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UNITED NATIONS	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:	20 January 2010
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Decision of: **20 January 2010**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON GOTOVINA DEFENCE REQUEST FOR CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S DECISION ON MOTION FOR NON-DISCLOSURE ORDER DIRECTED TO PROSECUTOR SERGE BRAMMERTZ

Office of the Prosecutor

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Mr Goran Mikuličić
Mr Tomislav Kuzmanović

1. On 1 December 2009, the Chamber denied a motion of the Gotovina Defence for a non-disclosure order directed to Prosecutor Serge Brammertz ("Decision").[1] On 8 December 2009, the Gotovina Defence filed a request for certification to appeal the Decision ("Request").[2] On 22 December 2009, the Prosecution filed its response to the Request, asking that it be denied ("Response").[3]

2. Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules") requires two cumulative criteria to be satisfied to allow a Trial Chamber to grant a request for certification to appeal: 1) that the decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that, in the opinion of a Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

3. As for the first requirement of Rule 73 (B) of the Rules, the Gotovina Defence submits that the Decision affects Gotovina's right to equality of arms.[4] Specifically, the Gotovina Defence argues that, while its only way of obtaining documents from the European Union is to request an order from the Trial Chamber, the Prosecution, by making public comments on Croatia's co-operation, resorts to a non-procedural avenue of obtaining evidence, in violation of Rule 7 *bis* of the Rules.[5] The Prosecution responds that Gotovina fails to show how the Prosecutor's reports violate any of Gotovina's rights under the Statute of the Tribunal or how the requested non-disclosure order would have any effect on his own efforts to obtain documents from the European Union.[6] Therefore, concludes the Prosecution, Gotovina fails to show that the Decision affects either the conduct or outcome of the trial.[7]

4. As for the second requirement of Rule 73 (B) of the Rules, the Gotovina Defence argues that, if the Appeals Chamber were to find now that Gotovina's right to equality of arms

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[1] Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz, 1 December 2009.
[2] Gotovina Defence Request for Certificate to Appeal the Trial Chamber's Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz, 8 December 2009.
[3] Response to Gotovina's Motion for Certification to Appeal Decision Denying Non-Disclosure Order, 22 December 2009.
[4] Request, paras 3-7.
[5] Ibid., paras 7-8. 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.
[6] Response, paras 1-3.
[7] Ibid., para. 3.

has been violated, the Chamber could still act to ensure that Gotovina is able to obtain evidence from the European Union, and act further to exclude any evidence obtained in violation of Rule 7 *bis* of the Rules.[8] The Prosecution advances the same counter-arguments as for the first requirement of Rule 73 (B) of the Rules, and further argues that Gotovina does not allege that any evidence has been obtained in violation of Rule 7 *bis* of the Rules, which therefore remains a hypothetical possibility.[9]

5. The Chamber notes that the Gotovina Defence's search for European Community Monitoring Mission documents is the subject of separate litigation. In response to a motion of the Gotovina Defence, the Chamber has already issued an order and two invitations aiming to assist the Gotovina Defence in obtaining certain documents from the European Union.[10] Furthermore, it is not a central issue in the Decision. An immediate ruling by the Appeals Chamber would therefore not assist in obtaining the one outstanding document that the Gotovina Defence still seeks from the European Union. As for excluding any evidence hypothetically obtained in violation of Rule 7 *bis* of the Rules, it would be practically very difficult, if not impossible, to determine whether reporting by the Prosecutor to the UN Security Council constituted the ultimate motivation behind providing specific documents to the Prosecution. Most importantly, the motion of the Gotovina Defence was for an order barring the Prosecutor 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 his application under Rule 54 *bis* of the Rules.[11] A reversal of the Decision by the Appeals Chamber, with the effect of barring the Prosecutor from making such public statements, would have no discernible consequences for the proceedings. The possibility that further reporting by the Prosecutor would lead to obtaining relevant and probative documents that otherwise would not have been obtained is too remote and hypothetical to satisfy the second requirement in Rule 73 (B) of the Rules. Consequently, the Chamber finds that an immediate resolution by the Appeals Chamber would not materially advance the proceedings. Having found that the second requirement of Rule 73 (B) of the Rules is not met, there is no need for the Chamber to examine the first requirement.

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[8] Request, paras 9-10.
[9] Response, paras 1, 4-5.
[10] See, in particular, Order Compelling Access to Archives of the European Union Monitoring Mission, 28 February 2008; Invitation to the European Union and to the Gotovina Defence, 19 June 2009; Invitation to the European Union, 16 December 2009.
[11] Decision, para. 1.

6. The Chamber therefore, pursuant to Rule 73 (B) of the Rules, **DENIES** the Request.

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

Judge Alphons Orie
Presiding Judge

Dated this 20th day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]