



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 July 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Order of: 25 July 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**ORDER TO THE PROSECUTION
CONCERNING THE ALLEGED CONFLICT OF
INTEREST OF ATTORNEY GREGORY KEHOE**

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 (in transfer) and Ms. Jadranka Sloković (in transfer) for Ivan Čermak
Mr. Miroslav Šeparović (in transfer) and Mr. Goran Mikuličić for Mladen Markač

I, BAKONE JUSTICE MOLOTO, Judge of Trial Chamber I 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 “Ivan Čermak’s and Mladen Markač’s joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 13 April 2007 (“Motion”), in which Čermak and Markač request the Trial Chamber:

- 1) to order the Prosecutor (“Prosecution”) to inform it of Gregory Kehoe’s (“Kehoe”) involvement in the investigation of Operation Storm by providing all relevant information on the conflict of interest to the Trial Chamber (“First Request”),¹ and
- 2) to decide whether Kehoe has a conflict of interest in representing Ante Gotovina considering his prior involvement in the case and, if so, to resolve it prior to the commencement of the trial (“Second Request”);²

RECALLING the Trial Chamber’s finding in the “Order to the Registrar regarding Gregory Kehoe’s appointment as defence counsel for Ante Gotovina”, filed on 25 June 2007 (“Order to the Registrar”) that while not explicitly requesting the review of [the “Decision of the Deputy Registrar”, filed on 7 April 2006 (“Kehoe Decision”), by which the Registrar admitted Kehoe to represent Ante Gotovina], 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;³

RECALLING 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 to safeguard the integrity of the proceedings;⁴

¹ Motion, paras 1 and 15.

² *Ibid.*

³ Order to the Registrar, p. 4.

⁴ Order to the Registrar, p. 5, referring to *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, “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”, filed on 26 March 2002, 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, filed on 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, filed on 4 May 2007, para. 23.

RECALLING the Trial Chamber's finding in the Order to the Registrar that it 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, that the Trial Chamber is seized of the matter, and that the Trial Chamber therefore is competent to review whether the Registrar has exercised his discretion correctly or abused such discretion when admitting Kehoe to represent Gotovina;⁵

NOTING that Čermak and Markač allege that during at least part of the period between 1995 and 1999/2000, while Kehoe was working in the Prosecution, 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; that Ante Gotovina, whom Kehoe now represents as co-counsel, was one of the suspects then being investigated;⁶ that Kehoe was "involved in the Storm Investigation to an extent giving rise to a conflict of interest";⁷ that Kehoe had received and was privy to evidence or information in the early stages of the case which remained relevant;⁸ and that Kehoe's apparent role in the Operation Storm investigation means that a real possibility of a conflict of interest exists in respect of his representation of Ante Gotovina;⁹

NOTING the "Defendant Ante Gotovina's response to Ivan Čermak's and Mladen Markač's joint motion to resolve conflict of interest regarding attorney Gregory Kehoe", filed on 25 April 2007 ("Gotovina First Response"), wherein Gotovina submits, *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";¹⁰ that the Motion does not offer evidence to support the assertion that Kehoe personally and substantially participated in the Storm investigation, nor does it explain what right or interest of Čermak's or Markač's was impacted by Kehoe's participation in this case;¹¹ that Čermak and Markač lack standing to invoke Article 14(C) of the Code of Professional Conduct of Defence Counsel ("Code")¹²; and 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").¹³

⁵ Order to the Registrar, p. 5.

⁶ Motion, para. 2.

⁷ Motion, para. 3.

⁸ Motion, para. 12.

⁹ Motion, para. 7.

¹⁰ Gotovina First Response, para. 6.

¹¹ Gotovina First Response, para. 3.

¹² Gotovina First Response, paras 33-34.

¹³ Gotovina First Response, para. 30.

NOTING the “Prosecution’s response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 27 April 2007 (“Prosecution Response”);

NOTING the “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”, filed on 2 May 2007 (“Consolidated Reply”), wherein Čermak and Markač argue that Rule 70 limits the Prosecution’s general disclosure obligations to the Defence under Rule 66 and Rule 67, and that Rule 70 does not restrict the provision of materials to which that Rule applies to the Trial Chamber;¹⁴

CONSIDERING that Rule 70 is concerned with restricting the Prosecution’s disclosure obligations to the Defence pursuant to Rule 66 and Rule 67 and that it is not relevant in the present matter;

NOTING the “Defendant Ante Gotovina’s response in opposition to joint request for leave to reply to Gotovina’s and Prosecutor’s responses to Ivan Čermak’s and Mladen Markač’s joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 3 May 2007, whereby Gotovina requests that the Trial Chamber issue a public decision on this matter;¹⁵

CONSIDERING that there is nothing in the Motion which would require that this matter be decided confidentially;

RECALLING that in the Order to the Registrar the Trial Chamber ordered the Registrar to disclose to the parties and the Trial Chamber “the reasoning behind the [Kehoe Decision], all information on which [that] Decision was taken and any supporting documentation, including any correspondence with the [Prosecution], if any, dating from around the time leading up to the [...] Decision”;

NOTING the “Registry submission regarding Kehoe’s appointment as defence counsel for Ante Gotovina”, filed on 9 July 2007 with two annexes (“Registry Submission”), in which the Registrar submits that:

if a counsel engaged by an accused fulfils the qualification requirements of Rule 44(A) of the Rules (s)he “shall be considered qualified [...]” (emphasis added) to represent the accused before the Tribunal. The language of the Rule does not allow for the exercise of discretion. The Registrar’s role in approving the appointment of such counsel is therefore limited to vetting counsel’s qualifications;¹⁶

NOTING that the Registrar submits that Article 14(C) of the Code:

¹⁴ Consolidated Reply, para. 10.

¹⁵ Defendant Ante Gotovina’s response in opposition to joint request for leave to reply to Gotovina’s and Prosecutor’s responses to Ivan Čermak’s and Mladen Markač’s joint motion to resolve conflict of interest regarding attorney Gregory Kehoe, filed on 3 May 2007, p. 2, fn. 1.

¹⁶ Registry Submission, para. 7.

requires counsel to consider whether the client's matter is one in which counsel participated "personally *and* substantially" as a staff member of the Tribunal, and if so, to decline representation or risk engaging in professional misconduct [and that t]his determination is primarily made by counsel in accordance with the rules of professional conduct and ethics and absent information to the contrary, it has to be trusted;¹⁷

NOTING that the Registrar submits that:

[i]n cases where the Registrar believes that a conflict of interest exists or may arise, the Registrar would normally inform counsel of his concerns in writing, warn him or her that by continuing the representation counsel may engage in professional misconduct, and ask counsel to reconsider his or her position or raise the matter before the Chamber seized of the case" and that "[t]he Registrar would also inform the Trial Chamber of its concerns and the reasons thereof;¹⁸

NOTING in this respect, that on 28 March 2006 Ante Gotovina executed a power of attorney in favour of Kehoe authorising him to represent Ante Gotovina before the Tribunal;¹⁹

NOTING that, according to his own admission, the Registrar was aware that Kehoe had previously worked in the Prosecution, wherefore the Registrar, prior to proceeding with the appointment of Kehoe as counsel for Ante Gotovina under Rule 44 "and [in the exercise of] due diligence", on 28 March 2006 requested the Prosecution to provide the Office of Legal Aid and Detention Matters ("OLAD") "with any information which the [Prosecution] possesses on Mr Kehoe, which may make him unsuitable to act as counsel before the Tribunal";²⁰

NOTING the Registrar's submission that "[b]ased on previous experience, the Registrar expected the [Prosecution] to raise a conflict of interest issue if they were of the view that one existed or was likely to arise in relation to Mr. Kehoe's former position as [a Prosecution] staff member";²¹

NOTING in this respect, the Prosecution Response, whereby the Prosecution submits that:

[a]fter the matter of Mr. Kehoe serving as Gotovina's counsel came to its attention, the Prosecution conducted an internal review of Kehoe's role within the Office of the Prosecutor and his participation in the investigation related to Operation Storm. After a lengthy effort by the Prosecution to collect, review and consider relevant information concerning Mr. Kehoe's involvement in the instant case as well as the applicable legal standard [...], the senior management of the Office of the Prosecutor determined that there was not a sufficient basis to challenge Mr. Kehoe's assignment as defence counsel;²²

NOTING that the Registrar does not make any reference to receiving, nor does the Prosecution make any reference to submitting, the results of the Prosecution's "lengthy effort", but that,

¹⁷ Registry Submission, para. 9.

¹⁸ Registry Submission, para. 10.

¹⁹ Kehoe Decision, 7 April 2006.

²⁰ Registry Submission, Annex I, internal memorandum from the Deputy Head of OLAD to the Deputy Prosecutor. The Trial Chamber notes that in the Registry Submission, para. 11, the Registrar incorrectly paraphrases his request to the Prosecution: "to provide [the Registrar] with any information in its possession *which may disqualify Mr. Kehoe from acting as counsel.*"

²¹ Registry Submission, para. 11.

according to the Registrar's submission, on 7 April 2006, the Head of OLAD by way of email informed the Deputy Prosecutor that:

[For your information], we have decided to go ahead and admit Greg Kehoe as (2nd) counsel to Gotovina – having waited for two weeks for the [Prosecution's] response and considering our limited capabilities to intervene under Rule 44 (the only real reasons to intervene would be under 44(vi) or a clear/strong conflict situation). If the [Prosecution] has identified a conflict, may I suggest it conveys them [*sic*] directly to the Chamber;²³

CONSIDERING that Rule 44 regulates qualifications and duties of counsel, and appointment of counsel *before the Tribunal*;

CONSIDERING that Article 14(C) of the Code regulates counsel's representation of clients *in a specific matter* in which counsel has previously participated personally and substantially as an official or staff member of the Tribunal or in any other capacity when there is a real possibility of a conflict of interest between counsel's former and current assignments in the matter;

CONSIDERING that the Registrar rightly submits that the determination under Article 14(C) of the Code "is primarily made by counsel in accordance with the rules of professional conduct and ethics and absent information to the contrary, it has to be trusted";

CONSIDERING however, that it is the Registrar's duty, *when aware of proposed counsel's previous participation in a specific matter*, to make a determination pursuant to Article 14(C) of the Code and to follow the procedure therein, and not, as submitted by the Registrar, to *inform* counsel of the Registrar's concerns that a conflict of interest exists or may arise, *warn* counsel that by continuing the representation counsel may engage in professional misconduct, and *ask* counsel to reconsider his or her position or *raise* the matter before the Chamber seized of the case;

CONSIDERING that the Registrar knew that Kehoe had previously worked in the Prosecution and that, rather than requesting the Prosecution pursuant to Rule 44 to provide OLAD "with any information which the [Prosecution] possesses on Mr Kehoe, which may make him *unsuitable to act as counsel before the Tribunal*",²⁴ the Registrar ought to have requested the Prosecution, under the terms of Article 14(C) of the Code, to provide the Registrar with any information that Kehoe, a former Prosecution staff member, participated personally and substantially *in the matter at hand*;

CONSIDERING that the matter at hand is the joint case and indictment against Ante Gotovina, Ivan Čermak and Mladen Markač, including the formerly separate cases and indictments against these Accused;

²³ Prosecution Response, para. 8.

FINDING therefore that the Registrar erred in the discharge of his duties by not awaiting the outcome of the Prosecution's internal review, which the Registrar requested the Prosecution to carry out, so as to be able to make an informed determination pursuant to Article 14(C) of the Code on the basis of all relevant material, and to follow the procedure laid down in that provision;

FINDING that it is in the interest of justice that the Trial Chamber make such a determination;

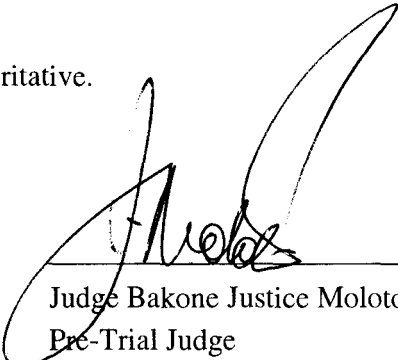
PURSUANT TO Article 20(1) of the Statute and Article 14(C) of the Code;

GRANTS the First Request;

ORDERS the Prosecution to provide the Trial Chamber with all information, to the extent possible in electronic form, in relation to Kehoe's participation as set out in the Motion, paragraph 15(a), including in relation to the separate cases and indictments against the individual Accused in this case, as well as the materials which the Prosecution reviewed upon the Registrar's request;

POSTPONES its determination of the Second Request.

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



Judge Bakone Justice Moloto
Pre-Trial Judge

Dated this twenty-fifth day of July 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

²³ Registry Submission, Annex II, email from Head of OLAD to the Deputy Prosecutor, sent on 7 April 2006.

²⁴ Registry Submission, Annex I (emphasis added).