

5-06-90-T  
①32319-①32315  
20 January 2010

32319  
48.



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 Kinis  
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 DECISION OF 4 NOVEMBER 2009**

---

**Office of the Prosecutor**

Mr Alan Tieger  
Mr Stefan Waespi

**Counsel for Ante Gotovina**

Mr Luka Mišetić  
Mr Gregory Kehoe  
Mr Payam Akhavan

**Counsel for Ivan Čermak**

Mr Steven Kay, QC  
Mr Andrew Cayley  
Ms Gillian Higgins

**Counsel for Mladen Markač**

Mr Goran Mikuličić  
Mr Tomislav Kuzmanović

1. On 4 November 2009, the Chamber rendered an oral decision admitting into evidence under seal exhibits P2631 and P2632, two official notes compiled by the Croatian Military Police (“Official Notes”).<sup>1</sup> On 5 November 2009, the Gotovina Defence filed a request for certification to appeal the Decision.<sup>2</sup> On 19 November 2009, the Prosecution responded, requesting that certification be denied.<sup>3</sup>

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 in Rule 73 (B) of the Rules, the Gotovina Defence submits that the Decision involves two issues which affect the fair and expeditious conduct of the proceedings.<sup>4</sup> Firstly, the Gotovina Defence argues that the Decision may have violated the Accused’s right to cross-examine witnesses enshrined in Article 21 (4) (e) of the Tribunal’s Statute, since the Official Notes purport to record the statements of two persons who have neither appeared before the Tribunal nor been subjected to cross-examination.<sup>5</sup> Secondly, the Gotovina Defence submits that, by ordering the compilation of the Official Notes, the Chamber was directly responsible for the creation of substantive evidence against Gotovina, thus violating his right to be tried by an independent and impartial tribunal, enshrined in Article 21 (2) of the Tribunal’s Statute.<sup>6</sup>

4. As far as the second requirement of Rule 73 (B) of the Rules is concerned, the Gotovina Defence relies on a decision of the Trial Chamber in the case of *Prosecutor v. Jadranko Prlić et al.*<sup>7</sup> Specifically, the Gotovina Defence draws a parallel between the present situation and that of the *Prlić* Decision, where the co-accused could not cross-examine Prlić,

<sup>1</sup> T. 23891-23892 (“Decision”).

<sup>2</sup> Gotovina Defence Request for Certificate to Appeal the Trial Chamber’s Decision of 4 November 2009, 5 November 2009 (“Request”), paras 1, 11.

<sup>3</sup> Prosecution’s Opposition to the Gotovina Defence’s Request for Certification to File an Interlocutory Appeal of the Trial Chamber’s Decision of 4 November 2009, 19 November 2009 (“Prosecution Response”), paras 1, 17.

<sup>4</sup> Request, paras 4-5.

<sup>5</sup> Ibid., paras 4, 6.

<sup>6</sup> Ibid., paras 4, 7-8.

<sup>7</sup> Ibid., para. 9, citing *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Request for Reconsideration and Certification to Appeal the Decision for Admission of the Statement of Jadranko Prlić, 10 October 2007 (“*Prlić* Decision”).

whose suspect interview had been admitted into evidence, and the Trial Chamber had held that, “if the Prosecution wishes to use the Prlić Statement with other witnesses in court, an urgent ruling of the Appeals Chamber could, in this case, expedite the proceedings”.<sup>8</sup> The Gotovina Defence further submits that the Decision raises a new issue that has not been previously resolved by the Trial Chamber, namely whether a statement created pursuant to a Trial Chamber’s order can be admitted as substantive evidence without giving the Accused the possibility of cross-examining the author of the statement.<sup>9</sup> This issue, argues the Gotovina Defence, must be settled as soon as possible, since the Prosecution might use the Official Notes with other witnesses or tender other official notes into evidence.<sup>10</sup>

5. With regard to the first requirement in Rule 73 (B) of the Rules, the Prosecution responds that the admission of the Official Notes does not significantly affect Gotovina’s right to cross-examine witnesses, as the Official Notes do not concern the acts and conduct of the Accused or any other substantive issue in the case, and there is no indication that the Gotovina Defence would wish to cross-examine the interviewees of the Official Notes.<sup>11</sup> The Prosecution also argues that the Gotovina Defence’s submission that Gotovina’s right to be tried by an independent tribunal has been violated by the admission into evidence of the Official Notes is incoherent with the Gotovina Defence’s recognition that the Official Notes would be admissible under Rule 92 *bis* of the Rules.<sup>12</sup>

6. As for the second requirement in Rule 73 (B) of the Rules, the Prosecution submits that the present situation differs from that of the *Prlić* Decision. Firstly, argues the Prosecution, the statement of the Accused Prlić related to the acts and conduct of his co-accused; secondly, it was clear that in *Prlić* the co-accused would wish to cross-examine the maker of the statement and they would have had the right to do so if Prlić had not been a co-accused.<sup>13</sup> Therefore, concludes the Prosecution, the co-accused’s cross-examination rights were directly implicated.<sup>14</sup> In addition, the Prosecution argues that the *Prlić* Trial Chamber had taken the position that, had the statement not been admitted, it could not have been used with other witnesses, and that this was part of the *Prlić* Trial Chamber’s rationale to certify

<sup>8</sup> Ibid., citing *Prlić* Decision, para. 18.

<sup>9</sup> Request, para. 10.

<sup>10</sup> Ibid.

<sup>11</sup> Prosecution Response, paras 4, 6-9.

<sup>12</sup> Ibid., paras 10-11.

<sup>13</sup> Ibid., paras 13-14.

<sup>14</sup> Ibid.

the appeal.<sup>15</sup> In this case, instead, the Prosecution submits that the Chamber has permitted the parties to confront witnesses with statements even when they were not admissible in evidence.<sup>16</sup> The Prosecution therefore submits that the impact of the Decision on the conduct of the proceedings is distinguishable from the *Prlić* Decision.<sup>17</sup> Lastly, the Prosecution responds that, in light of the late stage of the proceedings, the possibility that the Prosecution will use the Official Notes with other witnesses or introduce other similar notes into evidence is a remote one, and is in any event speculative.<sup>18</sup>

7. The Decision concerns the admission into evidence of two Official Notes. The Chamber recalls that it has admitted official notes compiled by Croatian authorities on a number of occasions.<sup>19</sup> The Chamber further recalls that it admitted the Official Notes in question to corroborate and complement the testimony of Expert Witness Feldi and to better evaluate his testimony, specifically in respect of the methods used, the circumstances under which documents were retrieved, and the transparency of the sources used to compile his expert report.<sup>20</sup> Furthermore, the Chamber reiterates that the two Official Notes were not meant to substitute live witness testimony on matters charged in the Indictment in this case.<sup>21</sup>

8. With regard to the Gotovina Defence's second argument concerning Article 21(2) of the Statute, it is noted that the compilation of official notes was caused by the need to gather additional information as to the whereabouts of missing artillery documents sought from Croatia by the Prosecution.<sup>22</sup> The Chamber deemed this course of action appropriate due to the inconsistency of the submissions made by the Prosecution, on the one hand, which claimed that the documents in fact existed but were being withheld, and Croatia, on the other, which denied those allegations.<sup>23</sup> Considering this factual and procedural background, it cannot be said that the Chamber is responsible for the creation of substantive evidence against

<sup>15</sup> Ibid., para. 15.

<sup>16</sup> Ibid., para. 15.

<sup>17</sup> Ibid., para. 15.

<sup>18</sup> Ibid., para. 16.

<sup>19</sup> See, for example, Decision on Admission of MUP Official Notes and Reasons for the Decision to Deny the Admission of the Official Note of Ivan Čermak, 30 January 2009; see also by way of example D177; P1084; P1089.

<sup>20</sup> T. 23891-23892.

<sup>21</sup> T. 23891.

<sup>22</sup> Order in Relation to the Prosecution's Application for an Order Pursuant to Rule 54 bis, 16 September 2008, para. 18.

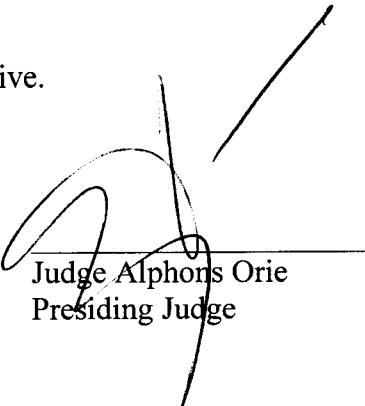
<sup>23</sup> See Prosecution's Application for an Order Pursuant to Rule 54 bis Directing the Government of the Republic of Croatia to Produce Documents or Information, with public and confidential Appendices, 13 June 2008; Prosecution's Further Submissions Relating to Its Application for an Order Pursuant to Rule 54 bis Directing the Government of the Republic of Croatia to Produce Documents or Information, Appendix A, 18 July 2008.

Gotovina or either of his co-accused. Therefore, the Chamber finds that the Decision does not involve Gotovina's right to be tried by an independent and impartial tribunal.

9. Considering the nature of the Decision and of the Official Notes as described above, the Chamber finds that the Decision does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Having found that the first of the two cumulative requirements in Rule 73 (B) of the Rules is not met, the Chamber will not address the second requirement.

10. 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 twentieth day of January 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**