



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: 3 June 2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elizabeth Gwaunza
Registrar: Mr John Hocking
Decision of: 3 June 2010

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE GOTOVINA DEFENCE'S REQUEST TO ORDER THE
EUROPEAN UNION TO CARRY OUT FURTHER INVESTIGATIONS ON THE
WHEREABOUTS OF THE "RC KNIN LOG-BOOK"

Office of the Prosecutor
Mr Alan Tieger

General Secretariat of the Council of
The European Union
Mr Pierre de Boissieu

High Representative of the Union for
Foreign Affairs and Security Policy
Mrs Catherine Ashton

The Presidency of the Council of the
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The Commission of the European Union

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Mr Tomislav Kuzmanović

The Founding Member States
of the ECMM (Belgium,
Denmark, France, Germany,
Greece, Ireland, Italy,
Luxembourg, The Netherlands,
Portugal, Spain, and the United
Kingdom)

PROCEDURAL HISTORY¹

1. On 28 December 2007, the Gotovina Defence filed a confidential and *ex parte* motion seeking an order to compel access to the archives of the European Union Monitoring Mission (“EUMM”).² On 28 February 2008, the Chamber granted the request and ordered the Secretary-General of the Council of the European Union (“EU”) to allow the Gotovina Defence access to the archives.³

2. On 20 March 2009, the Gotovina Defence filed a motion whereby, *inter alia*, it informed the Chamber that many of the documents sought were missing from the EUMM archives.⁴ Therefore, the Gotovina Defence requested the Chamber to order the EU to further investigate the whereabouts of all the European Community Monitoring Mission (“ECMM”) reports listed as missing in Annex A of the 20 March 2009 Request and to provide the Gotovina Defence with the documents found as a result of the investigation.⁵ Further, the Gotovina Defence requested to be informed, along with the Chamber, about the efforts undertaken to retrieve the missing documents.⁶ On 23 March 2009, the Gotovina Defence filed a corrigendum to rectify a number of mistakes in Annex A of the 20 March 2009 Request, which listed eleven documents as missing although they had previously been disclosed to the Gotovina Defence by the Prosecution and by the EUMM.⁷ As a result, the Gotovina Defence listed 80 documents as still missing.⁸ On 3 April 2009, the Chamber notified the EU of the 20 March 2009 Request and the 23 March 2009 Corrigendum, and invited it to respond.⁹ On 17 April 2009, the Secretary-General of the Council of the EU, Mr Javier Solana, responded that the Gotovina Defence had been given full and unrestricted access to the archives, and that 24 of the documents claimed to be missing were in the EUMM

¹ For more information on the procedural history, see Request for Information, 10 June 2008; Order Compelling Access to the Archives of the European Union, 28 February 2008 (“28 February 2008 Order”); Decision on Ante Gotovina’s Motion to Compel Disclosure of EUMM Documents in Unredacted Form, 24 July 2008; Invitation to the European Union and to the Gotovina Defence, 19 June 2009 (“19 June 2009 Invitation”); Invitation to the European Union, 16 December 2009 (“16 December 2009 Invitation”); Urgent Invitation to the European Union, 3 February 2010 (“3 February 2010 Urgent Invitation”).

² Defendant Ante Gotovina’s Motion to Compel Access to the EUMM Archives, 28 December 2007.

³ 28 February 2008 Order, p. 5.

⁴ Defendant Ante Gotovina’s Motion to Enforce the Trial Chamber’s Previous Rule 54 *bis* Order Compelling Access to Archives of the European Union Monitoring Mission, 20 March 2009 (“20 March 2009 Request”), para. 6.

⁵ *Ibid.*, para. 21.

⁶ *Ibid.*

⁷ Corrigendum to Defendant Ante Gotovina’s Motion to Enforce the Trial Chamber’s Previous Rule 54 *bis* Order Compelling Access to Archives of the European Union Monitoring Mission, 23 March 2009 (“23 March 2009 Corrigendum”).

⁸ *Ibid.*

⁹ Notification of Motion and Invitation to Respond, 3 April 2009.

archives when the Gotovina Defence's representative accessed them on 10 March 2008.¹⁰ He also stated that it was doubtful whether the remaining documents claimed to be missing had ever been created and that, if they were, they were not present in the EUMM archives.¹¹

3. On 20 April 2009, the Gotovina Defence requested leave to reply to the 17 April 2009 letter.¹² On 22 April 2009, the Chamber decided to grant the request and informed the parties accordingly through an informal communication. On 23 April 2009, in its reply the Gotovina Defence requested the Chamber to order the EU to produce documents of which Mr Solana had admitted the existence, to further investigate the whereabouts of the documents that were still missing, and to provide the Chamber with a progress report.¹³ In addition, the Gotovina Defence requested the Chamber to invite Mr Solana, Secretary-General of the Council of the EU at the time, to recuse himself from dealing with the requested documents, alleging a conflict of interest.¹⁴ On 26 May 2009, the EU reaffirmed its position as expressed in its 17 April 2009 Letter.¹⁵

4. On 19 June 2009, the Chamber invited the EU to verify that eleven reports, for which the Chamber had found indicia of existence, could be found in the EUMM archives, and in case of their absence to provide the Chamber with specific reasons for this.¹⁶ On the same day, the Prosecution informed the Chamber that it was in possession of 27 of the 80 EUMM documents that the Gotovina Defence claimed to be missing.¹⁷ The Prosecution stated that one of these 27 documents had been disclosed to the Gotovina Defence in March 2007, while other ten documents had been disclosed in August 2008.¹⁸ The Prosecution disclosed the remaining 16 documents through its filing of 19 June 2009.¹⁹

5. On 22 June 2009, the Prosecution informed the Chamber that, as a result of its 19 June 2010 disclosure, only three of the documents listed in Appendix A of the 19 June 2009

¹⁰ Letter from the Secretary-General of the European Union, 17 April 2009 ("17 April 2009 Letter").

¹¹ *Ibid.*

¹² Gotovina Defence Request to Reply to European Union Response to Defendant Ante Gotovina's Motion to Enforce the Trial Chamber's Previous Rule 54 *bis* Order Compelling Access to Archives of the EUMM, 20 April 2009.

¹³ Gotovina Defence Reply to European Union's Response to Defendant Ante Gotovina's Motion to Enforce the Trial Chamber Previous Rule 54 *bis* Order Compelling Access to the Archives of the EUMM, 23 April 2009 ("Gotovina 23 April 2009 Reply"), paras 3, 18.

¹⁴ *Ibid.*, paras 10-14.

¹⁵ Letter from the Secretary-General of the European Union, 26 May 2009.

¹⁶ 19 June 2009 Invitation, p. 3.

¹⁷ Prosecution Disclosure of Documentation Currently Sought by the Gotovina Defence from the European Union, 19 June 2009, para. 5.

¹⁸ *Ibid.*, para. 9 and Annex A.

¹⁹ *Ibid.*, paras 11-13 and Annexes A and B.

Invitation remained outstanding.²⁰ On 24 June 2009, the Gotovina Defence requested the Chamber to order, rather than invite, the EU to conduct a detailed investigation on all of the documents originally sought in the 20 March 2009 Request as modified by the 23 March 2009 Corrigendum.²¹

6. On 13 August 2009, the EU informed the Chamber that it had already disclosed eight of the eleven documents indicated in the 19 June 2009 Invitation to the Gotovina Defence, and stated that three remaining documents, namely the daily reports of EUMM Knin Team for 10, 11 and 12 August 1995, could not be found.²² The EU added that, although there were indicia that the team in question had been operating on these days, it could not be ascertained that the sought reports had been compiled, nor, if they were compiled, whether they were ever transmitted to the General Secretariat of the Council of the EU.²³

7. On 25 August 2009, the Chamber orally invited the Gotovina Defence to submit a list of documents still outstanding and to provide further information regarding their existence.²⁴ On 10 November 2009, the Chamber noted in court that it had not yet received the clarification sought on 25 August 2009.²⁵ In response, the Gotovina Defence stated that it sought further action from the Chamber only in relation to the log-book of the regional centre in Knin (“RC Knin Log-book”).²⁶ According to Annex A of the 20 March 2009 Request, as modified by the 23 March 2009 Corrigendum, the RC Knin log-book contains log reports of the EUMM regional centre in Knin for the period from 4 August 1995 to 15 August 1995.²⁷

8. On 16 December 2009, the Chamber invited the EU to focus and intensify its search on the RC Knin Log-book and, by 30 December 2009, to either provide the Gotovina Defence with this document, or parts thereof, or, if it failed to locate the document, to provide the Chamber with an overview of all efforts undertaken.²⁸

²⁰ Prosecution’s Submission in Relation to the Trial Chamber’s Invitation to the European Union and the Gotovina Defence, 22 June 2009, para. 2.

²¹ Gotovina Defence Submission in Response to the Trial Chamber’s Invitation to the European Union and the Gotovina Defence, 24 June 2009, para. 8.

²² Letter from the Secretary-General of the Council of the European Union, 13 August 2009 (“13 August 2009 Letter”).

²³ Ibid.

²⁴ T. 20884-20885.

²⁵ T. 24459.

²⁶ Ibid.

²⁷ 20 March 2009 Request, Annex A; 23 March 2009 Corrigendum.

²⁸ 16 December 2009 Invitation, p. 3.

9. On 12 January 2010, the Gotovina Defence requested the Chamber to take all measures available to compel the production of the RC Knin Log-book, and to compel the EU to provide an overview of all efforts undertaken to find the document.²⁹

10. On 19 January 2010, the Secretary-General of the Council of the EU responded that, in spite of all the efforts undertaken, the RC Knin Log-book could not be found.³⁰

11. On 20 January 2010, the Gotovina Defence orally requested the Chamber to urgently take further action on the matter.³¹

12. On 3 February 2010, the Chamber invited the Secretary-General of the Council of the EU to provide the Chamber, within 14 days, with an overview of all efforts undertaken in its search for the RC Knin Log-book.³² The Chamber added that, should the time limit of 14 days prove to be inadequate for the fulfilment of this invitation, it would consider a request for an extension of time supported by a plan for further action.³³

13. On 17 February 2010, the Secretary-General of the Council of the EU in his reply listed the efforts made to locate the RC Knin log-book and stated that

“[n]one of the documents found could be identified [...] as a[n] ‘RC Knin Log Book’ or an ‘RC Knin Log Report’. No cross references were found which would indicate that these documents have been created or that they were transmitted to the Secretariat of the Council upon termination of the EUMM mission.”³⁴

The Secretary-General also suggested that a further possibility to ascertain the existence of the RC Knin Log-book would be to enquire with the founding members of the EUMM whether the sought document could be found in their national archives.³⁵

14. On 22 February 2010, the Gotovina Defence responded to the 17 February 2010 Letter. It requested the Chamber to order the EU to step up its efforts to locate the RC Knin Log-book and listed a number of activities which the EU should carry out and report about to

²⁹ Gotovina Defence Motion to Compel Production of Document from the European Union Pursuant to Rule 54 *bis*, 12 January 2010, para. 3.

³⁰ Letter from the Secretary-General of the Council of the European Union, 19 January 2010.

³¹ T. 27054-27055.

³² 3 February 2010 Urgent Invitation, p. 3.

³³ *Ibid.*

³⁴ Letter from the Secretary-General of the Council of the European Union, 17 February 2010, filed on 18 February 2010 (“17 February 2010 Letter”).

³⁵ *Ibid.*

the Chamber.³⁶ On 4 March 2010, the Prosecution filed submissions in response to the Gotovina Further Request, in which it took no position on the matter.³⁷

SUBMISSIONS OF THE PARTIES

15. The Gotovina Defence submits that, although the EU has searched its archives, it is evident that it has neither carried out investigative steps to establish the chain of custody of the missing documents, nor interviewed individuals who may have been able to provide information concerning the requested documents.³⁸ The Gotovina Defence further argues that the RC Knin Log-book, which it argues could be potentially exculpatory for Gotovina, must have been created because every EUMM regional centre compiled such reports from the field.³⁹ In support of its submission, the Gotovina Defence attaches the log report from the Zagreb regional centre for 5 August 1995.⁴⁰ The Gotovina Defence further argues that the requested documents are property of the EU, which therefore needs to take appropriate steps to locate them.⁴¹ In support of this submission, the Gotovina Defence recalls that the EU itself has asserted that states have an obligation to assist the Tribunal by retrieving documents currently in possession of third parties.⁴² Finally, the Gotovina Defence submits that the EU failed to make an effort to interview Søren Liborius and Stig Marker-Hansen, who were known to have been in possession of EUMM documents not properly filed in the EU archives.⁴³

16. The Gotovina Defence requests the Chamber to order the EU to a) contact Liborius and Marker-Hansen to determine whether they have additional information which may reveal the current whereabouts of the RC Knin Log-book; b) further investigate the whereabouts of the RC Knin Log-book; c) intensify and broaden its investigation and provide the Gotovina Defence with all requested documents that it might find during the investigation; and d)

³⁶ Gotovina Defence Response to European Union Submission of 18 February 2010, 22 February 2010 ("Gotovina Further Request"), pp. 5-6.

³⁷ Prosecution's Submission Regarding the Gotovina Defence Response to the European Union Submission of 18 February 2010, 4 March 2010 ("Prosecution Submission"), p. 1.

³⁸ Gotovina Further Request, para. 1.

³⁹ Ibid., paras 3-6 and Annex A.

⁴⁰ Ibid.

⁴¹ Ibid., para. 7.

⁴² Ibid.

⁴³ Ibid., paras 9-11.

provide the Chamber and the Gotovina Defence with a detailed and substantiated report specifying the efforts undertaken to obtain the requested documents.⁴⁴

17. The position of the EU, as outlined by its Secretary-General in his 17 February 2010 Letter, is that the RC Knin Log-book is not in the EUMM archives.⁴⁵ The EU reached this conclusion after several searches carried out both manually and electronically between April 2009 and February 2010.⁴⁶ The EU adds that, during the searches, no cross-references were found indicating that the RC Knin Log-book had ever been created, nor that it had ever been transmitted to the EU upon termination of the EUMM mission.⁴⁷ The EU thereby re-affirms the position it had taken in a number of previous letters, in which it had consistently questioned the existence of this document, as well as its own alleged possession thereof.⁴⁸

18. The Prosecution takes no position in relation to the Gotovina Further Request.⁴⁹ However, it informs the Chamber that, upon a request advanced by the Gotovina Defence on 10 July 2009, the Prosecution contacted Søren Liborius and Stig Marker-Hansen, who stated that they had handed over all the ECMM documentation that they had to the Prosecution, and that they did not keep any documents.⁵⁰ The Gotovina Defence was informed accordingly on 14 July 2009.⁵¹

APPLICABLE LAW

19. Article 29 of the Statute of the Tribunal ("Statute") provides that states have an obligation to co-operate with the investigations of the Tribunal and shall comply without undue delay with any request for assistance.

20. Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules") provides that a Judge or a Chamber may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial at the request of either party or *proprio motu*.

⁴⁴ Ibid., para. 12.

⁴⁵ 17 February 2010 Letter.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ 17 April 2009 Letter; 13 August 2009 Letter; 19 January 2009 Letter; 17 February 2010 Letter.

⁴⁹ Prosecution Submission, para. 3.

⁵⁰ Ibid., para. 4.

⁵¹ Ibid.

21. Rule 54 *bis* (A) of the Rules provides that a party applying to the Chamber for an order to a state for the production of documents or information shall (i) identify as far as possible the documents or information to which the application relates; (ii) indicate how they are relevant to any matter in issue and necessary for the fair determination of that matter; and (iii) explain the steps that have been taken by the applicant to secure the State's assistance.

DISCUSSION

22. The Gotovina Defence originally requested the Chamber's assistance in retrieving a number of documents which it alleged were missing from the EUMM archives.⁵² Subsequently, on 10 November 2009, the Gotovina Defence limited the scope of its request to the RC Knin Log-book, which it said comprised of log reports of the EUMM Regional Centre ("RC") Knin for the period from 4 to 15 August 1995.⁵³ The Gotovina Defence requests the Chamber to order the EU to broaden and intensify its search for the RC Knin Log-book, including by interviewing two former monitors, Liborius and Marker-Hansen, to report on the efforts undertaken and to provide any of the requested documents found during its search.

23. The EU's position is that the RC Knin Log-book is not in the EUMM archives, and that its very existence is doubtful. The Secretary-General of the Council of the EU has repeatedly expressed doubts regarding the creation of this document.⁵⁴ The EU's 17 February 2010 Letter indicated that the EU archives were searched extensively and that, in the thousands of documents searched both manually and electronically, no cross-references were found which would indicate that the RC Knin Log-book was ever created, or that it was ever transmitted to the Secretariat of the Council of the EU upon termination of the EUMM mission.⁵⁵ The Gotovina Defence was granted access to the EUMM archives, and were also unable to locate the RC Knin Log-book during the ensuing search.⁵⁶

⁵² 20 March 2009 Request as modified by the 23 March 2009 Corrigendum.

⁵³ T. 24459. The Gotovina Defence's 23 April 2009 Reply also includes a request to the Chamber to invite Mr Javier Solana, Secretary-General of the Council of the EU at the time, to recuse himself from being involved in the matter concerning the provision of the documents sought by the Gotovina Defence. To the extent that this request remained pending after 10 November 2009 it is now moot, since on 1 December 2009, Mr Pierre de Boissieu succeeded Mr Solana as Secretary-General of the Council of the EU and has since then been the person dealing with invitations by the Chamber on this matter.

⁵⁴ 17 April 2009 Letter; 13 August 2009 Letter; 19 January 2009 Letter; 17 February 2010 Letter.

⁵⁵ 17 February 2010 Letter.

⁵⁶ On 28 February 2008 the Chamber ordered the EU to allow the Gotovina Defence access to the EUMM archives, see 28 February 2008 Order, p. 5. See also 17 February 2010 Letter; 23 April 2009 Request.

24. The Gotovina Defence submits that “[e]very Regional Centre maintained hour-by-hour (or even minute-by-minute) ‘log reports’ to record ECMM monitor reports from the field”.⁵⁷ In support of its submission, the Gotovina Defence attached a log report from the Zagreb RC for 5 August 1995.⁵⁸ However, this document does not necessarily imply that such a log-book was also created for the RC in Knin for the dates identified by the Gotovina Defence. Notably, the Secretary-General of the Council of the EU pointed out in his 17 April 2009 Letter that, due to logistical limitations, the ECMM team in Knin was not operational during parts of the month.⁵⁹

25. The Gotovina Defence also requests that the EU interview Liborius and Marker-Hansen, who served as ECMM monitors in Knin during the period relevant to the Indictment, in order to determine whether they have additional information that may reveal the current whereabouts of the RC Knin Log-book. In this respect, the Chamber notes that Liborius and Marker-Hansen have already stated that they have handed over all the ECMM documentation that they had to the Prosecution.⁶⁰ The Prosecution stated that it made this information available to the Gotovina Defence on 14 July 2009.⁶¹ The Gotovina Defence has not disputed this. In addition, Marker-Hansen,⁶² Liborius,⁶³ and at least one other witness in this trial⁶⁴ have testified about the reporting system followed by the ECMM in Croatia in August 1995, and the parties have thus had ample opportunities to examine them on this matter.

26. Both the extensive archive searches carried out by the EU, in connection with invitations by the Chamber, and the information provided by Liborius and Marker-Hansen to the Prosecution have cast doubts on the existence of the RC Knin Log-book as identified by the Gotovina Defence. The EU has undertaken substantial efforts to locate the RC Knin Log-book, but has been unable to find it, or even confirm its existence. The Gotovina Defence has not pointed to any statement or information, either from the examinations in court or from any possible enquiries carried out by the Gotovina Defence itself, indicating that Liborius and Marker-Hansen would be able to provide further information regarding the existence or

⁵⁷ Gotovina Further Request, para. 4.

⁵⁸ *Ibid.*, Annex A.

⁵⁹ 17 April 2009 Letter, p. 2.

⁶⁰ Prosecution Submission, para. 4.

⁶¹ *Ibid.*

⁶² P1285 (Stig Marker-Hansen, witness statement, 24 April 2008), paras 5-7; Stig Marker-Hansen, T. 14980-14983, 15054.

⁶³ Søren Liborius, T. 8278, 8343.


⁶⁴ P931 (Eric Hendriks, witness statement, 4 April 2008), para. 7; Eric Hendriks, T. 9695-9696.

whereabouts of the RC Knin Log-book. Under these circumstances, the Chamber will take no further action on this matter.

DISPOSITION

27. For the foregoing reasons, the Chamber **DENIES** the Gotovina Further Request.

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



Judge Alphons Orié
Presiding Judge

Dated this 3rd day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]