



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: 18 September 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:

18 September 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON MOTION FOR CLARIFICATION,
RECONSIDERATION OR CERTIFICATION TO APPEAL**

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. 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”) is seized of the Prosecution “Motion for clarification, reconsideration or certification to appeal”, filed on 1 August 2007 (“Motion”).

I. RELEVANT PROCEDURAL HISTORY

1. On 13 April 2007, the Defence of Ivan Čermak and of Mladen Markač (“Defence”) filed a joint motion to resolve the alleged conflict of interest regarding Gregory Kehoe, counsel for Ante Gotovina.¹ The Defence requested the Trial Chamber (1) to order the Prosecution to provide the Trial Chamber with all relevant information, as further defined in the motion, on the alleged conflict of interest of Gregory Kehoe, a former Prosecution staff member (“First Request”),² and (2) “to decide whether Gregory 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”).³

2. On 25 July 2007, the Trial Chamber granted the First Request and ordered the Prosecution “to provide the Trial Chamber with all information, to the extent possible in electronic form, in relation to [Gregory Kehoe’s] participation as set out in [the Čermak and Markač 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”.⁴

3. On 10 August 2007, the Defence filed the “Consolidated response to Prosecution’s motion for clarification, reconsideration or certification to appeal and Ante Gotovina’s request for certification to appeal” (“Response”).

II. SUBMISSIONS

4. The Prosecution submits that it “understands [the Order] to mean, particularly in light of earlier language in the Order referring to Rule 70(A) protections and the absence of any need for confidentiality in this matter, that the Prosecution is asked to provide the *information* sought in paragraph 15(a) of the [Čermak and Markač Motion] as well as similar information that emerged

¹ “Ivan Čermak’s and Mladen Markač’s joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 13 April 2007 (“Čermak and Markač Motion”).

² Čermak and Markač Motion, para. 15(a).

³ Čermak and Markač Motion, para. 15(b).

⁴ “Order to the Prosecution concerning the alleged conflict of interest of attorney Gregory Kehoe”, filed on 25 July 2007 (“Order”), p. 7.

from the Prosecution's internal review of the materials".⁵ However, the Prosecution submits that the Order can be read as requiring the Prosecution to provide "the actual underlying materials".⁶ If this is the case, the Prosecution seeks reconsideration of the Order or, if the Trial Chamber denies reconsideration, certification to appeal the Order pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules").⁷

5. In support of its request for reconsideration, the Prosecution submits that the "materials reviewed by the Prosecution consist of internal work product of the Office of the Prosecutor", including "confidential internal information and communication", and that "[c]onfidentiality of internal work product lies at the very heart of Prosecutorial independence", referring to Article 16 of the Statute.⁸ The Prosecution furthermore submits that "the confidentiality of this material is embraced by the protections more generally afforded to the internal work product of a party engaged in litigation" and that "[w]ithout such protection, the ability of the Prosecutor, or a party, to prepare fully and properly for litigation is seriously impaired".⁹ The Prosecution also submits that "the Trial Chamber seeks to receive these materials on an *ex parte* basis" and that "some of these materials may relate directly to the substance of this case, such as analysis of evidence or prosecution strategy".¹⁰

6. As a solution, the Prosecution proposes that "[t]he Trial Chamber's expressed objective of assessing the extent of Mr. Kehoe's involvement can be addressed by means that do not unnecessarily intrude on prosecutorial independence or privilege nor unnecessarily expose the Trial Chamber to information bearing on the issues in the case [...] by a summarizing document identifying the salient features of the underlying materials but not the conclusions, opinions, substance, assessments or other matters at the heart of internal workings".¹¹ In the Prosecution's view, "[t]his less intrusive approach would thus satisfy the Trial Chamber's expressed interest without intruding on the work product privilege, compromising the independence of the Prosecutor or jeopardising the fairness of the trial".¹²

7. In support of its request for certification of an interlocutory appeal, the Prosecution submits that "[t]he submission of work product to the Trial Chamber is a question of fundamental fairness" and that "impingement on the protection afforded to the Prosecution's internal operations, including

⁵ Motion, para. 3 (emphasis added).

⁶ Motion, para. 4.

⁷ Motion, para. 1.

⁸ Motion, paras 7-8.

⁹ Motion, para. 8.

¹⁰ Motion, para. 9.

¹¹ Motion, para. 10.

¹² Motion, para. 10.

the collection and evaluation of evidence, strikes at the heart of a fair process.”¹³ Moreover, it is submitted that the Order “requires the *ex parte* submission of materials to the Trial Chamber that may bear on the very issues to be decided at trial.”¹⁴ In the Prosecution’s submission, an immediate resolution by the Appeals Chamber will materially advance the proceedings “because the effect of this Order is irrevocable [...as o]nce the Prosecution is required to submit its internal work product for review by the trier of fact, the important principles identified above are already breached.”¹⁵

8. In respect of the Prosecution’s request for clarification, the Defence submits that it should be denied as “the Order [...] states in unequivocal language the obligation of the Prosecution to provide information and ‘*materials*’ which it reviewed upon the Registrar’s request’ and not merely information that emerged from this review.”¹⁶ In respect of the Prosecution’s request for reconsideration, the Defence submits “[t]he confidentiality of the materials does not bar their disclosure to the Trial Chamber” as “[t]hese materials can only be obtained through disclosure by the Prosecution to the Trial Chamber” and that “[t]he materials related to Gregory Kehoe’s prior involvement in the investigation of Operation Storm contain information which is essential for the Trial Chamber to assess Mr. Kehoe’s conflict of interest.”¹⁷ It is furthermore submitted that “an *in camera* review of the materials sought by the Trial Chamber would allow it to consider the matter before it without prejudicing the case or violating prosecutorial independence.”¹⁸ The Defence does not make any submissions in relation to the Prosecution’s request for certification of an appeal.

III. DISCUSSION

9. Initially, the Trial Chamber recalls that the reference in the Order to Rule 70(A) concerned the argument advanced by the Defence of Ante Gotovina that “the only way the Trial Chamber could impose its own determination concerning Mr. Kehoe’s alleged participation in the Operation Storm case is if the Trial Chamber reviewed the Prosecution’s internal notes and memoranda, which are protected from disclosure by Rule 70(A).”¹⁹ The Trial Chamber found that according to its terms and as far as it is relevant to the present matter, Rule 70(A) is concerned with restricting the

¹³ Motion, para. 13.

¹⁴ Motion, para. 13.

¹⁵ Motion, para. 14.

¹⁶ Response, para. 4. Footnote omitted.

¹⁷ Response, para. 6.

¹⁸ Response, para. 6.

¹⁹ “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, para. 30.

Prosecution's disclosure obligations to the Defence pursuant to Rules 66 and 67.²⁰ As such, this provision affects neither the Order's disposition, nor its interpretation.

10. In submitting that confidentiality of internal work products lies at the very heart of prosecutorial independence, the Prosecution makes reference to Article 16 of the Statute. This provision reads in the relevant part (paragraph 2):

The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

The essence of the independence of the Prosecutor is expounded in this provision, *i.e.* that in the carrying out of her functions, the Prosecutor is duty-bound not to seek or receive instructions from any source. It is certainly the case that the maintaining of confidentiality of internal work products is essential to the functioning of the Office of the Prosecutor, including and in particular when engaged in litigation before the Tribunal. However, it is not a correct statement to suggest that "the ability of the Prosecutor, or a party, to prepare fully and properly for litigation is seriously impaired" if such internal work products are subjected to scrutiny by a Chamber in the fulfilment of its duties under the Statute and the Rules. The Chamber must be careful in treading this path; however when there are other interests at stake which are of greater importance, then the materials may be provided to the Trial Chamber. The Trial Chamber considers that this is particularly true in matters concerning Article 20(1) of the Statute.

11. In this respect, the Trial Chamber recalls its previous finding that the question of qualification of counsel is a matter which may concern the Trial Chamber's broad powers to ensure a fair trial and the integrity of the proceedings.²¹ Moreover, the Trial Chamber has found that the purported conflict of interest of Gregory Kehoe alleged in the Čermak and Markač Motion may affect the integrity of the proceedings and impact the wider interests of justice.²² As previously found in the Order, Rule 70 is not relevant in this matter. There is no other rule which would limit the access of a Trial Chamber to internal documents of the Prosecution when there is an interest at stake which is of a greater importance than that which underlies the internal work product privilege.

²⁰ Order, p. 4. See further *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, "Decision on Vidoje Blagojević's expedited motion to compel the Prosecution to disclose its notes from plea discussions with the Accused Nikolić & request for an expedited open session hearing", filed on 13 June 2003, p. 6. However, the Trial Chamber notes that Rule 67(C) provides that "additional evidence or material which should have been disclosed earlier pursuant to the Rules" shall be disclosed "to the other party and the Trial Chamber" immediately upon discovery.

²¹ "Order to the Registrar regarding Gregory Kehoe's appointment as defence counsel for Ante Gotovina", filed on 25 June 2007, pp 5-6, with further references.

²² In this respect, the Trial Chamber also recalls the finding of the Trial Chamber in *Hadžihasanović* that "if the Rules explicitly provide for the power of a Chamber to take such far-reaching steps as to exclude a counsel for all future cases from representing a suspect or accused, the Chamber certainly has the power to take less far-reaching steps aimed at ensuring a fair trial and the proper administration of justice in a concrete case pending before that Chamber", *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, "Decision on Prosecution's motion for review of the

The Trial Chamber stresses in this context that it does not seek to interfere with or limit the discharge of the Prosecutor's duties and the exercise of her prosecutorial discretion. However, the Trial Chamber concludes that there is nothing in the Statute or the Rules which, as a matter of principle, would prevent the Trial Chamber from receiving materials, even confidential materials, in order to be able to carry out its duties under the Statute to ensure the fairness and integrity of the proceedings.

12. Further in support of its request for reconsideration of the Order, the Prosecution submits implicitly that it would not be appropriate for the Trial Chamber to receive the materials ordered on an *ex parte* basis.²³ The Trial Chamber recalls, by way of analogy, that according to Rule 66(C) the Prosecution may apply to the Trial Chamber, sitting *in camera*, for relief of its disclosure obligations under the Rules if the disclosure would "prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State". Importantly, according to this provision, when the Prosecution makes a request pursuant to Rule 66(C) "the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential". If the Trial Chamber can receive such information, which may include materials such as notes of interviews with witnesses in the Prosecution's possession, "on an *ex parte* basis", to use the Prosecution's formulation, in order to assess whether the interests stated in Rule 66(C) would be infringed by disclosure, then by analogy the Trial Chamber in the present situation must be able to receive the materials ordered for the purpose of assessing whether the alleged conflict of interest does exist. The Trial Chamber cannot, therefore, see the merit in the Prosecution's argument in this respect.

13. The Prosecution also submits that some of the materials demanded in the Order may relate directly to the substance of this case, including to analysis of evidence or to prosecution strategy, and that for this reason the Trial Chamber should not be "unnecessarily exposed" to the materials. The Prosecution does not further explain in which manner the Trial Chamber would be affected by such an exposure during its review of the materials. However initially and as a general observation, the Trial Chamber recalls that according to Rule 14, before taking up duties, each Judge shall make a solemn declaration to perform his or her duties "honourably, faithfully, impartially and conscientiously". The Trial Chamber also recalls the Appeals Chamber's holding in *Furundžija* that

decision of the Registrar to assign Mr. Rodney Dixon as co-counsel to the Accused Kubura", filed on 26 March 2002, para. 17.

²³ Motion, para. 9, submitting that "[g]iven that the Trial Chamber was not aware of the nature of the documents at the time of the Order, the Trial Chamber may not have been in a position to consider the full effect of this aspect of its Order."

“there is a presumption of impartiality which attaches to a Judge.”²⁴ In *Akayesu*, the Appeals Chamber held that the Judges “are professional judges, who are called upon to try a number of cases arising out of the same events [or arising out of the same contextual background], and that they may be relied upon to apply their mind to the evidence in the particular case before them.”²⁵ The Appeals Chamber continued that “[i]t is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.”²⁶ The Trial Chamber considers that this applies by analogy to the present situation. In other words, even if information bearing upon the substance of the case is included in the materials to be provided to the Trial Chamber, the Trial Chamber and its subsequent treatment of the matters to be determined at trial will not be affected or prejudiced.²⁷

14. The Prosecution submits that a “summarizing document” should be sufficient for the Trial Chamber’s assessment of the alleged conflict of interest. However, the Trial Chamber considers that such a document would be inadequate and would put the Trial Chamber in a position of dependency *vis-a-vis* the Prosecution in the carrying out of its functions. The Trial Chamber must have access to the relevant documents in unchanged and unfiltered form; if not, the Trial Chamber could not properly carry out its duties as the guardian of the fairness and the integrity of the proceedings.

15. With respect to the Prosecution’s request for certification of an interlocutory appeal of the Order, the Trial Chamber considers that the matter at hand, *i.e.* the submission of internal work products for review by the Trial Chamber, does not in and of itself amount to “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. Furthermore, the Trial Chamber cannot find that there is a risk of an ‘irrevocable effect’, as submitted by the Prosecution. Such would only be the case should the Trial Chamber be affected by any material bearing upon the issues to be decided at trial. As has been held above, this is not the case.

²⁴ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 196. The Appeals Chamber also held that “in the absence of evidence to the contrary, Judges of the Tribunal ‘can disabuse their minds of any irrelevant personal beliefs or predispositions’”, *id.* at para. 197, referring to the case of *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Judgement on Recusal Application, 1999 (7) BCLR 725 (CC), 3 June 1999, para. 48. See also *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (“*Akayesu* Appeal Judgement”), para. 269.

²⁵ *Akayesu* Appeal Judgement, para. 269.

²⁶ *Akayesu* Appeal Judgement, para. 269.


²⁷ The Trial Chamber notes that the Prosecution is not certain that such materials would be included, Motion, para. 13. The Trial Chamber also recalls that “[t]here is a high threshold to reach in order to rebut the presumption of impartiality. As has been stated, ‘disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be ‘firmly established’”, *Furundžija* Appeal Judgement, para. 197, referring to Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352 (adopted in the subsequent Australian High Court decision in *Re Polities; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448).

16. In conclusion, the Trial Chamber does not consider that there is a need to clarify the motion. Moreover, the Trial Chamber does not see merit in the Prosecution's submissions in support of its request for reconsideration of the Order. Lastly, the Trial Chamber finds that the elements of Rule 73(B) have not been met and that the request for certification fails.

IV. DISPOSITION

17. For the reasons set out above and having considered the submissions, the Trial Chamber denies the Motion.

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



Judge Alphons Orie
Presiding

Dated this eighteenth day of September 2007

At The Hague

The Netherlands

[Seal of the Tribunal]