



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: 29 November 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: 29 November 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON IVAN ČERMAK'S AND MLADEN
MARKAČ'S JOINT MOTION TO RESOLVE CONFLICT OF
INTEREST REGARDING ATTORNEY GREGORY KEHOE**

The Office of the Prosecutor

Mr. Alan Tieger
Mr. Stefan Waespi

Counsel for the Accused

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Steven Kay and Mr. Andrew Cayley for Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Z. Kuzmanović 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 “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 the Defence for Ivan Čermak and the Defence for Mladen Markač (“Čermak and Markač”) request the Trial Chamber:

- 1) to order the 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 “Order to the Prosecution concerning the alleged conflict of interest of attorney Gregory Kehoe”, filed on 25 July 2007 (“Order to the Prosecution”), whereby the Trial Chamber decided the First Request, as will be further detailed below, and postponed its decision on the Second Request, which thus remains pending before the Trial Chamber;³

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 Office of the Prosecutor, he was involved in the investigation of the crimes allegedly committed during or after Operation Storm; that Kehoe “must have been involved in formulating prosecutorial and investigative strategies in this case”; that Kehoe supervised legal and investigative staff and attended meetings and missions concerning events connected with the Operation Storm investigation; that “the investigation of the crimes allegedly committed during Operation Storm and afterwards [...] fell under the legal supervision of Gregory Kehoe”; that Kehoe interviewed “witnesses and analysed witness interviews concerning the Storm Investigation, Ante Gotovina or related matters”; that Kehoe “received and was privy to evidence or information in the early stages of the case which remain relevant to this date”; that Ante Gotovina, whom Kehoe now represents as co-counsel, was one of the suspects then being

¹ Motion, paras 1 and 15.

² *Ibid.*

³ See *infra*, p. 5 onwards.

investigated; and that Kehoe's "apparent role in the Storm investigation means that a real possibility of a conflict of interest exists in respect of his representation of Ante Gotovina";⁴

NOTING the following filings and the submissions therein: "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; the "Prosecution's response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe", filed on 27 April 2007; 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; and the "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", filed on 3 May 2007;

NOTING the "Decision of the Deputy Registrar", filed on 7 April 2006 ("Kehoe Decision"), whereby the Deputy Registrar admitted Kehoe to represent Ante Gotovina without apparent reference to Kehoe's previous employment in the Office of The Prosecutor;

RECALLING 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"), wherein the Trial Chamber noted that:

while not explicitly requesting the review of the [...] 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 [of Professional Conduct for Counsel Appearing before the International Tribunal ("Code")];⁵

and wherein the Trial Chamber considered 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 and that the Trial Chamber is seized of the matter and is therefore competent to review whether the Registrar has exercised his discretion correctly or abused such discretion when admitting Kehoe to represent Gotovina;⁶

⁴ Motion, paras 2, 3, 7, 12.

⁵ Order to the Registrar, p. 4.

⁶ Order to the Registrar, p. 5-6, citing *Prosecutor v. Hadžihasanović and Kubura*, 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", 26 March 2002 ("*Hadžihasanović* Decision"), para. 55; *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT. "Decision on the Prosecution motion to resolve conflict of interest regarding attorney Borislav Pisarević", 25 March 1999, p. 6; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.1, "Decision on Miroslav Šeparović's interlocutory appeal against Trial Chamber's decisions on conflict of interest and finding of misconduct", 4 May 2007, para. 23. The Trial Chamber also referred (p. 5) to the following passages of the *Hadžihasanović* Decision, para. 21 where the Trial Chamber 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", and para. 23, where it was held that "the concrete issue of qualification, appointment and assignment of counsel is properly within the jurisdiction of

wherefore, pursuant to Article 14(C) of the Code and Rules 44(A)(vi) and 54 of the Rules of Procedure and Evidence (“Rules”), the Trial Chamber ordered 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;⁷

RECALLING the “Registry submission regarding Kehoe’s appointment as defence counsel for Ante Gotovina”, filed on 9 July 2007 with two annexes (“Registrar’s Submission”), wherein the Registrar stated that he was aware that Kehoe had previously worked in the Office of the Prosecutor and therefore, prior to proceeding with the appointment of Kehoe as counsel and in the exercise of due diligence, on 28 March 2006 requested the Prosecution to provide him with any information in its possession which might render Kehoe unsuitable to act as counsel before the Tribunal;⁸

RECALLING further that the Deputy Registrar proceeded to admit Kehoe to represent Gotovina prior to receiving the result of the Prosecution’s internal review of Kehoe’s “role within the Office of the Prosecutor and his participation in the investigation related to Operation Storm”,⁹ which the Prosecution had carried out “[a]fter the matter of Mr. Kehoe serving as Gotovina’s counsel came to its attention”,¹⁰ and that the Office of Legal Aid and Detention Matters (“OLAD”) informed the Deputy Prosecutor on 7 April 2006 – the date Kehoe was admitted to represent Gotovina – that if the Prosecution would identify a conflict of interest it was recommended to convey it “directly to the Trial Chamber”;¹¹

RECALLING the Prosecution’s submission that having conducted its lengthy internal review referred to above, “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”;¹²

RECALLING the Order to the Prosecution, wherein the Trial Chamber:

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.”

⁷ Order to the Registrar, p. 6, also holding 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”.

⁸ Registrar’s Submission, para. 11 and Annex I, internal memorandum from the Deputy Head of OLAD to the Deputy Prosecutor.

⁹ Prosecution’s response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe”, filed confidentially on 27 April 2007, para. 8.

¹⁰ Prosecution’s response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe, filed confidentially on 27 April 2007, para. 8.

¹¹ Registrar’s Submission, para. 12 and Annex II, email from Head of OLAD to the Deputy Prosecutor, sent on 7 April 2006.

¹² Prosecution’s response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe, filed confidentially on 27 April 2007, para. 8.

1) held, in view of the fact that the Registrar knew that Kehoe had previously worked in the Prosecution, 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*”,¹³ 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 participated personally and substantially *in the matter at hand*,¹⁴ and

2) pursuant to Article 20(1) of the Statute and Article 14(C) of the Code, ordered 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;¹⁵

NOTING the following filings and the submissions therein: “Defendant Ante Gotovina’s request for certification to appeal the Trial Chamber’s order of 25 July 2007 to the Prosecution concerning the alleged conflict of interest of attorney Gregory Kehoe”, filed on 1 August 2007; “Ivan Čermak’s and Mladen Markač’s consolidated response to Prosecution’s motion for clarification, reconsideration or certification to appeal and Ante Gotovina’s request for certification to appeal”, filed on 10 August 2007; “Defendant Ante Gotovina’s motion for leave to file a reply in support of his request for certification to appeal”, filed on 17 August 2007; “Defendant Ante Gotovina’s reply in support of his request for certification to appeal”, also filed on 17 August 2007; and “Notice to the Trial Chamber in response to Ante Gotovina’s reply in support of his request for certification to appeal”, filed on 22 August 2007 by Čermak and Markač;

NOTING the following filings and the submissions therein: “Motion for clarification, reconsideration or certification to appeal”, filed by the Prosecution on 1 August 2007; and “Consolidated response to Prosecution’s motion for clarification, reconsideration or certification to appeal and Ante Gotovina’s request for certification to appeal”, filed by Čermak and Markač on 10 August 2007;

RECALLING that on 18 September 2007, the Trial Chamber denied the Defence of Ante Gotovina (“Gotovina”) its request for certification, finding that it did not involve an issue that would affect

¹³ Registry Submission, Annex I (emphasis added).

¹⁴ Order to the Prosecution, p. 6.

¹⁵ Order to the Prosecution, p. 7.

the fair and expeditious conduct of the proceedings or the outcome of the trial, as it sought anticipatory relief in a matter which the Trial Chamber had yet to consider on its merits;¹⁶

RECALLING the “Decision on motion for clarification, reconsideration or certification to appeal”, filed on 18 September 2007 (“Decision of 18 September 2007”), by which the Trial Chamber denied the Prosecution’s “Motion for clarification, reconsideration or certification to appeal”, holding that there was no need to clarify the Order to the Prosecution, that there was no merit in the Prosecution’s submissions in support of its request for reconsideration thereof, and that the elements of Rule 73(B) had not been met;¹⁷

NOTING the “Defendant Ante Gotovina’s notice to the Trial Chamber concerning 18 September 2007 decision on motion for clarification, reconsideration or certification to appeal”, filed on 20 September 2007, wherein Gotovina submits, *inter alia*, that the Decision of 18 September 2007 “directly affects General Gotovina’s fundamental rights to counsel of his own choosing under Article 21 of the Statute” and that it therefore is “axiomatic that General Gotovina has a right to be heard”¹⁸ and that “both General Gotovina and Mr. Kehoe have a right to be heard on the ‘unchanged and unfiltered materials’ which the Trial Chamber is reviewing”;¹⁹

NOTING the “Prosecution submission pursuant to Trial Chamber’s order concerning alleged conflict of interest of attorney Gregory Kehoe”, filed confidentially and *ex parte* on 3 October 2007 with 36 appendices (“Prosecution Materials”);

RECALLING that at the Status Conference on 26 October 2007 (“Status Conference”), the Defence of Markač informed the Pre-Trial Judge that:

We don’t think that we should be disclosed any of these materials because we are entirely in the hands of the Trial Chamber and we completely trust their decision in this matter;²⁰

and that the Defence of Čermak stated that:

The Prosecution have been caused to disclose further materials that may well be relevant to the matter, but we are satisfied here that this is to be disclosed so that the Court can properly

¹⁶ Decision on Defendant Ante Gotovina’s request for certification to appeal the Trial Chamber’s order of 25 July 2007 to the Prosecution concerning the alleged conflict of interest of attorney Gregory Kehoe”, filed on 18 September 2007. On 31 July 2007, Judge Theodor Meron, acting in his capacity as Duty Judge, denied the “Defendant Ante Gotovina’s motion for clarification of the Trial Chamber’s order to the Prosecution concerning the alleged conflict of interest of attorney Gregory Kehoe, and motion to suspend the time limits of Rule 73(C)”, which was filed on 27 July 2007.

¹⁷ Decision on motion for clarification, reconsideration or certification to appeal, p. 8.

¹⁸ Defendant Ante Gotovina’s notice to the Trial Chamber concerning 18 September 2007 decision on motion for clarification, reconsideration or certification to appeal”, filed on 20 September 2007, para. 4.

¹⁹ Defendant Ante Gotovina’s notice to the Trial Chamber concerning 18 September 2007 decision on motion for clarification, reconsideration or certification to appeal”, filed on 20 September 2007, para. 13, citing the Decision of 18 September 2007, para. 14, and referring to *Prosecutor v. Jelišić*, Case No. IT-95-10-A, Judgement, 5 July 2001, paras 27-28.

²⁰ Status Conference, 26 October 2007, T. 293 (private session).

determine the issue, and we would have no further submissions to advance on the matter other than to permit the Court to look at it and the Court to decide it;²¹

RECALLING that at the Status Conference all parties agreed that the Prosecution Materials should be disclosed to Kehoe,²² but that Gotovina and the Prosecution disagreed as to the next step forward, that is whether, in order to assist Kehoe, the Prosecution Materials should be disclosed to Gotovina or instead, as submitted by the Prosecution, to a third counsel;²³

NOTING the “Prosecution position on providing documents regarding conflict of interest to defence counsel Gregory Kehoe”, filed on 5 November 2007, wherein the Prosecution, pursuant to the Trial Chamber’s invitation to it at the Status Conference, *inter alia*, repeats its submission that the Prosecution Materials should be disclosed to a third counsel, arguing that the materials are “internal Prosecution work product and are protected from disclosure to the Defence by Rule 70(A)”;²⁴

RECALLING that at the Status Conference the Pre-Trial Judge stated that Rule 126 *bis*:

will be more strictly enforced in the future with respect to filings. In other words, any replies to responses must be accompanied by a request for leave to reply. And the same thing goes for replies to replies. Likewise, other-named filings such as notices or supplemental submissions must be accompanied by a request for leave to file;²⁵

NOTING “Ivan Čermak’s observations on the Prosecution’s position on providing documents regarding conflict of interest to defence counsel Gregory Kehoe”, filed confidentially on 13 November 2007 and the “Prosecution response to Čermak’s motion concerning Rule 70(A) documents”, filed confidentially on 19 November 2007, and **CONSIDERING** that as these submissions do not contain requests for leave to file, they will not be further considered by the Trial Chamber;²⁶

NOTING that at the Status Conference the Pre-Trial Judge expressed a *prima facie* view concerning the Prosecution Materials to the effect that the materials appear incomplete in that:

²¹ Status Conference, 26 October 2007, T. 294-295 (private session).

²² Status Conference, 26 October 2007, T. 293 (private session), where Markač stated that “I believe it would be fair to disclose [the Prosecution Materials] to the Gotovina Defence, i.e., to Mr. Kehoe who is at the heart of this matter of the possible conflict of interest” and where Čermak stated that “[the Prosecution Materials] should be disclosed to the person accused who’s got a relevant stake in the matter”, T. 298-299, 301 (private session).

²³ Status Conference, 26 October 2007, T. 299 (private session), where the Prosecution proposed “the appointment of a sort of containment counsel to assist Mr. Kehoe in this matter”, T. 301-303 (private session), where Gotovina stated that it disagrees with “giving it to Mr. Kehoe alone and some appointed counsel of his” and repeated submissions from the Gotovina Notice, including that this matter concerns Gotovina’s rights under Article 21 of the Statute.

²⁴ Status Conference, 26 October 2007, T. 300-301 (private session); Prosecution position on providing documents regarding conflict of interest to defence counsel Gregory Kehoe, filed on 5 November 2007, para. 2.

²⁵ Status Conference, 26 October 2007, T. 335.

²⁶ The Trial Chamber notes that even if it were to consider these filings in reaching its determination of the matter, they would not alter the conclusions ultimately reached.

[t]here are memoranda that refer to meetings, and minutes of those meetings are not disclosed [...t]here are [...] trip itineraries that refer to consultations with various possible prospective witnesses, victims, and officials of governments [and] the content of those interviews were not disclosed;²⁷

NOTING that at the Status Conference, the Pre-Trial Judge further stated that the Prosecution was not asked to do anything “until a resolution of the next step forward” and that the incomplete appearance of the Prosecution Materials was only raised as “a warning light” should the resolution of the next step forward require further disclosure;²⁸

REITERATING the finding that it is in the interest of justice that the Trial Chamber, in the exercise of its broad powers under Article 20(1) of the Statute to ensure a fair trial and to safeguard the integrity of the proceedings, review whether the Registrar exercised his discretion correctly or abused such discretion when admitting Kehoe to represent Ante Gotovina and, thus, determine whether Kehoe should be disqualified;²⁹

REITERATING the finding that the Registrar committed a procedural error in the discharge of his duties by not awaiting the outcome of the Prosecution’s internal review, which the Registrar had 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;³⁰

CONSIDERING that, as stated by counsel for Čermak at the Status Conference, “[i]t must be remembered here that the parties raised this issue of the conflict of interest based upon a generality of information”;³¹

CONSIDERING that “any challenge to the integrity of the proceedings, however artificial or theoretical, should form the basis of a reaction from the Chamber [but that only] when that challenge is real, some reaction is required”;³²

CONSIDERING that involvement of counsel with one of the parties *in the same case* is incompatible with representing the opposite party, but that working in part on the same factual basis alone does not create a conflict of interest;³³

²⁷ Status Conference, 26 October 2007, T. 304 (private session).

²⁸ Status Conference, 26 October 2007, T. 304 (private session).

²⁹ Order to the Registrar, p. 5; Order to the Prosecution, p. 7.

³⁰ Order to the Prosecution, p. 7.

³¹ Status Conference, 26 October 2007, T. 294 (private session).

³² *Hadžihasanović* Decision, para. 46.

³³ *Hadžihasanović* Decision, paras 47 (emphasis in the original) and 48.

CONSIDERING that the Trial Chamber has carried out a careful and thorough review of the substance of Prosecution Materials in light of the submissions of the parties and concludes:

- that Kehoe, as alleged by Čermak and Markač, worked as a lawyer in the Office of the Prosecutor between 1995 and 1999;
- that Kehoe was not, as alleged by Čermak and Markač, “involved in formulating prosecutorial and investigative strategies in this case”;³⁴
- that “the investigation of the crimes allegedly committed during Operation Storm and afterwards” did not, as alleged by Čermak and Markač fall “under the legal supervision of Gregory Kehoe”;³⁵
- that Kehoe did not, as alleged by Čermak and Markač, supervise legal or investigative staff involved in the investigation into crimes committed during or after Operation Storm, or otherwise;
- that Kehoe, while working in the Office of the Prosecutor, in 1995 and 1996 was copied on documents concerning investigations into crimes committed against both Serbs and Croats in the territory of the Republic of Croatia between 1991 and 1995, but that the information received by Kehoe on the basis of these documents concerned several investigations, and not only that into any crimes allegedly committed by the Accused in this case;
- that Kehoe attended one meeting in 1996 and one meeting in 1999 that concerned topics relevant to investigations into alleged crimes committed on the territory of the Republic of Croatia between 1991 and 1995 against both Serbs and Croats, but that Kehoe did not, as alleged by Čermak and Markač, attend any meeting, mission or witness interview concerning specifically “the Storm Investigation, Ante Gotovina or related matters”;³⁶

CONSIDERING that there is no evidence in the Prosecution Materials that Kehoe provided *any* legal advice concerning future indictments or cases against Croatian accused, including against the Accused in this case;

CONSIDERING that while Kehoe’s prior association with the Office of the Prosecutor may have afforded him insight into the functioning of the Office of the Prosecutor and provided him with information concerning investigations ongoing at the time, including information regarding the

³⁴ Motion, para. 12.

³⁵ Motion, para. 2.

³⁶ Motion, paras 2, 3.

factual background of the present case, Kehoe has not obtained an *undue advantage* relative to any other party to the present proceedings which might impact the fairness of the proceedings;³⁷

FINDING that Kehoe did not participate personally and substantially in the present matter, and that the Trial Chamber need not, therefore, continue to consider whether there is a real possibility of a conflict between his former assignment in the Office of the Prosecutor and his current appointment as counsel for Ante Gotovina;

FINDING therefore, that the Registrar's procedural error has proved harmless;

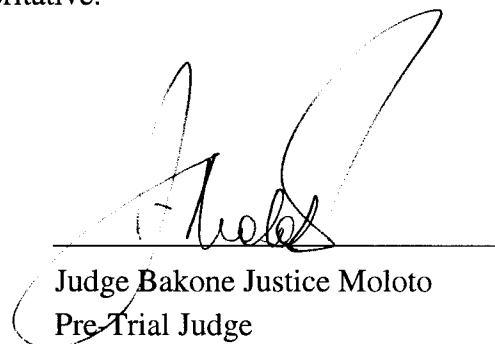
PURSUANT TO Rule 44(A)(vi) and Article 14(C) of the Code;

DENIES the Second Request;

AFFIRMS the Kehoe Decision; and

DECLARES moot all other submissions made on this matter.

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



Judge Bakone Justice Moloto
Pre-Trial Judge

Dated this twenty-ninth day of November 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

³⁷ The Trial Chamber especially recalls in this regard that the Prosecution does not claim, and never has claimed, that a conflict of interest exists, *supra* p. 4 and fn 12 referring to Prosecution's response to joint motion to resolve conflict of interest regarding attorney Gregory Kehoe, filed confidentially on 27 April 2007, para. 8.