383-19384, 19386-19387, 19431.
[54] Reply to Renewed Motion, paras 2-6; Annex A, Decision of the Republic of Croatia Ministry of Defence, 3 February 2006; Annex B, Decision of the Republic of Croatia Ministry of Defence, 4 August 2006; *Ex Parte* Filing to Accompany Defendant Ante Gotovina's Reply in Support of the Motion for a Restraining Order against the Republic of Croatia pursuant to Rule 54, 12 May 2009. The Chamber notes that the existence of this *ex parte* filing was revealed *inter partes* in the Reply to Renewed Motion, footnote 6.
[55] Reply to Renewed Motion, para. 2; Accreditation Letter.
[56] Reply to Renewed Motion, paras 8-10.

2009, and arrested Mr Ivanović on 9 December 2009, releasing him on 10 December 2009.[58] The Gotovina Defence submitted that Mr Ribičić had not been accredited by the Registry, but that his name was disclosed to the Registrar in July 2006 on the list of Gotovina Defence members.[59] The Gotovina Defence further submitted that Croatia initiated a second criminal proceeding against Mr Ivanović in December 2009.[60]

14. In its Response to the Renewed Motion, the Prosecution submitted that the Gotovina Defence had failed to establish how the proceedings against Mr Ivanović impact on the fairness of the proceedings against Mr Gotovina, or on Mr Gotovina's ability to conduct his case.[61] The Prosecution also submitted that a restraining order is not necessary for the purposes of the trial, because Mr Ivanović remained at liberty and the Gotovina Defence has already benefited from all the documents Mr Ivanović has gathered.[62] In relation to the Oral Request of 10 December 2009, the Prosecution submitted that the Gotovina Defence had failed to establish the exceptional circumstances required for the issuance of a restraining order, which would effectively immunize a Croatian national residing in Croatia in relation to Croatian law.[63]

15. In relation to the Renewed Motion, Croatia submitted that Mr Ivanović was not a member of the Gotovina Defence in 2007 at the time when the acts charged as a criminal offence were committed, as he was not accredited at the Tribunal until 6 March 2008.[64] Croatia further incorporated its previous submissions regarding the Motion of 1 April 2009.[65] Croatia previously confirmed that Mr Ivanović had been charged with the criminal offence of destruction and concealment of archival materials under Article 327 of the Croatian Criminal Code and submitted that the criminal proceedings were being conducted in Croatia's national interest.[66] Croatia further submitted that the criminal proceedings before its national courts were fully independent from the proceedings conducted before the Tribunal.[67] Croatia also submitted that defence counsel do not enjoy immunity under Croatian law and that immunity

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[57] Ibid., para. 7; Reply of 12 May 2009, paras 18-19.
[58] T. 26009-26012, 26023, 26041. See also Statement of Mr Ivanović, p. 4.
[59] T. 26012-26013.
[60] Gotovina Defence 4 January 2010 Submission, para. 36, Annex H, Summons to the Defendant Marin Ivanović, 18 December 2009.
[61] Response to Renewed Motion, paras 1-5; T. 19438.
[62] Response to Renewed Motion, para. 4; Response of 9 April 2009, paras 3, 12.
[63] Prosecution 11 January 2010 Submission, paras 3, 34.
[64] Submission to Renewed Motion, pp. 2-3.
[65] Ibid., p. 2.
[66] Submission of 29 April 2009, pp. 3-4.

for a Croatian citizen residing in Croatia cannot exist unless it is created by a bilateral agreement between Croatia and another State or between Croatia and an international organization.[68] Croatia further confirmed that a number of persons were called in order to conduct an inquiry for a potential criminal procedure and those persons were under an obligation to attend the interview.[69] In relation to the Oral Request of 10 December 2009, Croatia stated that information obtained by the Task Force provided grounds to suspect the commission of crimes that are prosecuted *ex officio* and that on 9 December 2009, Croatian police arrested Mr Ivanović, brought him to the police administration of Zagreb county, interviewed him and then released him on 10 December 2009.[70] Croatia further stated that the new information from the Task Force indicated that Mr Ivanović could have committed another crime under Article 327 of the Croatian Criminal Code and that a second preliminary investigation had been initiated against him.[71] Croatia produced a list of persons under investigation, on which the Gotovina Defence recognized Mr Ribičić as a present Gotovina Defence member, and Mr Hučić as a former Gotovina Defence member.[72]

(iv) Submissions with regard to searches and seizures

16. The Gotovina Defence submitted 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 Mr Ribičić.[73] The Gotovina Defence further stated that the police seized from Mr Ivanović a laptop computer and documents.[74] The Gotovina Defence added that it had a second office in Zagreb, which had not yet been searched.[75] The Gotovina Defence further submitted that the items seized by Croatia included a number of materials which are protected from disclosure under Rules 97,

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[67] Ibid., p. 3.
[68] T. 19369-19370, 19375-19378, 19380, 19382-19383, 19412-19416, 19418, 19424-19425.
[69] T. 19384-19390.
[70] T. 26084-26085, 26087-26089, 26100-26101; Croatia 14 January 2010 Submission, pp. 4, 6.
[71] T. 26092-26094.
[72] T. 26094-26098.
[73] T. 26009, 26011-26013, 26028-26029. See also T. 26096, 26098; 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.
[74] T. 26009-26010, 26012, 26028-26029.
[75] T. 26011.

70 (A), and/or 67 (A) of the Rules.[76] The Gotovina Defence submitted that under Rule 67 (A) the Prosecution may only obtain disclosure of material that the Defence intends to use in its case-in-chief, and is precluded from engaging in a fishing expedition to determine which Operation Storm documents the Defence has in its possession.[77] It argued that the Croatian Government might turn the seized materials over to the Prosecution.[78] According to the Gotovina Defence, the seizure of these items violated Mr Gotovina's rights, irrespective of whether it took place within the context of Croatia's administrative investigation or a criminal investigation.[79] The Gotovina Defence submitted that violations of fundamental rights of the accused are *per se* exceptional circumstances that warrant the Chamber's intervention and justify a restraining order.[80] Further, according to the Gotovina Defence, Croatian law does not recognize a work product privilege such as the one in Rule 70 (A) and Croatia does not recognize the application of the lawyer-client privilege with regard to Mr Ivanović, Mr Ribičić or Mr Hučić.[81] The Gotovina Defence further submitted that the Chamber should ensure that the rights and privileges of the accused are not frustrated by differences in the scope of lawyer-client privilege between Tribunal law and domestic laws.[82] The Gotovina Defence opposed the involvement of the Advisory Panel, because the Directive on the Assignment of Defence Counsel is inapplicable to Mr Gotovina who has not been assigned counsel on the basis of indigency, and because it is for the Chamber to ensure a fair trial.[83]

17. In 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.[84] 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 Markač Defence.[85] The Markač Defence submitted that the Chamber should prevent any privileged information from being obtained by any other party, including the Croatian Government and

[76] Gotovina Defence 4 January 2010 Submission, paras 11, 38, 42.
[77] Gotovina Defence 4 January 2010 Submission, para. 11; Gotovina Defence 21 January 2010 Submission, paras 18-19.
[78] T. 26010.
[79] Gotovina Defence 21 January 2010 Submission, para. 7.
[80] Ibid., para. 30.
[81] Ibid., para. 31.
[82] Ibid., paras 31-32.
[83] Ibid., paras 36-37.
[84] T. 26019-26020.
[85] T. 26024. See also T. 26116.

the Prosecution.[86] In January 2010, the Markač Defence further submitted that the Prosecution had instructed Croatia to investigate Mr Vlado Rendulić, a member of the Markač Defence, and that Croatia had questioned two of Mr Rendulić's former superiors.[87] The Markač Defence finally submitted that, in light of the Prosecution's instructions, Croatia's filings, and the actions recently undertaken by Croatia there was a reasonable likelihood that its Defence team members and/or offices would be investigated and/or searched.[88]

18. The Prosecution submitted that it recognized the importance of protecting privileged material from disclosure, but that the Chamber should pursue the least intrusive measure that is available to afford such protection.[89] The Prosecution submitted that contemporaneous military documentation is not subject to lawyer-client privilege.[90] The Prosecution further submitted that if appropriate procedural safeguards were in place to protect against the disclosure of privileged material, a permanent restraining order would not be necessary.[91] The Prosecution submitted that the Croatian procedural safeguards governing lawyer-client privilege appeared to be broadly consistent with those of several other jurisdictions, including the European Court of Human Rights.[92] The Prosecution further submitted that the review of seized materials by an entity designated to assess privilege does not constitute a privilege violation.[93] The Prosecution also submitted that the procedural safeguards required to protect lawyer-client privilege could be applied to the work product privilege of Rule 70 (A) as well.[94] In order to address the risk of disclosure of certain seized materials that are privileged under the Tribunal's law but not under Croatian law, the Prosecution proposed two levels of scrutiny: the first conducted by Croatia, the second – in case of dispute between Croatia and the Gotovina Defence regarding whether certain seized material is privileged – by the Tribunal.[95] The Prosecution opposed the involvement of the Advisory Panel, being a non-judicial body with limited competencies, and proposed instead that any disputed privilege issues should be determined by a single Judge of the Tribunal, not involved in the *Gotovina et*

[86] T. 26129-26130.
[87] Markač Defence 26 January 2010 Submission, paras 3-7, Appendices A-C, E.
[88] Markač Defence 26 January 2010 Submission, para. 8.
[89] T. 26123-26124; Prosecution 21 January 2010 Submission, paras 2-3.
[90] Prosecution 11 January 2010 Submission, paras 10, 20.
[91] Ibid., paras 30-31; Prosecution 21 January 2010 Submission, para. 4.
[92] T. 26124; Prosecution 21 January 2010 Submission, paras 7-10.
[93] Prosecution 21 January 2010 Submission, para. 10.
[94] Ibid., paras 11-12.
[95] Ibid., paras 13-14, 19.

al. case.[96] The Judge should, according to the Prosecution, hear Croatia and the Prosecution before making any determinations on privilege.[97] The Prosecution submitted that it had not received any material at all arising from Croatia's searches in issue.[98] The Prosecution finally submitted that neither the Gotovina Defence nor the Markač Defence had submitted a sufficient factual basis demonstrating the likelihood of further searches against their offices or members so as to justify a permanent preventive order, or, in the alternative, that the same proposed procedural safeguards could be imposed in the event of future searches.[99]

19. Croatia submitted that on 9 December 2009, Croatian police seized and immediately sealed Mr Ivanović's vehicle, took it away, and searched it.[100] Croatia further stated that the police seized from Mr Ivanović's vehicle three binders of military documents pertaining to Operation Storm, a portable printer, and a laptop computer, at least some of which were sealed in the presence of Mr Ivanović and his attorney and had not been searched.[101] Croatia stated that on 10 December 2009, the police searched Mr Ivanović's apartment, an apartment of his relatives, two other vehicles, and Mr Ivanović's office.[102] During these searches, the police found and seized relevant materials in Mr Ivanović's apartment only, namely an appointment book and several CDs and diskettes.[103] Croatia further stated that the apartment of Mr Hučić had been searched, from where military documentation and 24 diskettes were seized; and that the home of Mr Ribičić had been searched as well, from where a laptop computer had been seized and searched.[104] According to Croatia, apart from the above-mentioned laptop computer taken from Mr Ivanović, all seized materials had been subjected to preliminary inspection and analysis and no matters subject to lawyer-client privilege had been found.[105] Croatia stated that only Mr Ivanović was a member of the legal profession and that neither Mr Ivanović, Mr Ribičić, nor Mr Hučić was considered an "attorney subject to lawyer-client privilege".[106] Croatia further stated that if it would find among the seized materials any documents sought by the Prosecution, it would consider handing them over to

[96] Ibid., paras 15-19, 22.
[97] Ibid., paras 20-22.
[98] Ibid., para. 32.
[99] Ibid., paras 5-6.
[100] T. 26087-26088, 26100-26101; Croatia 14 January 2010 Submission, p. 4.
[101] T. 26087-26088, 26100-26101, 26150; Croatia 14 January 2010 Submission, pp. 4-7. See also Statement of Mr Ivanović, pp. 3-4.
[102] T. 26087-26088; Croatia 14 January 2010 Submission, p. 5. See also Statement of Mr Ivanović, p. 4.
[103] T. 26088-26089; Croatia 14 January 2010 Submission, p. 5.
[104] T. 26098; Croatia 14 January 2010 Submission, pp. 6-7.
[105] T. 26150; Croatia 14 January 2010 Submission, pp. 6-7.
[106] T. 26101; Croatia 14 January 2010 Submission, p. 7.

the Tribunal.[107] Croatia finally submitted the rules and procedures which protect lawyer-client privilege under Croatian law.[108]

III. APPLICABLE LAW

20. 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, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

21. The Appeals Chamber has held that, under Article 21 (4) and the fair trial guarantee of Article 20 (1) of the Statute, the Chamber must ensure that neither party is put at a disadvantage when presenting its case.[109] However, the rights of the accused should not be interpreted to mean that the Defence is entitled to the same means and resources as the Prosecution.[110]

22. 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.[111]

23. 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.
>
> 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.

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[107] T. 26109.
[108] T. 26099-26102; 26104-26107; Croatia 14 January 2010 Submission, pp. 1-3, 5.
[109] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 44, 47-48.
[110] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras 20, 60; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, paras 69-70.
[111] *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 ("Blaškić Decision"), para. 26.

> 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.

24. Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961 ("Vienna Convention on Diplomatic Relations") provides that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

25. Article 31 of the Vienna Convention on Diplomatic Relations provides, in relevant part, that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, with certain exceptions.

26. Article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 ("UN Convention on Privileges and Immunities") sets out, in relevant parts:

> Section 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. [...]
>
> Section 18. Officials of the United Nations shall:
> (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.
>
> [...]
>
> Section 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.

27. Rule 54 of the 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 the Tribunal, the Chamber is, in exceptional circumstances, competent to make such an intervention under Rule 54.[112]

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[112] Decision of 23 July 2009, paras 17-18; T. 26045-26046; Decision and Reasons of 18 December 2009, para. 10.

28. Rule 70 (A) of the Rules provides that, notwithstanding the provisions of Rules 66 and 67 of the Rules, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those two rules.

29. 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 the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

30. 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.[113] 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.[114] This obligation also requires them to allow the Prosecution and the defence to fulfil their tasks free from any possible impediment or hindrance.[115]

IV. DISCUSSION

(i) Word limits and standing of the Prosecution

31. The Chamber grants the Gotovina Defence's and the Prosecution's requests for leave to exceed the word limit, given the importance and complexity of the issues involved. With regard to the disputed standing of the Prosecution to respond to the Renewed Motion, the Chamber has previously held that the request for a restraining order to cease the proceedings against Mr Ivanović could possibly affect the position of both parties, and that the request concerns an issue related to the fairness of the proceedings.[116] The Chamber is satisfied that the Prosecution, as a party to these proceedings, has standing to respond.

(ii) The significance of the requested intervention

32. The Chamber has previously held that it is competent to consider issuing a restraining order to a State under Articles 20 and 29 of the Statute and Rule 54 of the Rules.[117] The

[113] Blaškić Decision, para. 53.
[114] Ibid.
[115] Ibid.
[116] T. 19398-19399; Chamber's Invitation, p. 3.
[117] Decision of 23 July 2009, paras 17-18; Decision and Reasons of 18 December 2009, para. 10.

Chamber further recalls that it is competent to make a significant intervention in a domestic jurisdiction under Rule 54 in exceptional circumstances only, and that it should also consider what other measures, if any, have been or may be taken to resolve the issue before it.[118] The Gotovina Defence has argued that the requested restraining orders do not constitute a significant intervention in the domestic jurisdiction of Croatia, alleging that Croatia's actions are attributable to the Prosecution and that the Prosecution has engaged in misconduct. The submissions before the Chamber indicate that, pursuant to the Chamber's Order of 16 September 2008, Croatia undertook an administrative investigation into missing documents requested by the Prosecution. On the basis of information uncovered during the administrative investigation, Croatia initiated preliminary investigations and prosecutions of crimes which are prosecuted *ex officio*. The submissions do not establish that the Prosecution directed or encouraged criminal investigations or prosecutions of Gotovina Defence members. Instead, the submissions indicate that the Prosecution made suggestions regarding the administrative investigation, with a view to finding the missing documents. The Chamber finds that such suggestions are not *per se* inappropriate, because the administrative investigation may (and should) be conducted in such a manner so as not to infringe upon the Accused's rights. Having reviewed the sources cited by the Gotovina Defence, the Chamber finds that the Gotovina Defence has failed to establish a factual basis for its contention that Croatia's actions are attributable to the Prosecution, or for its allegations of misconduct. Moreover, it has not been established that even if Croatia's actions were attributable to the Prosecution, this would render any less significant the requested intervention in the exercise of domestic jurisdiction by a State. For these reasons, and given the intrusive nature of the requested restraining orders, the Chamber finds that the requested measures would constitute a significant intervention in the domestic jurisdiction of Croatia.

(iii) Searches and seizures of Gotovina Defence records and computers

33. On 11 December 2009, the Chamber issued an interim order 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,

[118] Decision of 23 July 2009, paras 17-18; T. 26045-26046; Decision and Reasons of 18 December 2009, paras 10, 17.

provisionally identified as Mr Ivanović, Mr Ribičić and Mr Hučić, or from their relatives.[119] In the reasons for that order, the Chamber considered that the seized materials might contain lawyer-client privileged information and that information found in the seized materials may be handed over to the Tribunal, and held 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.[120] The Chamber will now deal with the Gotovina Defence request of 10 December 2009, for a permanent restraining order directed to Croatia to stop all searches of records and computers in its custody which were seized from Gotovina Defence offices or members.

34. The Gotovina Defence has argued that the seized materials include a number of items which are precluded from disclosure under Rule 67 (A) of the Rules. The Chamber notes that Rule 67 (A) merely contains a positive obligation for the defence to disclose to the Prosecution certain materials and sets up a disclosure regime for this purpose. This Rule does not in itself limit the ways in which the Prosecution may receive other materials in the Defence's custody or control. The Gotovina Defence has also argued that the Prosecution is precluded from engaging in a fishing expedition to determine which Operation Storm documents the Defence has in its possession. The Chamber has held that for it to issue an order for the production of documents under Rule 54 of the Rules, the requesting party must meet a two pronged test, the purpose of which is to ensure that a party is not engaging in a fishing expedition in seeking an order of the Chamber.[121] This holding does not preclude parties from seeking the production of documents by other means than an order of the Chamber. The Chamber will not further consider these arguments.

35. The Gotovina Defence has further argued that the seized materials include a number of items which are protected from disclosure under Rules 70 (A) and 97 of the Rules. Under Rule 70 (A), internal documents prepared by a party in connection with the investigation or preparation of the case shall not be subject to disclosure under Rules 66 and 67 of the Rules. Under Rule 97, lawyer-client communications are privileged and therefore, as a rule, not subject to disclosure at trial. Considering that the seized materials include laptops, CDs and

[119] T. 26160-26161.
[120] Decision and Reasons of 18 December 2009, paras 16-17.
[121] Decision on Prosecution's Motion Seeking the Production of Documents Obtained by the Gotovina Defence, 3 April 2009, para. 13.

diskettes taken from members of the Gotovina Defence, the Chamber accepts that the seized materials may include items of the Gotovina Defence that fall within the scope of Rules 70 (A) and 97.

36. In December 2009, the Markač Defence argued 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. The Markač Defence did not further substantiate the possible existence of its lawyer-client communications among the seized materials in its January 2010 submissions. Nor did the Gotovina Defence state that its seized materials contained any lawyer-client communications of the Markač Defence. Furthermore, the assertion that the Defence teams shared information is of a vague and general nature. Therefore, the Chamber finds that neither the Markač Defence nor the Gotovina Defence has provided a sufficient factual basis demonstrating the likelihood that items of the Markač Defence that fall within the scope of Rules 70 (A) and 97 exist among the seized materials.

37. The Chamber recalls that the principle that all communications between lawyer and client are privileged is central to the functioning of the defence of an accused.[122] Rule 97 protects the privileged relationship between lawyer and client, in which lawyer and client should be free to communicate without fear of such communications becoming available to outside parties. Consequently, the Chamber finds that Rule 97 protects the contents of such privileged communications from becoming available to any outside party without the client's consent or prior voluntary disclosure to a third party. Croatia's search and seizure of materials from the Gotovina Defence may, depending on the procedure applied to the seized materials, lead to a situation in which the protection under Rule 97 is not ensured.

38. Croatia has indicated that it might provide the Tribunal with any documents sought by the Prosecution from among the seized materials. If Croatia hands over items from among the seized materials to the Tribunal, there is a risk that certain internal documents prepared by the Gotovina Defence could become available to the Prosecution, which would vitiate the protection against disclosure of such documents at trial provided by Rule 70 (A). Lawyer-client communications of the Gotovina Defence could similarly become available to the Prosecution, in violation of the privileged nature of such communications under Rule 97. For

[122] Decision and Reasons of 18 December 2009, para. 16.

these reasons, the Chamber considers that the procedure to be applied to the seized materials must respect the rights protected in Rules 70 (A) and 97.

39. The Chamber further considers that the seized materials may also include items which do not fall within the scope of Rules 70 (A) or 97. Consequently, the procedure applied to the seized materials should distinguish between items that fall within the scope of Rules 70 (A) or 97, which are privileged or not subject to disclosure, and items which do not fall within the scope of those Rules.

40. In determining the procedure to be applied, the Chamber has considered Croatia's submissions on the protection of lawyer-client privilege under Croatian law. In light of the risks inherent in the difference in scope and interpretation in different jurisdictions of lawyer-client privilege and the protection of internal documents prepared by parties, the Chamber finds it necessary for the conduct of trial to order under Rule 54 that the following procedure be applied, so as to ensure the protections of Rules 70 (A) and 97.

41. Croatia shall initially desist from inspection of the contents of the seized materials and keep the materials in its custody and under seal. Croatia shall further provide the Gotovina Defence with access to the seized materials, in such a manner that the Gotovina Defence can review their content and that the integrity of the seized materials is protected. Croatia may temporarily lift the seal on the seized materials only to the extent necessary to provide such access. The Gotovina Defence and Croatia shall then communicate with a view to seeking agreement on which items are and which are not protected under Rules 70 (A) or 97. Croatia shall not inspect the contents of the materials during such communications. Instead, the Gotovina Defence shall provide brief descriptions of the items it considers protected under those Rules. The Chamber notes that the Gotovina Defence may seek the assistance of an independent third party, such as the Tribunal's Association of Defence Counsel, to assist the communications with Croatia, for instance by confirming that the Defence's descriptions match the contents of seized materials.

42. Croatia may lift the seal on and inspect any seized materials the Gotovina Defence does not consider protected under those Rules. Croatia shall return to the Gotovina Defence any items that the Gotovina Defence and Croatia agree are protected under those Rules.

43. With regard to items the Gotovina Defence considers to be protected under Rules 70 (A) or 97, but which Croatia does not consider to be protected under those Rules, the

Gotovina Defence shall contact the President of the Tribunal with a view to seeking a determination of the matter by an independent body. Croatia must return to the Gotovina Defence the items which an independent body has determined fall within the scope of Rules 70 (A) or 97. Croatia may lift the seal on and inspect items which an independent body has determined fall outside of the scope of those Rules.

44. The Chamber considers that the President of the Tribunal would be the appropriate authority to establish an independent body for the purpose of determining whether materials fall within the scope of Rules 70 (A) or 97, as well as to decide on its composition. The Chamber notes that such a body could include a Judge of the Tribunal not working on the *Gotovina et al.* case and possibly involve consultation with the Advisory Panel.[123] Considering that the protections of Rules 70 (A) and 97 can be upheld in this manner, the Chamber does not find it necessary for the purposes listed in Rule 54 to permanently order Croatia to stop all inspections of the seized materials.

(iv) Future investigative steps against defence members and/or offices

45. The Chamber further interprets the Gotovina Defence's requests of 4 and 21 January 2010, and the Markač Defence's request of 26 January 2010, to preclude Croatia from taking investigative steps against any of their members without a prior order of the Chamber, to overlap with their oral requests of 10 December 2009, namely to desist from any future searches or actions against their offices or members. The Chamber will now deal with the Gotovina and Markač Defence requests to preclude Croatia from taking future investigative steps against their members and/or offices.

46. In deciding on the related request for urgent temporary relief, the Chamber held that the Gotovina Defence and the Markač Defence had not provided a sufficient factual basis demonstrating the likelihood of further searches against their offices or members, so as to justify granting the remedy sought.[124] The Gotovina Defence has not provided further factual submissions on the likelihood of future investigative steps against its offices or members. The Markač Defence has submitted documents which in its view show the likelihood of searches or investigations against its members or offices. Having reviewed the submissions before it, the Chamber finds that neither Defence has provided a sufficient factual basis demonstrating the likelihood of future investigative steps against their offices or members, so as to establish

[123] See Articles 32 and 33 of the Directive on the Assignment of Defence Counsel (Directive No. 1/94).

the exceptional circumstances required to justify a significant intervention in a domestic jurisdiction. Moreover, the Chamber recalls that searches and seizures by a State of materials belonging to a Defence team before the Tribunal may or may not give rise to violations of Rules 70 (A) or 97, depending on the procedure applied.[125]

(v) Criminal proceedings against Mr Ivanović and Mr Ribičić

47. The Gotovina Defence's Renewed Motion of 29 September 2009 and part of its Oral Request of 10 December 2009 seek the same remedy, namely a restraining order to cease the investigations and criminal proceedings against Mr Ivanović. Further, with regard to the Gotovina Defence's requests of 4 and 21 January 2010 for the Chamber to preclude Croatia from taking investigative steps against any member of the Gotovina Defence without a prior order of the Chamber, the Chamber interprets these requests to include a request for an additional restraining order to cease the ongoing investigations against Mr Ribičić. The Chamber does not interpret these requests to include a request for a restraining order to cease the ongoing investigations against Mr Hučić, who is a former Gotovina Defence member. The Chamber will now deal with the Gotovina Defence's requests to cease the investigations and criminal proceedings against Mr Ivanović and Mr Ribičić.

(a) The position of defence members under Article 30 (4) of the Statute

48. With regard to Mr Ivanović's status as a member of the Gotovina Defence, which Croatia has disputed, the Chamber notes that the Gotovina Defence identified Mr Ivanović as a member of its Defence to the Registry in July 2006. Further, in February and August 2006, the Croatian Minister of Defence granted Mr Ivanović certain rights to access and communication, acknowledging as early as February 2006 that Mr Ivanović was a member of the Gotovina Defence. According to the Gotovina Defence, Mr Ivanović was officially accredited by the Registry prior to the start of trial on 10 March 2008 to enable him to attend court proceedings. The Chamber understands the process of Registry accreditation, at least with regard to members of a privately funded defence team, to be important mainly for the provision of access to the Tribunal's premises, the defence network and email servers, and the judicial database. In these circumstances, and notwithstanding the later date of formal accreditation by the Registry, the Chamber considers that Mr Ivanović was, at the time of the alleged acts for which he has been indicted in the Croatian proceedings, a member of the

[124] Decision and Reasons of 18 December 2009, para. 14.

Gotovina Defence for the purposes of considering the requested restraining orders. With regard to Mr Ribičić's status as a member of the Gotovina Defence, the Chamber considers that he has not been accredited, but was similarly identified as a Gotovina Defence member to the Registry in July 2006. Further, no party has explicitly disputed his status. Therefore, the Chamber considers that Mr Ribičić was a member of the Gotovina Defence for the purposes of considering the requested restraining orders, at least as of July 2006.

49. The Chamber has previously held that it was inclined to accept that a legal basis exists for functional immunity of defence counsel before the Tribunal and 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.[126] Being seised of renewed requests for restraining orders, which the Gotovina Defence has argued should be issued, in part for reasons of functional immunity, the Chamber will now further consider the protection under the Statute of defence members from legal process with regard to acts related to the Defence's fulfilment of its official function before the Tribunal.

50. The Chamber first considers whether defence investigators fall within the scope of Article 30 (4) of the Statute. Articles 30 (2) and 30 (3) of the Statute provide the privileges and immunities that the judges, the Prosecutor, the Registrar, and the staff of the Prosecutor and of the Registrar shall enjoy. Article 30 (4) of the Statute provides that other persons required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the Tribunal. Considering that defence counsel are required at the seat of the Tribunal to present the defence of an accused, the Chamber finds that they may be considered to be among such "other persons required at the seat of the Tribunal". Thus, under Article 30 (4) of the Statute, defence counsel should enjoy such treatment as is necessary for the proper functioning of the Tribunal. The Chamber further considers that the tasks performed by defence investigators are necessary for the performance by defence counsel of their functions, and that if such treatment is not extended to defence investigators, defence counsel's ability to carry out their functions would be frustrated. Therefore, the Chamber finds that defence investigators should enjoy such treatment under Article 30 (4) of the Statute also.

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[125] Ibid., para. 16.
[126] Decision of 23 July 2009, paras 19-20.

51. The Chamber will now consider the treatment to be accorded to defence members under Article 30 (4) of the Statute. Article 30 (2) of the Statute, to the extent relevant here, provides that the judges, the Prosecutor and the Registrar shall enjoy the immunities accorded to diplomatic envoys in accordance with international law.[127] The Chamber notes that Article 29 of the Vienna Convention on Diplomatic Relations provides that the person of a diplomatic agent shall be inviolable and that he shall not be liable to any form of arrest or detention. Article 31 of the Vienna Convention on Diplomatic Relations further provides that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State, as well as, with certain exceptions, from civil and administrative jurisdiction.

52. Article 30 (3) of the Statute, to the extent relevant here, provides that staff of the Prosecutor and of the Registrar shall enjoy the immunity accorded to officials of the United Nations under Article V, Section 18 of the UN Convention on Privileges and Immunities, which provides that such officials are immune from legal process in respect of words spoken or written and all acts performed in their official capacity. The Chamber notes that this immunity in respect of words spoken or written and all acts performed in their official capacity continues to exist even after the person ceases to be a member of the staff of the Prosecutor or Registrar, unless it is waived by the Secretary General of the United Nations pursuant to Article V, Section 20 of the UN Convention on Privileges and Immunities.

53. Unlike Article 30 (2) and (3) of the Statute, Article 30 (4) of the Statute does not refer to the Vienna Convention on Diplomatic Relations or to the UN Convention on Privileges and Immunities. Nor does Article 30 (4) of the Statute otherwise explicitly provide personal or functional immunity. Instead, Article 30 (4) of the Statute specifies only that other persons shall be accorded such treatment as is necessary for the proper functioning of the Tribunal. The Chamber notes that the treatment to be accorded defence members has not been further defined by a Security Council resolution, by a multilateral treaty,[128] or by a bilateral agreement with Croatia, such as the agreement between Croatia and the United Nations on the status of the Liaison Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia and its personnel.[129]

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[127] Article 1 (e) of the Vienna Convention on Diplomatic Relations further provides that the head of a mission is a "diplomatic agent" within the meaning of the convention. Article 14 (b) provides that envoys are among one of the classes of heads of missions.
[128] Compare with the "Agreement on the Privileges and Immunities of the International Criminal Court", 9 September 2002.
[129] See Additional Submission of 2 April 2009, Annex B.

54. Under Article 29 (1) of the Statute, States have an obligation to cooperate with the Tribunal. The Appeals Chamber has held with regard to the States and entities of the former Yugoslavia specifically, that they are obliged to cooperate with the Tribunal in such a manner as to enable the Tribunal to discharge its functions, which also requires them to allow the Prosecution and the defence to fulfil their tasks free from any possible impediment or hindrance.[130] The Chamber notes that it must presently interpret Article 30 (4) of the Statute, which applies to all States, whereas the Appeals Chamber's ruling was limited to the States and entities of the former Yugoslavia. The Chamber further notes that it must presently determine the treatment to be accorded under Article 30 (4) of the Statute to defence members specifically, rather than States' obligations towards the Prosecution and the defence as parties to a trial before the Tribunal in general.

55. The Johnson Legal Opinion suggested that defence investigators could enjoy functional immunity under Article 29 (4) of the Statute of the International Criminal Tribunal for Rwanda ("Statute of the ICTR").[131] The wording of Article 29 (4) of the Statute of the ICTR is nearly identical to that of Article 30 (4) of the Statute of the ICTY.[132] The Chamber notes that the Johnson Legal Opinion focused primarily on whether defence investigators, by virtue of their functions and their contractual relationship with the Tribunal, would fall within the scope of Article 29 (4) of the Statute of the ICTR.[133] In interpreting whether that Article provided functional immunity, the Johnson Legal Opinion considered that the Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters for the ICTR ("Tanzania Headquarters Agreement") provided functional immunity for defence counsel.[134] The Chamber further notes that the conclusion of the Johnson Legal Opinion suggested that the ICTR Registry advise the ICTR Trial Chamber that the defence investigator enjoyed immunity as a person on mission under the Tanzania Headquarters Agreement.[135] The conclusion did not refer to Article 29 (4) of the Statute of the ICTR.

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[130] Blaškić Decision, para. 53.
[131] Johnson Legal Opinion, paras 3-7.
[132] Article 29 (4) of the Statute of the ICTR provides that "*Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda*".
[133] Johnson Legal Opinion, paras 3-4, 7.
[134] Ibid., paras 5-11.
[135] Ibid., para. 20.

56. The Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the ICTY ("Host State Agreement") similarly provides functional immunity for defence counsel, as well as for experts on mission.[136] However, the Host State Agreement is binding only on the parties to that agreement, i.e. the United Nations and the Kingdom of the Netherlands. The Chamber recalls that it must presently determine the treatment to be accorded by all States to defence members under Article 30 (4) of the Statute of the ICTY. The Chamber finally notes that the Johnson Legal Opinion was provided in relation to the question of functional immunity of a defence investigator, Mr Nshogoza, before the ICTR. The ICTR Trial Chamber in the *Nshogoza* contempt case did not pronounce on the existence of functional immunity for defence members under Article 29 (4) of the Statute of the ICTR. The ICTR Trial Chamber determined instead that the issue of functional immunity did not arise, as Mr Nshogoza was no longer acting in his capacity as a defence investigator at the time of the acts for which he was charged.[137] For these reasons, the Johnson Legal Opinion and the ICTR Decision in the *Nshogoza* case cannot assist the Chamber any further in interpreting Article 30 (4) of the Statute of the ICTY.

57. In determining the treatment to be accorded to defence members under Article 30 (4) of the Statute, the Chamber recalls that the functions of defence counsel are necessary for the proper functioning of the Tribunal. Consequently, the protection of the performance of those functions may be considered necessary for the proper functioning of the Tribunal. The Chamber therefore finds that under Article 30 (4) of the Statute, defence members should be accorded such treatment as is necessary to protect the performance of their functions before the Tribunal.

58. The Gotovina Defence has not claimed, nor is the Chamber aware of, a general practice in domestic jurisdictions of providing immunity from legal process to the defence or the prosecution with regard to the performance of their duties within domestic criminal trials.

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[136] Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the 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, Article XIX, 2 (c) provides, in relevant part, that counsel shall be accorded immunity from criminal jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel. Article XVII (1) provides, in relevant part, that persons performing missions for the Tribunal shall enjoy the immunities under Articles VI and VII of the General Convention which are necessary for the independent of their duties for the Tribunal [sic].

[137] *Prosecutor v. Léonidas Nshogoza*, ICTR-2007-91-PT, Decision on Defence Judical [sic] and Administrative Application for Deferral in Favour of the ICTR, 5 November 2008, para. 10.

This suggests that functional immunity is not indispensable for the defence or the prosecution to fulfil their functions in a criminal trial.

59. Moreover, States have a legitimate interest in investigating and prosecuting possible crimes committed on their territory. An obligation to refrain from subjecting to the exercise of domestic jurisdiction members of the defence before an international court or tribunal could frustrate this legitimate State interest. This would be especially problematic in cases where no other State or international court or tribunal has jurisdiction, for instance because the defence member is a national of the State where the alleged offence was committed.

60. On the other hand, parties to a trial before an international court or tribunal must fulfil part of their tasks, such as interviewing witnesses and conducting on-site investigations, on the territory of States and therefore within the scope of States' territorial jurisdiction, and away from the seat of the international court or tribunal. The Chamber notes that if members of the defence before an international court or tribunal do not enjoy immunity or are not otherwise protected, there is a risk that States may exercise their jurisdiction against defence members improperly with the intended or foreseeable result of substantially impeding or hindering the performance by defence members of their functions. Consequently, the proper functioning of an international court or tribunal may require some form of protection for defence members from the improper exercise of domestic jurisdiction, in order to protect the performance of their functions.

61. Based on the foregoing, the Chamber considers that defence members do not enjoy personal or functional immunity from legal process under Article 30 (4) of the Statute. The Chamber instead considers that, under this Article, a State may not exercise its jurisdiction by improperly subjecting defence members to legal process, with regard to acts that fall within the defence's fulfilment of its official function before the Tribunal, with the intended or foreseeable result of substantially impeding or hindering the performance by defence members of their functions. The Chamber finally notes that it would be for the competent authorities of the United Nations and the Tribunal to further consider whether the treatment accorded to the defence under Article 30 (4) of the Statute should be further defined by Security Council resolution, multilateral treaty or bilateral agreements.

(b) Necessity under Rule 54 of the Rules

62. Having considered the protection from legal process to which defence members are entitled under Article 30 (4) of the Statute, the Chamber will now consider whether it is competent to issue the requested orders in the specific case before it. Under Rule 54, a Chamber may at its discretion issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. Given the significance of the requested intervention in Croatia's domestic jurisdiction, the Chamber reiterates that it is competent to make such an intervention under Rule 54 in exceptional circumstances only.

63. The Gotovina Defence has argued that the Chamber has issued an order for safe conduct, which illustrates that it has the power to provide immunity from prosecution in domestic jurisdictions where this is necessary for a fair trial. The Chamber notes that an order for safe conduct is a less serious intervention in domestic jurisdictions than the requested restraining orders. A safe conduct order affects domestic jurisdictions of transit countries only in that they cannot exercise their right to arrest, detain, prosecute, or subject the travelling person to any other restrictions on his liberty, for a short period of time during transit. A safe conduct order applies to a travelling person who must enter the territory of the transit country by virtue of an obligation to appear before the Chamber. By contrast, the requested restraining orders would intervene in ongoing judicial proceedings against a person already present on the prosecuting State's territory and could apply for as long as may be necessary for the purposes listed in Rule 54, possibly even beyond the end of the proceedings before the Tribunal.

64. The Chamber recalls that domestic criminal proceedings against defence members before the Tribunal for acts which are closely connected to the performance of their functions can impede or hinder the fulfilment of the defence's functions.[138] That could in turn, in certain circumstances, result in the infringement of an accused's right to a fair trial.[139] Under Article 20 of the Statute, the Chamber shall ensure that the trial is fair. If the exercise of domestic jurisdiction is such that it would render the trial before the Chamber unfair, that would amount to the exceptional circumstances required to justify a significant intervention in the exercise of a domestic jurisdiction.

[138] Decision of 23 July 2009, para. 18.
[139] Decision of 23 July 2009, para. 18.

65. The Gotovina Defence has argued that "the arrest and trial of a defence investigator for obtaining evidence for the defence for use at the Tribunal is *per se* a 'possible impediment or hindrance' to the defence, even if the arrest and trial take place after the evidence has been secured".[140] The Chamber considers that a *possible* impediment or hindrance to the defence is an insufficient basis to justify issuing the requested permanent restraining orders under Rule 54. Instead, the exceptional circumstances required to justify the requested permanent restraining orders would be present if the Croatian investigations and proceedings would *in fact* impede or hinder the Gotovina Defence in the fulfilment of its tasks to such an extent that it would result in the infringement of Mr Gotovina's right to a fair trial. In this regard, the Chamber recalls that, unlike Article 30 (2) and (3) of the Statute, Article 30 (4) does not provide for personal or functional immunity, which would bar legal process unless waived. Instead, defence members should be accorded under Article 30 (4) such treatment as is necessary to protect the performance of their functions.

66. In determining the existence of the exceptional circumstances required, the Chamber will consider the following factors concerning the ongoing investigations and criminal proceedings against Mr Ivanović and Mr Ribičić in Croatia: (i) whether Croatia is exercising its jurisdiction in those proceedings improperly with the intended or foreseeable result of substantially impeding or hindering the performance by the Gotovina Defence members of their functions; (ii) whether those proceedings impede or hinder the Gotovina Defence in the fulfilment of its tasks to such an extent that it would result in the infringement of Mr Gotovina's right to a fair trial; and (iii) whether those proceedings infringe Mr Gotovina's right to procedural equality of arms.

67. According to the information at the Chamber's disposal, the County State Prosecutor's Office in Zagreb filed a proposed indictment against Mr Ivanović on 17 November 2008, which was approximately four months before the end of the Prosecution's case in the *Gotovina et al.* trial. The proposed indictment charged Mr Ivanović with the criminal offence of destruction and concealment of archival materials under Article 327 of the Croatian Criminal Code and recommended a suspended sentence of one year imprisonment pursuant to Articles 67 and 327 of the Croatian Criminal Code.

68. In March and June 2009, up to five members of the Gotovina Defence, including Mr Ivanović, were interviewed, at least some of whom were under an obligation to attend. The

[140] Reply to Renewed Motion, paras 8-10.

submissions before the Chamber do not establish whether these interviews were conducted in relation to the criminal proceedings against Mr Ivanović, or in the context of a broader administrative investigation into documents requested by the Prosecution.

69. At a hearing on 26 June 2009, representatives of Croatia submitted that defence counsel do not enjoy immunity under Croatian law and that immunity for a Croatian citizen residing in Croatia cannot exist unless it is created by a bilateral agreement between Croatia and another State or between Croatia and an international organization. On 4 September 2009, the Municipal Criminal Court in Zagreb denied Mr Ivanović's counsel's motion seeking to discontinue proceedings on the basis of functional immunity, calling upon the statement of reasons of the Deputy Municipal State Attorney, who had argued that there was no immunity for defence counsel or defence members. The Chamber recalls that it is not aware of a general practice in domestic jurisdictions of providing immunity from legal process to the defence with regard to the performance of their duties within domestic criminal trials and notes that Croatian law does not appear to be exceptional in this respect. However, the Chamber further notes that the submissions before it with regard to the events of June and September 2009 do not clearly establish whether Croatia fully considered its obligation under Articles 29 (1) and 30 (4) of the Statute to accord defence members such treatment as is necessary to protect the performance of their functions before the Tribunal.

70. In December 2009, Croatia initiated investigations against Mr Ivanović and Mr Ribičić, in the course of which their homes, the home of Mr Ivanović's parents, his vehicle and his law office were searched, and a number of materials, including documentation and two laptops, were seized. Mr Ribičić was briefly detained on 9 December 2009 and Mr Ivanović was arrested and detained from 9 to 10 December 2009.

71. Croatia has submitted that it undertook an administrative investigation, pursuant to the Chamber's Order of 16 September 2008, into the documents requested by the Prosecution. Croatia has filed a number of written reports in relation to this administrative investigation, as well as numerous official notes of interviews. In December 2009, Croatia undertook investigative measures with a view to establishing the chain of custody and whereabouts of certain documents, conducting 32 interviews, 16 searches of homes and businesses, and investigating at least eight persons for destroying or concealing archival materials.[141] Croatia has further submitted that the investigations and prosecutions in Croatia were initiated *ex*

officio, on the basis of information uncovered during the administrative investigation. On the basis of the submissions before it, the Chamber cannot establish that Croatia is exercising its jurisdiction in those proceedings improperly with the intended or foreseeable result of substantially impeding or hindering the performance by the Gotovina Defence members of their functions. In this regard, the Chamber wishes to emphasize that in its Order of 16 September 2008, it did not direct Croatia to conduct any investigations into or prosecutions of crimes.

72. The Chamber further considers that the searches conducted against the Gotovina Defence members and related premises, and the seizure of their materials may present practical obstacles to the performance by Mr Ivanović and Mr Ribičić of their functions. The Chamber has dealt above with the implications of the searches and seizures for attorney-client privilege and internal documents prepared by a party. In addition, the investigation and/or prosecution of Mr Ivanović and Mr Ribičić may present other practical obstacles to the performance of their functions, as well as possibly having a chilling effect on some or all members of the Gotovina Defence.

73. However, the Chamber notes that the recent events of December 2009 occurred several months after the Gotovina Defence heard the last witness in its defence case on 16 September 2009.[142] Further, apart from the brief detention of Mr Ribičić and the arrest and detention from 9 to 10 December 2009 of Mr Ivanović, they both appear to have remained at liberty to assist the Gotovina Defence during the Croatian investigations and proceedings against them. For instance, Gotovina Defence filings before the Chamber indicate that Mr Ivanović was present at and/or conducted a number of witness interviews in January, February and May 2009; contacted a witness with regard to protective measures in September 2009; and was present at a court hearing before the Chamber on 16 December 2009.[143]

74. The Gotovina Defence has not made submissions on the extent to which the investigations and proceedings against Mr Ivanović and Mr Ribičić have in fact impeded or hindered it in the fulfilment of its tasks, nor has it argued that a restraining order should be issued on this basis. The Chamber has not observed any obvious signs of serious impediments

[141] See T. 26085-26086, 26094.
[142] T. 21775.
[143] Defendant Ante Gotovina's Submission of Rule 92 ter Statement of Witness AG-34, 10 June 2009, Confidential Appendix A, p. 21; Defendant Ante Gotovina's Submission of Rule 92 ter Statement of Witness

or hindrance on the Gotovina Defence's ability to present its case or otherwise fulfil its functions during the trial. Considering these circumstances, the Chamber cannot, on the basis of the submissions before it, establish that the ongoing investigations and criminal proceedings against Mr Ivanović and Mr Ribičić in Croatia impede or hinder the Gotovina Defence in the fulfilment of its tasks to such an extent that it would result in the infringement of Mr Gotovina's right to a fair trial.

75. The Gotovina Defence has further argued that Mr Gotovina's right to procedural equality of arms is directly threatened by the investigations and prosecutions in Croatia and that Croatian citizens employed in the Prosecution Liaison Office enjoy functional immunity within Croatia, pursuant to an agreement between Croatia and the United Nations. The Appeals Chamber has held that, under Article 21 (4) and the fair trial guarantee of Article 20 (1) of the Statute, the Chamber must ensure that neither party is put at a disadvantage when presenting its case.[144] However, the rights of the accused should not be interpreted to mean that the Defence is entitled to the same means and resources as the Prosecution.[145] Considering the circumstances set out above, the Chamber cannot, on the basis of the submissions before it, establish that the ongoing investigations and criminal proceedings against Mr Ivanović and Mr Ribičić in Croatia have put the Gotovina Defence at a disadvantage when presenting its case.

76. For the reasons set out above, the Chamber concludes that the Gotovina Defence has not demonstrated the existence of the exceptional circumstances required to justify the requested significant intervention in the Croatian proceedings under Rule 54. Nonetheless, the submissions before the Chamber raise serious concerns of a general nature with regard to the confidence with which defence members will conduct themselves when performing acts in Croatia that fall within the defence's fulfilment of their official functions before the Tribunal. The Chamber considers the apparent absence of a legal instrument which provides functional immunity for members of the defence of an accused before the Tribunal to be a matter that concerns the Tribunal as a whole and informs the parties that it will notify the President of the Tribunal of the submissions made in this regard and of the Chamber's present decision.

AG-31, 9 July 2009, Confidential Appendix A, p. 11; Defendant Ante Gotovina's Request for Protective Measures for Witness AG-10, 25 September 2009, Confidential Annex A, pp. 8-9; T. 26394.

[144] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 44, 47-48.

[145] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras 20, 60; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, paras 69-70.

V. DISPOSITION

77. For the foregoing reasons, pursuant to Articles 20 (1), 29 and 30 of the Statute, and Rules 54, 70 (A) and 97 of the Rules, the Chamber hereby:

1. GRANTS the requests for leave to exceed word limits;

2. DENIES the Motion to Strike;

3. LIFTS its temporary order of 11 December 2009 directed to Croatia to stop, until further notice, all inspections of the contents of all documents and other objects, including computers, in its custody which were seized and removed from the possession of the Gotovina Defence, or from present or former members of the Gotovina Defence, or from their relatives, to seal these seized items, to the extent it had not already done so, and to keep them in its possession until further notice;

4. With regard to the 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, or from their relatives ("the seized materials"):

(a) **ORDERS** Croatia to desist from inspection of the contents of the seized materials and keep each item thereof in its custody and under seal until:

(i) the Gotovina Defence has informed Croatia that it does not consider the item to be protected under Rules 70 (A) or 97, pursuant to *(c)(i)* below, or,

(ii) an independent body has determined that the item does not fall within the scope of Rules 70 (A) or 97, as per *(e)* below;

(b) **ORDERS** Croatia, within two weeks of the day of filing of this decision, to provide the Gotovina Defence with access to the seized materials, in such a manner that the Gotovina Defence can review their content and that the integrity of the seized materials is protected, and to unseal the seized materials only to the extent necessary to provide such access;

(c) **ORDERS** the Gotovina Defence, within six weeks of being provided access to the seized materials:

(i) to identify to Croatia the items it does not consider to be protected under Rules 70 (A) or 97, and,

(ii) to identify to Croatia items it considers to be protected under Rules 70 (A) or 97, including by providing a brief description of each item and indicating whether it considers the item to be protected under Rule 70 (A) and/or 97, and to communicate with Croatia with a view to reaching an agreement on which items are protected under those Rules;

(d) **ORDERS** Croatia to communicate with the Gotovina Defence with a view to reaching an agreement on which items are protected under Rules 70 (A) or 97 and, without inspecting the contents of the seized materials and on the basis of the information from and communications with the Gotovina Defence pursuant to *(c)(ii)* above, within six weeks of having received that information:

(i) to return, without inspecting their contents or keepings any copies, to the Gotovina Defence any items among those identified by the Gotovina Defence pursuant to *(c)(ii)* above, which Croatia considers to be protected under Rules 70 (A) or 97,

(ii) to identify to the Gotovina Defence any items among those identified by the Gotovina Defence pursuant to *(c)(ii)* above, which Croatia considers not to be protected under Rules 70 (A) or 97;

(e) **ORDERS** the Gotovina Defence, with regard to items identified by Croatia pursuant to *(d)(ii)* above, within two weeks of receiving that information, to contact the President of the Tribunal, with a view to seeking a determination by an independent body on whether specific items fall within the scope of Rules 70 (A) or 97;

(f) **ORDERS** Croatia to return to the Gotovina Defence, without inspecting their contents or keeping any copies, items which an independent body has determined fall within the scope of Rules 70 (A) or 97, within the deadline set by that body;

5. REITERATES that if the seized materials include any information with regard to witnesses who have been granted protective measures by an order of a Chamber of the Tribunal, or any other information that may be confidential before the Tribunal, Croatia must treat such information as confidential;[146]

[146] T. 26036-26037.

6. DENIES the requests for a permanent restraining order directed to Croatia to stop all searches of records and computers in its custody which were seized from Gotovina Defence offices or members;

7. DENIES the requests for permanent restraining orders precluding Croatia from taking investigative steps against any member and/or office of the Gotovina or Markač Defence without a prior order of the Chamber; and

8. DENIES the requests for a permanent restraining order directed to Croatia to cease the preliminary investigations and criminal prosecutions against Mr Ivanović and Mr Ribičić.

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

Judge Alphons Orie
Presiding Judge

Dated this Twelfth day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]