



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: 25 June 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Pre-Trial Judge
Judge Alphons Orie
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Order of: 25 June 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**ORDER TO THE REGISTRAR REGARDING GREGORY KEHOE'S APPOINTMENT
AS DEFENCE COUNSEL FOR ANTE GOTOVINA**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Marks Moore

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 (in transfer) 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 SEIZED of the confidential “Ivan Čermak’s and Mladen Markač’s joint motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe” (“Motion”) of 13 April 2007, in which Counsel for Čermak and Markač requested that the Trial Chamber orders the Office of the Prosecutor (“OTP”) to inform it of Gregory Kehoe’s (“Kehoe”) involvement in the investigation of Operation Storm¹ when he worked for the OTP, to provide all relevant information on the conflict of interest to the Trial Chamber² and for the Trial Chamber to consider whether a conflict of interest exists, and if it does, to resolve such conflict of interest;³

NOTING “Defendant Ante Gotovina’s Response to Ivan Čermak’s and Mladen Markač’s Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe” of 25 April 2007 (“Gotovina First Response”) in which he stated that in February 2006, the OTP had conducted an internal investigation and concluded that Kehoe had not personally and substantially participated in the Operation Storm investigation and that there was no basis to seek his exclusion from the case;⁴

NOTING the “Prosecution’s Response to Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe” of 27 April 2007 (“Prosecution Response”) in which the OTP stated that after a “lengthy effort” to collect, review and consider relevant information concerning Kehoe’s involvement in the Operation Storm investigation, the OTP had determined that there was not a sufficient basis to challenge Kehoe’s assignment [*sic*] as defence counsel;⁵

NOTING the confidential “Joint Request for Leave to Reply and Consolidated Reply to Gotovina and Prosecutor’s Responses to Ivan Čermak and Mladen Markač’s Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe” of 2 May 2007 (“Consolidated Reply”) in which Čermak and Markač argued, *inter alia*, that all parties are potentially adversely affected by the conflict, not just the OTP;⁶

NOTING “Defendant Ante Gotovina’s Response in Opposition to Joint Request for Leave to Reply to Gotovina and Prosecutor’s Responses to Ivan Čermak’s and Mladen Markač’s Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe” of 3 May 2007 (“Gotovina

¹ Motion, para. 1.

² Motion, para. 15.

³ Motion, paras 1, 15.

⁴ Gotovina First Response, paras 1, 8.

⁵ Prosecution Response, para. 8.

⁶ Consolidated Reply, para. 9.

Second Response”) requesting that the Trial Chamber issues a public decision on the Motion and that since the Consolidated Reply raised new arguments outside the scope of the Gotovina First Response, leave to file it should be denied;⁷

RECALLING the “Decision of the Deputy Registrar” of 7 April 2006 (“Kehoe Decision”), in which the Deputy-Registrar admitted Kehoe to represent the Accused Ante Gotovina (“Gotovina”);

NOTING that the Motion alleged that during at least part of the period between 1995 and 1999/2000, while Kehoe was working at the OTP, he was involved in the investigation of the crimes allegedly committed during Operation Storm and afterwards, that Kehoe supervised legal and investigative staff and attended meetings and missions concerning events connected with the Operation Storm investigation and that Gotovina, whom he now represents as co-counsel, was one of the suspects then being investigated;⁸ that Kehoe was “involved in the Storm Investigation to an extent giving rise to a conflict of interest”⁹ and that Kehoe’s apparent role in the Operation Storm investigation meant that a real possibility of a conflict of interest existed in respect of his representation of Gotovina;¹⁰ that Kehoe had received and was privy to evidence or information in the early stages of the case which remained relevant;¹¹

NOTING the Gotovina First Response which stated, *inter alia*, that Kehoe did not act as a ‘supervisor’ of the Operation Storm investigation and “as a seconded member of the OTP, he was not even eligible for a supervisory position”;¹² that the Motion did not offer evidence to support the assertion that Kehoe personally and substantially participated in the Storm investigation, nor did it explain what right or interest of Čermak’s or Markač’s was impacted by Kehoe’s participation in this case;¹³ that Čermak and Markač lacked standing to invoke Article 14 (C) of the Code of Professional Conduct of Defence Counsel (“Code”)¹⁴; that the Prosecution’s determination that there is no conflict of interest should be respected since the Trial Chamber can only determine this conflict if it reviews the Prosecution’s internal notes and memoranda, which are protected from disclosure by Rule 70(A) of the Rules of Procedure and Evidence (“Rules”).¹⁵

⁷ Gotovina Second Response, paras 1, 17.

⁸ Motion, para. 2.

⁹ Motion, para. 3.

¹⁰ Motion, para. 7.

¹¹ Motion, para. 12.

¹² Gotovina First Response, para. 6.

¹³ Gotovina First Response, para. 3.

¹⁴ Gotovina First Response, paras 33-34.

¹⁵ Gotovina First Response, para. 30.

NOTING that in their Consolidated Reply, Čermak and Markač argued that Rules 66 and 67 of the Rules are exclusively concerned with the Prosecutor's obligations of disclosure to the defence not to the Trial Chamber and that information under Rule 70(A) could be disclosed to the Trial Chamber;¹⁶

NOTING the Gotovina Second Response which held that the Consolidated Reply still had not explained why the Trial Chamber should conduct an independent review of the OTP's conclusions since it had not expressly argued that the OTP erred in concluding that Kehoe had not personally and substantially participated in the Operation Storm investigation; the Consolidated Reply had also not identified any right or interest of Čermak's and Markač's impacted by this alleged conflict of interest;¹⁷

NOTING that Rule 44 (A) of the Rules enjoins the Registrar to decide whether counsel is qualified to be appointed since

[...] a counsel shall be considered qualified to represent a suspect or accused if the counsel *satisfies the Registrar* that he or she [...].¹⁸

NOTING that with regard to Article 14(C) of the Code, the Registrar's determination is critical since

Counsel shall not represent a client in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal or in any other capacity, *unless the Registrar determines*, after consultation with the parties and taking account the views of the Chamber, that there is no real possibility shown that a conflict between the former and present assignment exists.¹⁹

NOTING that while not explicitly requesting the review of the Registrar's Kehoe Decision, the Motion in effect is asking the Trial Chamber to review Kehoe's appointment as counsel under Rule 44 (A)(vi), a task falling squarely within the Registrar's discretion, on the basis that Kehoe allegedly has a conflict of interest under Article 14 (C) of the Code;

NOTING that while the general rule set forth in Article 14 (C) of the Code is that counsel who has participated personally and substantially in a matter shall not represent a client, Article 14(C) of the Code also provides for an exception if the Registrar, in the exercise of his discretion, determines that although counsel may have participated personally and substantially in a matter, no real

¹⁶ Consolidated Reply, para. 10.

¹⁷ Gotovina Second Response, paras 3, 6.

¹⁸ Emphasis added.

¹⁹ Emphasis added.

possibility that a conflict of interest between the former and the present assignment has been shown to exist;

CONSIDERING that the Trial Chamber's role is not only to ensure that justice is done but that justice also appears to be done;

CONSIDERING that the *Prosecutor v. Hadžihasanović et. al.* case ("Hadžihasanović Decision") held that

[...] the issue of qualification, appointment and assignment of counsel, when raised as a matter of procedural fairness and proper administration of justice, is open to judicial scrutiny.²⁰

[...]

the concrete issue of qualification, appointment and assignment of counsel is properly within the jurisdiction of this Chamber where it can be shown that it affects, or is likely to affect, the right of the accused to a fair and expeditious trial or the integrity of the proceedings;²¹

CONSIDERING that when the question of qualification of counsel is brought to the Trial Chamber's attention because of an alleged conflict of interest, the Trial Chamber has the authority to determine whether such appointed counsel should be disqualified under its broad powers to ensure a fair trial and safeguard the integrity of the proceedings;²²

CONSIDERING FURTHER that the Hadžihasanović Decision emphasized that

[...] the Registrar has the primary responsibility in this matter and that, if the Registrar was not properly informed of necessary facts, he would be entitled to reconsider his previous decision on the basis of new information hitherto unavailable to him....in the view of the Chamber, this [the power of the Trial Chamber to review the Registrar's decision] is not a power to overrule the responsibilities of the Registrar, but rather a power which is complementary to that of the Registrar and aimed at ensuring the proper administration of justice, a power that falls clearly within the primary, if not exclusive, responsibility of the Chamber.²³

CONSIDERING that the Trial Chamber has the authority to review the Kehoe Decision since the alleged conflict of interest may affect the integrity of the proceedings and impact the wider interests of justice and that the Trial Chamber is seized of the matter and is therefore competent to review

²⁰ Hadžihasanović Decision, "Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura", Case No. IT-01-47-PT, 26 March 2002, para. 21. *See also* *Prosecutor v. Prlić et al.*, "Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel", Case No. IT-04-74-AR73.1, 24 November 2004, para. 21.

²¹ Hadžihasanović Decision, para. 23.

²² Hadžihasanović Decision, para. 55; *Prosecutor v. Simić et al.*, "Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević", Case No. IT-95-9-PT, 25 March 1999, p. 6; *Prosecutor v. Gotovina et al.*, "Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct", Case No. IT-06-90-AR73.1, 4 May 2007, para. 23.

²³ Hadžihasanović Decision, para. 24.

whether the Registrar has exercised his discretion correctly or abused such discretion when admitting Kehoe to represent Gotovina;

CONSIDERING that the Kehoe Decision is silent as to Kehoe's past employment with the OTP;

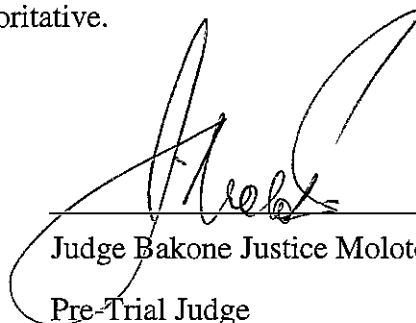
CONSIDERING that for the Trial Chamber to review the Registrar's exercise of discretion under Article 14 (C) of the Code and Rule 44 (A)(vi) of the Rules, it needs to investigate the basis on which the Registrar took the Kehoe Decision, review any information he gathered on the underlying facts and understand the analysis he carried out;

PURSUANT TO Article 14 (C) of the Code and Rules 44 (A)(vi) and 54 of the Rules, hereby

PARTIALLY GRANTS leave to file the Consolidated Reply to the extent that it elaborates on the earlier arguments presented in the Motion and denies leave to file the Consolidated Reply to the extent that it introduced new arguments;

ORDERS the Registrar to disclose to the parties and the Trial Chamber, within two weeks of this order, the reasoning behind the Kehoe Decision, all information on which the Kehoe Decision was taken and any supporting documentation, including any correspondence with the OTP, if any, dating from around the time leading up to the Kehoe Decision

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



Judge Bakone Justice Moloto
Pre-Trial Judge

Dated this twenty-fifth day of June 2007

At The Hague

The Netherlands

[Seal of the Tribunal]