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01 December 2009

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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-T
Date: 1 December 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 1 December 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON MOTION FOR NON-DISCLOSURE ORDER DIRECTED TO
PROSECUTOR SERGE BRAMMERTZ

Office of the Prosecutor

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PROCEDURAL HISTORY

1. On 22 October 2009, the Gotovina Defence requested the Chamber to issue an order to Prosecutor Serge Brammertz, barring him from making any public assessments of Croatia's co-operation in the search for artillery documents, and precluding him from disclosing to the public, including the UN Security Council and the European Union, any information relating to the Prosecutor's application under Rule 54 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 5 November 2009, the Prosecution filed a response, requesting that Gotovina's motion be dismissed.² On 9 November 2009, the Gotovina Defence requested leave to reply to the Prosecution's response.³ On 10 November 2009, the Chamber granted leave to reply, and informally communicated this to the parties. On 12 November 2009, the Gotovina Defence filed its reply, requesting that the Chamber issue the requested order by 1 December 2009.⁴

ARGUMENTS OF THE PARTIES

Standing of the Gotovina Defence

2. The Gotovina Defence argues that it has standing to request from the Chamber an order to the Prosecution to cease violating Rule 7 *bis* of the Rules, on the basis of the Chamber's obligation under Article 20 (1) of the Tribunal's Statute to ensure that proceedings are fair and conducted in accordance with the Rules, and on the basis of Gotovina's right to procedural equality under Article 21 (4) (e) of the Statute.⁵ The Prosecution argues that the Gotovina Defence does not have standing to seek an order preventing the Prosecutor from reporting to the Security Council about state co-operation, as such matters do not involve the Gotovina Defence and have no bearing on Gotovina's rights or legitimate interests.⁶

¹ Defendant Ante Gotovina's Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz Pursuant to Rule 53(A), 22 October 2009 ("Gotovina Motion"), paras 1, 11. Regarding the Prosecution's motion under Rule 54 *bis*, see in particular Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 13 June 2008; Order in Relation to the Prosecution's Application for an Order Pursuant to Rule 54 *bis*, 16 September 2008.

² Prosecution's Response to Defendant Ante Gotovina's Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz Pursuant to Rule 53(A), 5 November 2009 ("Prosecution Response"), paras 1, 10.

³ Gotovina Defence Request to Reply to Prosecution's Response to Defendant (*sic*) Ante Gotovina's Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz Pursuant to Rule 53(A), 9 November 2009.

⁴ Gotovina Defence Reply to Prosecution Response to Defendant Ante Gotovina's Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz Pursuant to Rule 53(A), 12 November 2009 ("Gotovina Reply"), para. 17.

⁵ Gotovina Reply, paras 12-13.

⁶ Prosecution Response, para. 7.

Legal basis for the requested order

3. The Gotovina Defence invokes as a legal basis for the requested order Rule 53 (A) of the Rules, which it argues applies on its plain language to “any document or information”, and in the alternative Rule 54 of the Rules.⁷ The Prosecution argues that Rule 53 (A) of the Rules applies to indictments and documents or information related to their issuance, and that the Gotovina Defence has addressed neither the conditions for its application nor how it supports the requested remedy.⁸ As for Rule 54 of the Rules, the Prosecution argues that the Gotovina Defence has failed to show how the question of the Prosecutor’s authority to report to the UN Security Council affects the conduct of trial.⁹ The Gotovina Defence replies that the Prosecution’s violations of Tribunal law, allegations that are summarized in paragraphs 4 and 5 below, satisfy the conditions for the application of Rule 53 (A) of the Rules.¹⁰ It further replies that Rule 54 of the Rules, read together with Article 20 (1) of the Statute, requires the Chamber to take action if it finds that the Prosecution is violating the Rules and jurisprudence of the Tribunal.¹¹

Legal basis for the Prosecution’s reporting on state co-operation

4. The Gotovina Defence argues that under the Rules and jurisprudence of the Tribunal – in particular Rule 7 *bis* – only the Chamber and/or President of the Tribunal, not the Prosecution, have the power to find that Croatia is not co-operating with the Tribunal and report such a finding to the European Union or UN Security Council.¹² The Gotovina Defence further argues that paragraph 6 of UN Security Council resolution 1534 (2004) does not authorize the Prosecutor to report to the UN Security Council about Croatia’s co-operation or delivery of artillery documents, as it merely requires him to report about progress made towards implementation of the Tribunal’s completion strategy.¹³ The Gotovina Defence adds that the Chamber is the only competent body to decide upon delays in the trial, and it has not indicated that there will be any such delay, let alone one that would affect the completion strategy.¹⁴ The Prosecution argues that the conditions for the application of Rule 7 *bis* are not fulfilled, and that there is no support for the Gotovina Defence’s claim that Rule 7 *bis* is the

⁷ Gotovina Motion, paras 1, 11; Gotovina Reply, para. 14.

⁸ Prosecution Response, para. 3.

⁹ Prosecution Response, para. 4.

¹⁰ Gotovina Reply, para. 15.

¹¹ Gotovina Reply, para. 16.

¹² Gotovina Motion, paras 2-5; Gotovina Reply, paras 2-8.

¹³ Gotovina Motion, paras 6-8; Gotovina Reply, para. 2.

¹⁴ Gotovina Motion, para. 9.

sole mechanism to report about state co-operation to the UN Security Council.¹⁵ It argues that state co-operation falls within the Prosecutor's obligation to report to the UN Security Council about progress made towards implementing the Tribunal's completion strategy.¹⁶

Equality of arms between the Prosecution and the Gotovina Defence

5. The Gotovina Defence argues that the Prosecutor's violations of Rule 7 *bis* of the Rules amount to a way of obtaining evidence that is not available to the Gotovina Defence, thereby violating Gotovina's right to procedural equality of arms under Article 21 (4) (e) of the Statute.¹⁷ The Prosecution argues that the principle of equality of arms does not require that the Defence have access to the same means, facilities and resources as the Prosecution.¹⁸ Furthermore, it argues that the Gotovina Defence has failed to explain how the Prosecutor's comments on the co-operation of Croatia could entail the compulsion of documents, and failed to even assert that he has indeed obtained documents through such comments.¹⁹

DISCUSSION

6. With regard to standing, the Chamber is satisfied that the Gotovina Defence, as a party to the proceedings in *Prosecutor v. Gotovina et al.*, has standing to request, under Article 20 (1) of the Tribunal's Statute, that the Chamber ensure that these proceedings are fair and conducted in accordance with the Rules, and that Gotovina's rights under Article 21 (4) (e) of the Statute are respected.

7. As for the legal basis for requesting the non-disclosure order, Rule 53 (A) of the Rules provides as follows:

In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

The fact that this Rule is placed under the heading of pre-trial proceedings does not in itself exclude that it may apply during trial proceedings. Rule 54, which is also placed under the same heading, has been repeatedly applied during trial proceedings by this Chamber. However, Rule 54 is a general rule that explicitly refers to the "conduct of trial", whereas the immediate context of Rule 53 (A), particularly provisions (B), (C) and (D) of Rule 53,

¹⁵ Prosecution Response, para. 9.

¹⁶ Prosecution Response, para. 8.

¹⁷ Gotovina Motion, paras 1, 10-11; Gotovina Reply, paras 6-11.

¹⁸ Prosecution Response, para. 5.

¹⁹ Prosecution Response, para. 6.

concerns non-disclosure of indictments and related documents prior to trial. Based on the foregoing, the Chamber finds that Rule 53 (A) does not constitute an appropriate legal basis for the order requested by the Gotovina Defence, and will therefore not consider further reasons why the Rule is inapplicable. Rule 54 of the Rules, on which the Gotovina Defence relies in the alternative, provides as follows:

At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

The Chamber understands the Gotovina Defence's complaint to be that the Prosecutor is reporting publicly that Croatia is not co-operating with the Tribunal, thereby infringing upon an exclusive judicial competence under the law of the Tribunal, and that this amounts to a means of obtaining documents that, not being available to the Defence, violates the procedural equality between the Prosecution and the Defence. Based upon this understanding, the Chamber is satisfied, in the context of the present litigation, that Rule 54 provides an adequate legal basis for requesting the non-disclosure order.

8. With regard to whether the Prosecutor has a legal basis to report on state co-operation, Rule 7 *bis* of the Rules provides as follows:

(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council.

(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.

This Rule deals with the judicial power, and the procedure, for reporting to the UN Security Council a judicial finding of state non-compliance under Article 29 of the Statute.²⁰ Specifically, Rule 7 *bis* (B) provides a procedure for the Prosecutor to seek a judicial finding of non-compliance from the President, with a view to notification of the UN Security Council. However, nothing in Rule 7 *bis*, or other legal authorities on which the Gotovina Defence relies, excludes the Prosecutor from providing information to the UN Security Council or

²⁰ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, paras 33-37.

other bodies according to other procedures. The UN Security Council, acting under Chapter VII of the UN Charter, requested in 2004 the Prosecutor to set out in detail the progress made towards implementation of the Completion Strategy of the Tribunal.²¹ The Chamber is not in a position to determine what exact information the UN Security Council considers to fall within the scope of this request, but notes that it might reasonably include information about obtaining documents. The Chamber further notes that the UN Security Council has developed prior to 2004 a practice of receiving reports from the Prosecutor.²² The Chamber finally notes that the Tribunal itself was created by the UN Security Council, acting under Chapter VII of the UN Charter, and that the Gotovina Defence advances no legal argument to support that the Chamber can preclude the Prosecutor from merely reporting under a request of the UN Security Council. The Chamber therefore finds that the Gotovina Defence has failed to establish that the Prosecutor lacks a proper basis to report upon co-operation of Croatia to the UN Security Council. It also follows from the Chamber's reasoning above that the Gotovina Defence has not established that the reporting of the Prosecution has violated Rule 7 *bis* of the Rules.

9. With regard to the alleged violation of Gotovina's right to procedural equality of arms, Article 21 (4) of the Statute provides as follows:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The Appeals Chamber has held that Article 21 (4) (e) of the Statute serves to ensure that the accused is placed in a position of procedural equality with the Prosecution in obtaining the attendance and examination of witnesses.²³ The Appeals Chamber has further held that, under this Article and the fair trial guarantee contained in Article 20 (1) of the Statute, the Chamber must ensure that neither party is put at a disadvantage when presenting its case.²⁴ However, the rights of the accused should not be interpreted to mean that the Defence is entitled to the

²¹ UN Security Council resolution 1534, 26 March 2004, para. 6.

²² See e.g. "Prosecutor for Former Yugoslavia, Rwanda Tribunals Briefs Security Council, Emphasizes Need for Cooperation from States", Press Release SC/6749, 10 November 1999; "Summary statement by the Secretary-General on matters of which the Security Council is seized and on the stage reached in their consideration (Addendum)", S/2000/40/Add.21, 12 June 2000; UN Security Council resolution 1503, 28 August 2003, para. 6.

²³ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, 15 July 1999, para. 24; *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 181.

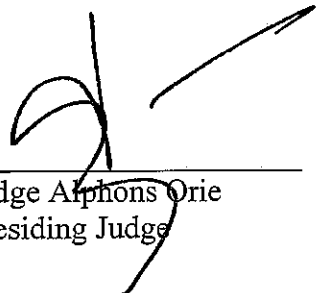
²⁴ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 44, 47-48.

same means as the Prosecution.²⁵ The Gotovina Defence has failed to demonstrate that the Prosecutor's reporting to the UN Security Council has put it at any disadvantage when presenting its case. As for reporting to the European Union and the public in general, the Gotovina Defence has failed to establish that it is at any procedural disadvantage compared to the Prosecution. The Chamber therefore finds that the Gotovina Defence has not established any violation of Articles 20 (1) or 21 (4) (e) of the Statute. Since the Gotovina Defence has not articulated any other reasons why granting the motion would be necessary for the conduct of the trial, the Chamber is not convinced that this condition of Rule 54 of the Rules has been fulfilled.

DISPOSITION

10. For the foregoing reasons, the Chamber **DENIES** the Gotovina Defence's motion.

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



Judge Alphons Orie
Presiding Judge

Dated this 1st day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras 20, 60; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, paras 69-70.