

UNITED
NATIONS

IT-06-90-PT
D Jose - D Joly
28 February 2008

Jose
H.B.



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

Case No. IT-06-90-PT
Date: 28 February 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Order of: 28 February 2008

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**ORDER COMPELLING ACCESS TO ARCHIVES OF
THE EUROPEAN UNION MONITORING MISSION**

Confidential and Ex Parte

Defence Counsel for Ante Gotovina

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan

European Union Monitoring Mission

Mr. Javier Solana

The Presidency of the Council of the European Union (Republic of Slovenia)

The Commission of the European Union

The Founding Member States of the European Community Monitoring Mission

Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands,
Portugal, Spain and the United Kingdom

1. On 28 December 2007, counsel for the Accused, Ante Gotovina, ("the Defence") filed a confidential and *ex parte* motion before this 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 ("International Tribunal"), seeking an order to compel access to the Defence to archives of the European Union Monitoring Mission ("EUMM") ("Motion").¹ The Motion requests that the order be directed to the EUMM, the Member States of the European Community at the time of the establishment of the European Community Monitoring Mission ("ECMM", now EUMM), the Presidency of the European Council, the Commission of the European Union, and to Mr. Javier Solana, Secretary General of the Council of the European Union ("Secretary General").

2. Prior to filing the Motion, the Defence sought access to the EUMM archives for documents it deemed critical to the preparation of the Accused's defence by petitioning the Secretary General on 30 May 2007.² When the Defence did not receive a response, it petitioned the Secretary General on 27 September 2007, requesting advice on the status of its document request.³ The Secretary General responded on 2 October 2007, indicating that the documents sought should be clearly identified and that they would be released to the Defence through the International Tribunal's Office of the Prosecutor ("Prosecutor") pursuant to Rule 70 of the Rules of Procedure and Evidence ("Rules") on a document-by-document basis.⁴ The Defence replied to the Secretary General on 18 October 2007, indicating that its request identified the sought documents in sufficient detail and challenging the release of documents through the Prosecutor.⁵ The Secretary General replied on 6 December 2007, re-affirming its position that documents must be disclosed through the Prosecutor, pursuant to Rules 66 and 68.⁶

3. In its Motion, the Defence relies on jurisprudence of the International Tribunal – to include a 2003 decision in the case of *Prosecutor v. Hadžihasanović* dealing with access to EUMM archives⁷ – in its submission that the access it seeks accords with Article 29 of the Statute of the

¹ Defendant Ante Gotovina's Motion to Compel Access to EUMM Archives (confidential and *ex parte*), 28 December 2007.

² Motion, Annex 1.

³ Motion, Annex 3.

⁴ Motion, Annex 4.

⁵ Motion, Annex 5.

⁶ Motion, Annex 7.

⁷ *Prosecutor v. Hadžihasanović*, Decision on Motion for Access to EUMM Archives, 15 December 2003; *Prosecutor v. Simić*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000; *Prosecutor v. Kordić*, Order for the Production of Documents by the European Community Monitoring Mission and its Member States (*ex parte* and partly confidential), 4 August 2000. These decisions and orders were made known to the Secretary General by the Defence in its correspondence seeking access.

International Tribunal (“Statute”)⁸ and 54 *bis* of the Rules.⁹ The Defence further submits that denial of access violates the Accused’s rights to a fair trial and equality of arms.¹⁰

4. Article 29 of the Statute, entitled “Co-operation and judicial assistance”, provides that States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law, and that States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: the identification and location of persons; the taking of testimony and the production of evidence; the service of documents; the arrest or detention of persons; and the surrender or the transfer of the accused to the International Tribunal.

5. The requirement of co-operation and judicial assistance in Article 29 of the Statute is not limited to States, but extends also to collective enterprises undertaken by States in the framework of international organisations and, in particular, their competent instruments which by virtue of their activities might have information relating to, or come into contact with, persons indicted by the International Tribunal for serious violations of international humanitarian law.¹¹ The EUMM is an instrument of the European Union's Common Foreign and Security Policy and reports to the European Council through the Secretary General of the Council of the European Union and High Representative for the Common Foreign and Security Policy.¹² As such, the Trial Chamber is satisfied that the EUMM is sufficiently organised and structured to receive and implement orders of the International Tribunal pursuant to Article 29.

6. Rule 54*bis* of the Rules, entitled “Orders Directed to States for the Production of Documents” provides that a party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall identify as far as possible the documents or information to which the application relates; indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and explain the steps that have been taken by the applicant to secure the State’s assistance. The Rule provides further that the Judge or Trial Chamber may reject an application under paragraph (A) *in limine* if satisfied that the documents or information are not relevant to any matter in issue in the proceedings before them or are not necessary for a fair determination of any such matter; or no reasonable steps have been taken by the applicant to obtain the documents or information from the State.

⁸ Motion, p. 5.

⁹ Motion pp. 8 – 11.

¹⁰ Motion, p. 7.

¹¹ *Prosecutor v. Simić et al*, *supra note 7* at para. 46.

¹² See EUMM official website at www.eumm.org as accessed on 25 February 2008.

7. A request for the production of documents must meet the following four conditions: the request must (1) identify specific documents and not broad categories; (2) set out the relevance of such documents to the trial; (3) not be unduly onerous; and (4) give the requested State sufficient time for compliance.¹³ Although a request for an order pursuant to Article 29 of the Statute must identify specific documents and not broad categories, the requirement of specificity does not prohibit the use of categories as such.¹⁴

8. Applying these criteria, the Trial Chamber finds that the Defence has sufficiently identified the specific documents sought, in that the request identifies the author and category of the documents and is temporally limited to the time period relevant to the Indictment of May to December 1995. Without access to the actual documents, the Defence cannot reasonably be expected to provide further particulars of the documents for which access is sought.

9. The Trial Chamber further finds that the Defence showing of relevance for the purpose of securing access to the requested material is adequate. On its face, the categories of documents described in Annex 1 to the Motion appear to be relevant to the charges against the Accused. EUMM monitors were present throughout Croatia during the period relevant to the Indictment, had access to various actors and produced a number of reports, the disclosure of which will facilitate a fair determination of the matters in issue by assisting the Defence in preparing for the cross-examination of four EUMM monitors listed in the Prosecution's witness list.¹⁵

10. Given the reasonable number of documents sought by the Defence, and in light of the fact that a similar procedure for the request of documents by defence teams to the EUMM has previously been endorsed by the International Tribunal,¹⁶ the Trial Chamber cannot but find that the request is not unduly onerous.

¹³ *Prosecutor v. Mladić*, Order to the Republika Srpska for the Production of Documents, filed on 1 September 2004, pp 2-3; *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 29 October 1997, para. 32.

¹⁴ *Prosecutor v. Milutinović et al.*, Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 bis, 17 November 2005, para. 19. See *Prosecutor v. Hadžihasanović*, Decision on Defence Motion for Access to EUMM Archives, 15 December 2003, p. 6 (“...the Trial Chamber finds that the documents to which access is required are sufficiently identified by the Defence...as they are described by general category, date, location, source, and that short of having seen the documents it does not appear reasonable to require more details”). See *Prosecutor v. Blaškić*, Order to the Republic of Croatia for the Production of Documents, 21 July 1998, Opinion of Judge Mohamed Shahabuddeen, p. 12 (“[P]rovided that a category is defined with sufficient clarity to permit ready identification of its members and that it is not so broad as to be oppressive, a State may be ordered to say whether it has any documents within the category even if particulars of each document are not given, and, if it has, to produce them either to a party or to the Chamber, barring valid considerations of State security.”).

¹⁵ *Prosecution v. Gotovina et al*, Prosecution Motion to Amend its Witness List, Confidential Appendix A 1 February 2008.

¹⁶ *Prosecutor v. Hadžihasanović and Kubura*, Decision on Motion for Access to EUMM Archives, 15 December 2003.

11. In determining the time to be granted for allowing access to the documents, the Trial Chamber has considered that the EUMM has been on notice of the petition by the Defence for a considerable period of time, has responded to the request with considerable delays and was aware of the position of the International Tribunal as expressed in *Prosecutor v. Hadžihasanović*.¹⁷ Given further that the trial of *Gotovina et al.* is scheduled to start on 11 March 2008, the Trial Chamber considers that a period of two weeks is reasonable and sufficient for compliance.

For the reasons above, pursuant to Article 29 of the Statute and Rules 54 and 54bis of the Rules,

GRANTS the Motion, and

ORDERS, no later than 14 March 2008, the Secretary General of the Council of the European Union and High Representative for the Common Foreign and Security Policy, or his designated representative, to grant access to the Defence to archives of the European Union Monitoring Mission specified in Annex 1 to the Motion and to select the documents that the Defence sought to be provided with;

INVITES the Secretary General of the Council of the European Union and High Representative for the Common Foreign and Security Policy, or his designated representative, in consultation with the founding member states of European Community Monitoring Mission as the case may be, to review the documents sought by the Defence, and redact them as appropriate before granting access to the Defence to protect any confidentiality concerns the European Union Monitoring Mission may have.

REQUESTS the Registrar of the International Tribunal to take all necessary steps to serve this Order, in accordance with Rule 54bis(E) of the Rules on:

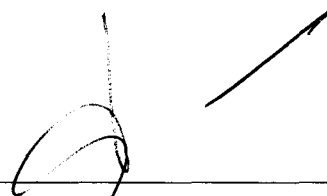
- (1) The Secretary General of the Council of the European Union and High Representative for the Common Foreign and Security Policy;
- (2) The European Union Monitoring Mission;
- (3) The Presidency of the Council of the European Union;
- (4) The Commission of the European Union;
- (5) The Founding Members States of the European Community Monitoring Mission.

¹⁷ *Supra* note 7.

7047

REQUESTS the Registrar to attach the Defence Motion and Annexes when serving this Decision on the Secretary General of the Council of the European Union and High Representative for the Common Foreign and Security Policy.

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



Judge Alphons Orie
Pre-Trial Judge

Dated this twenty-eighth day of February 2008

At The Hague

The Netherlands

[Seal of the Tribunal]