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International pour
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CASE/AFFAIRE NO. IT-03-72-A DATE 01 March 2007 A 526

FROM/DE CARLINE AMEERALI, DEPUTY CHIEF CMSS SM

TO/A

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Embassy/Ambassade

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FOR INFO : JUDGE POCAR JUDGE SHAHABUDEEN JUDGE GUNEY JUDGE SCHOMBURG

Registrar/Deputy Registrar/Greffier/Greffier adjoint
MR. A. DE WITT

VWS Coordinator/Coordinateur de la SVT
MS. W. LOBWEIN

Senior Legal Officer/Juriste hors-classe / Legal Officer
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UNITED
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4-03-72-A
4 325-A 322
01 March 2007

4-06-90-PT
D 707 D 706
01 March 2007

707 415
325
103



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-06-90-PT

Date: 1 March 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 1 March 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

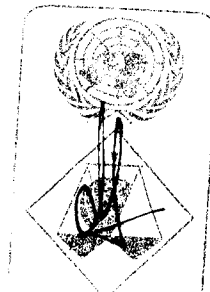
**DECISION ON IVAN ČERMAK'S AND MLADEN
MARKAČ'S JOINT MOTION FOR ACCESS TO
CONFIDENTIAL TESTIMONY AND DOCUMENTS IN
PROSECUTOR V. MILAN BABIĆ CASE**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Laurie Sartorio

Counsel for the Accused:

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač



TRIAL CHAMBER I (“Trial Chamber”) 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 (“Tribunal”);

BEING SEISED of “Ivan Čermak’s and Mladen Markač’s Joint Motion for Access to Confidential Testimony and Documents in Prosecutor v. Milan Babić Case”, filed on 9 January 2007 (“Motion”), in which counsel for the accused Ivan Čermak and counsel for the accused Mladen Markač (“Applicants”) request access to “confidential testimony, documents, transcripts and exhibits in the Prosecutor v. Milan Babić (“Babić case”) to the extent that the materials relate to the conflict between the forces of RSK [the Republic of Serbian Krajina] and Republic of Croatia and the events preceding it”;¹

NOTING the “Prosecution’s Consolidated Response to Motions Filed by the Accused for Access to Confidential Testimony and Documents in Prosecutor v. Slobodan Milošević, Prosecutor v. Milan Martić and Prosecutor v. Milan Babić Cases”, filed on 23 January 2007 (“Consolidated Response”);

NOTING “Ivan Čermak’s and Mladen Markač’s Joint Reply to Prosecution’s Consolidated Response to Motions Filed by the Accused for Access to Confidential Testimony and Documents in Prosecutor v. Slobodan Milošević, Prosecutor v. Milan Martić and Prosecutor v. Milan Babić Cases”, filed on 1 February 2007 (“Reply”);

NOTING that the Applicants submit that there exists a nexus between the *Babić* case and the case of *Gotovina et al.*, since the Indictment in the former case covers the same geographical area as the Indictment in the latter case as well as the time period and events directly preceding Operation Storm;²

NOTING that the Prosecution opposes the Motion submitting that the documents sought by the Applicants are identified “in sweeping terms” and that the Applicants have failed to show the existence of a legitimate forensic purpose for such access;³

NOTING that the Applicants submit that the further purpose of the Motion is to gain access to possibly exculpatory evidence arguing that due to “the Prosecutor’s huge absorption in many Tribunal’s cases and consequently the possibility of overlooking the significant material, Accused would prefer to examine possible 68 material by themselves”;⁴

¹ Motion, para. 3.

² Motion, para. 5.

³ Consolidated Response, para. 8.

⁴ Reply, para. 6.

NOTING that according to Rule 126 *bis* of the Rules of Procedure and Evidence (“Rules”) “a reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber”;

CONSIDERING that the Applicants did not request leave of the Trial Chamber to file the Reply and moreover filed the Reply after the time period for so doing had expired, and that therefore the Reply is not before the Trial Chamber;

CONSIDERING that even if the Reply would have been filed in accordance with Rule 126 *bis*, that pursuant to Rule 68(i) of the Rules “the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence” and that there is no reason to believe that due to “the Prosecutor’s huge absorption in many Tribunal’s cases” the Prosecution has not met, or will not be able to meet, its obligations in the case of *Gotovina et al.*;

CONSIDERING that a party may seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case, if a legitimate forensic purpose for such access has been shown and if it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, but in doing so, a party may not engage in a “fishing expedition”, that is seeking to access material in order to discover whether there is any case at all to make;⁵

CONSIDERING that the forensic purpose, *i.e.* the relevance of the material being sought by a party, may be determined by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, that is, where geographical, temporal or other material overlap between the cases exists the material sought is likely to be of assistance to the applicant’s case, or at least, there is a good chance that it may assist the defence of the applicant(s);⁶

CONSIDERING that a geographical and partly temporal overlap exists between the *Gotovina et al.* case and *Babić* case, insofar as the conflict between the forces of the RSK and the Republic of

⁵ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić & Čerkez Case, 23 January 2003, p. 3; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Momčilo Gruban’s Motion for Access to Material, 13 January 2004, para. 5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Materials in Another Case, 23 April 2002, p. 3. See also *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Applicant’s Motion Seeking Access to Confidential Material in the Martić Case, 28 November 2006, p. 2.

⁶ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Materials in Another Case, 23 April 2002, p. 3. See also *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Applicant’s Motion Seeking Access to Confidential Material in the Martić Case, 28 November 2006, pp 2-3.

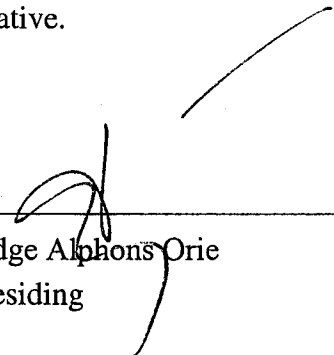
Croatia is concerned, including the time period and events preceding Operation Storm, and therefore that the material sought may be of material assistance to the Applicants' case;

CONSIDERING that the Applicants fail to describe the documents sought with the required specificity but indeed engage in "a fishing expedition";

PURSUANT TO Articles 20 and 21 of the Statute and Rule 54 of the Rules;

DISMISSES the Motion.

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



Judge Alphons Orie
Presiding

Dated this first day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

