



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: 16 September 2008
Original: English

IT-06-90-T
① 16655 - ① 16650
16 September 2008

16655
Yes.

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elizabeth Gwaunza
Registrar: Mr Hans Holthuis
Order of: 16 September 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

ORDER IN RELATION TO THE PROSECUTION'S APPLICATION FOR AN ORDER
PURSUANT TO RULE 54 *BIS*

Office of the Prosecutor

Mr Serge Brammertz
Mr Alan Tieger
Mr Stefan Waespi

Republic of Croatia

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

Counsel for Ante Gotovina

Mr Luka Mišetić
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Mr Steven Kay
Mr Andrew Cayley
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović

I. PROCEDURAL HISTORY

1. On 13 June 2008, the Prosecution filed an application requesting that the Chamber order the Republic of Croatia ("Croatia") to produce certain documents ("Application").¹ On 19 June 2008, the Prosecution filed a corrigendum.² These two submissions will be referred to below as the "Motion".
2. The Gotovina Defence filed a motion for leave to respond and a response on 24 June 2008 requesting that the Chamber dismiss the Motion.³ The Markač Defence joined the response on 26 June 2008.⁴ On the same day, the Prosecution filed an application to reply to the response of the Gotovina Defence.⁵ On 26 June 2008, the Chamber informally informed the parties that it had decided to give both the Prosecution and the Defence a further opportunity to be heard orally on the matter. The Prosecution and the Gotovina and Markač Defence made oral submissions on 30 June 2008.⁶
3. On 1 July 2008, the Chamber denied the Defence's request to dismiss the Motion and ordered that a hearing be held on 18 July 2008.⁷ On the day of the hearing the Prosecution filed a further submission, which contained a report from Croatia, dated 14 July 2008, accompanied by a total of 163 documents, and submissions of the Prosecution in relation to that report ("Prosecution's Further Submissions").⁸ During the hearing, the Representatives of the Government of Croatia, the Prosecution and the Gotovina and Markač Defence advanced their respective positions ("Hearing").⁹

¹ Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, with public and confidential Appendices, 13 June 2008.

² Corrigendum to Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 19 June 2008.

³ Defendant Ante Gotovina's Motion for Leave to Respond to Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 24 June 2008; Defendant Ante Gotovina's Response to Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 24 June 2008.

⁴ Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Response to Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 26 June 2008.

⁵ Prosecution's Application to Reply to Gotovina's Response to Prosecution's Application for an Order Pursuant to Rule 54 *bis*, 26 June 2008.

⁶ T. 5383-5406.

⁷ Order Scheduling a Hearing, 1 July 2008.

⁸ Prosecution's Further Submissions Relating to Its Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 18 July 2008.

⁹ T. 6755-6810.

4. On 23 July 2008, the Prosecution filed two documents confidentially to support certain arguments advanced during the Hearing.¹⁰ On 28 July 2008, Croatia confidentially filed a letter and six documents to support various arguments it had made during the Hearing.¹¹

II. SUBMISSIONS

5. In the Motion the Prosecution primarily requests the Chamber to issue an order directing Croatia to provide the documents listed in the request for artillery documents of 15 May 2007 (“Artillery Document Request”) and the request for special police documents of 27 June 2007 (“RFA 739”), as contained in confidential Appendices D and E to the Motion (“requested documents”).¹²

6. The Prosecution submits that it has requested the assistance of Croatia in obtaining the requested documents in the Artillery Document Request and RFA 739, but that this has only led to the production of a small part thereof.¹³ According to the Prosecution, the remaining requested documents exist.¹⁴ It argues that the Croatian authorities are unwilling to supply them and are concealing them.¹⁵ The Prosecution also argues that their whereabouts have not been properly investigated.¹⁶

7. The Representatives of the Government of Croatia request the Chamber to reject the Motion and to allow the authorities of Croatia to continue the investigation.¹⁷ Croatia submits that some of the documents referred to in the Artillery Document Request may not or no longer exist due to the conditions prevailing at the time of Operation Storm.¹⁸ Croatia disputes the position of the Prosecution that it is unwilling to co-operate and states that it does not obstruct the Prosecution’s case.¹⁹ Croatia argues that it has opened an investigation, which has yielded positive results and is ongoing.²⁰

III. APPLICABLE LAW

¹⁰ Prosecution’s Submission of Two Documents Relating to the July 2008 Hearing Held Pursuant to Rule 54 *bis*, 23 July 2008.

¹¹ Letter of the Embassy of the Republic of Croatia, 28 July 2008.

¹² Application, paras 15, 61.

¹³ Application, paras 6-14, 20, 24, 30, 33; Prosecution’s Further Submissions, paras 12-15.

¹⁴ Application, paras 6, 9-10, 16, 34, 38-42; T. 6787-6788.

¹⁵ Application, paras 3, 43-53; T. 6792-6795.

¹⁶ Application, paras 2, 4, 15-17, 36-37; Prosecution’s Further Submissions, paras 5-11, 16-22; T. 6789-6792.

¹⁷ T. 6766.

¹⁸ Prosecution’s Further Submissions, Appendix A, English Translation p. 10; T. 6763, 6770, 6775.

¹⁹ T. 6761-6763, 6778-6779.

²⁰ Prosecution’s Further Submissions, Appendix A; T. 6763-6764.

8. Article 29 of the Statute of the Tribunal (“Statute”) provides that States have an obligation to co-operate with the investigations of the Tribunal and shall comply without undue delay with any request for assistance.

9. Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that a Judge or a Chamber may issue 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 at the request of either party or *proprio motu*.

10. Rule 54 *bis* (A) of the Rules provides that a Party applying to the Chamber for an order to a State for the production of documents or information shall (i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue and necessary for the fair determination of that matter; and (iii) explain the steps that have been taken to secure the State’s assistance.

IV. DISCUSSION

11. Croatia has produced a certain amount of the requested documents. It is not disputed by the Prosecution and Croatia that some of requested documents have not been produced, but they differ on which and how many documents are concerned.²¹

12. Croatia has not opposed the position of the Prosecution that, according to legislation and regulations in force before, during and after Operation Storm, artillery operations should be documented and archived.²² Nevertheless, there is a dispute as to whether or not these documents exist. The Prosecution takes the position that they do exist, basing its position on the aforementioned legislation and regulations, the documents that Croatia has already produced and the compliance with the legislation and regulations the Prosecution derives from those documents, and the assumption that the documents were a pre-condition for an artillery assault, especially an assault of the scale of Operation Storm.²³ However, Croatia states that the Prosecution has not sufficiently grounded its assumption that the documents do exist.²⁴ In its report dated 14 July 2008 Croatia stated that “operative checks showed that not all units had kept all records, operative logbooks, maps and lists of targets, or drafted

²¹ Application, paras 6-14, 20, 24, 30, 33; Prosecution’s Further Submissions, paras 12-15, Appendix A, English translation pp. 2-8; T. 6770-6777.

²² Application, paras 9-10, 16, 39-42; Prosecution’s Further Submissions, Appendix A, English translation p. 8; T. 6787-6788.

²³ Application, paras 6, 9-10, 16, 34, 38-42; T. 6787-6788.

²⁴ T. 6769-6770.

reports".²⁵ Further, Croatia summarized the interviews it conducted in the investigation in the aforementioned report, and concluded that "all [the interviewed persons] stated that they had no documentation whatsoever that constitutes archival war materials of the units".²⁶

13. Based on the submissions of the Prosecution and Croatia, the Chamber is not in a position to draw any conclusion as to whether the requested documents do exist. In particular, the Chamber considers that the aforementioned general statements of Croatia in the report dated 14 July 2008 are not sufficient, without further facts or documents to substantiate them, to establish that they do not exist.

14. The Representatives of the Government of Croatia have reaffirmed the willingness of the State to comply with its obligation to co-operate with the Tribunal and to take all necessary steps to obtain the requested documents. Croatia has established a Military Police Task Force for the purpose of investigating the whereabouts of the documents listed in the Artillery Document Request, and a commission for the purpose of investigating the whereabouts of the documents mentioned in RFA 739. Croatia replaced the latter with a new commission on 5 June 2008, because the commission had up to then only found 33 documents.²⁷ In the report dated 14 July 2008 Croatia listed a number of investigative steps it intended to undertake.²⁸ Despite various shortcomings in the investigations carried out by Croatia, as indicated by the Prosecution, the Chamber considers that it is appropriate to give one further opportunity to Croatia to investigate the whereabouts of the requested documents.

15. Therefore, for the purpose of the conduct of the trial the Chamber finds it necessary to partly grant the request of Croatia to be given the opportunity to proceed with the investigation, for a limited period of time, to fulfil its obligation to fully co-operate with the Tribunal. The Chamber will therefore defer its decision on the Motion. The Chamber will order some requirements regarding the investigation.

V. DISPOSITION

16. Pursuant to Article 29 of the Statute and Rules 54 and 54 *bis* of the Rules, the Chamber **DEFERS** its decision on the Motion and **GRANTS** the request of Croatia to be

²⁵ Prosecution's Further Submissions, Appendix A, English translation p. 10.

²⁶ Prosecution's Further Submissions, Appendix A, English translation pp. 9-10.

²⁷ Application, paras 18-19, 28 and Appendices F and J; Prosecution's Further Submissions, Appendix A, English translation p. 2.

²⁸ Prosecution's Further Submissions, Appendix A, English translation pp. 11-12.

given the opportunity to further investigate the whereabouts of the remaining requested documents.

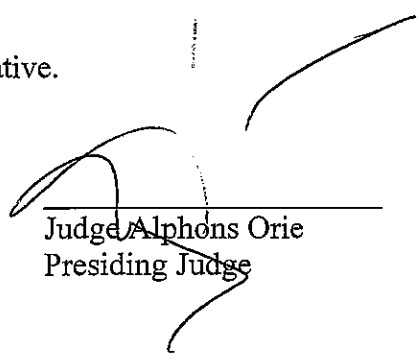
17. The Chamber **ORDERS** Croatia to intensify and broaden its investigation and to provide the Prosecution with all requested documents that it may find during the investigation.

18. The Chamber **ORDERS** Croatia to provide the Chamber and the Prosecution by 20 October 2008 with a detailed report specifying the efforts taken by Croatia to obtain the requested documents, including, as annexes, the documents that substantiate those efforts. The report should include the names, positions and official contact details of the persons who found the documents that Croatia will have produced by 20 October 2008, and the sources from which the documents were obtained. The report should further contain a detailed account of all the investigative steps that Croatia has taken with regard to any requested documents that Croatia will not have produced by 20 October 2008. This should include the names and position of those persons that Croatia has interviewed during the course of the investigation and the transcripts or notes of those interviews. The report should also contain an account of the chain of custody of the requested documents, as far as can be established through the investigation, from the time the documents were produced in 1995 until today.

19. The Chamber **REMAINS SEISED** of the Motion. The Chamber will consider whether it will be necessary to schedule a further hearing after 20 October 2008.

20. The Chamber **INSTRUCTS** the Registrar to serve the present Order on the Government of Croatia, *per* the Embassy of Croatia to The Netherlands, The Hague.

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



Judge Alphons Orie
Presiding Judge

Dated this 16th day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]