

IT-06-90-T
D 18839- D 18835
15 JANUARY 2009

18839
PK

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:

15 January 2009

Original:

English

IN TRIAL CHAMBER I

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

Acting Registrar: Mr John Hocking

Decision of: 15 January 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON THE GOTOVINA DEFENCE'S MOTION TO ORDER THE
PROSECUTION TO SHOW A PHOTO SPREAD TO WITNESS 3

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

Procedural History and Submissions of the Parties

1. On 21 April 2008, as Witness 3 was about to testify, the Gotovina Defence indicated in court that it had been in contact with the Croatian authorities, and obtained a photo of a person who might be a suspect in the killing incident about which Witness 3 was going to testify.¹ The Gotovina Defence wished to show the photo to the witness confidentially, due to an ongoing Croatian criminal investigation.² The Prosecution noted the importance of following proper procedure when showing to a witness a picture of a suspect in a criminal investigation.³ The Chamber noted that the proceedings at the Tribunal should not negatively affect any criminal investigation, and invited the parties to discuss, before showing any photo to Witness 3, how to proceed on the matter and to provide further information to the Chamber.⁴ The Gotovina Defence informed the Chamber that it had agreed with the Prosecution that the Defence would provide the relevant information and photo to the Prosecution, which would prepare a photo spread according to its rules and submit it to Witness 3.⁵

2. On 15 October 2008, the Prosecution filed a report indicating that it had received from the Defence a low-quality print-out of a photo, and had requested from the Croatian Government all information relating to the criminal investigation, including any suspect photos.⁶ The Prosecution indicated further that the Croatian Government had not provided any photo of a sufficient quality to be included in a photo spread, and had stated that it did not have any other photos of the person.⁷ The Croatian Government had also stated that the person did not formally have the status of a suspect, that an investigation was ongoing, and that the only information the Government had as to his possible involvement in the killing incident was that his mother was leaving flowers on the graves of the victims.⁸ In light of this, the Prosecution submitted that conducting a photo spread interview with Witness 3 would not provide the Chamber with relevant and helpful information.⁹

¹ T. 1865.

² T. 1865.

³ T. 1865-1868.

⁴ T. 1866-1867, 1869, 1904.

⁵ T. 1924.

⁶ Prosecution's Report Regarding Suspect Identification, 15 October 2008 ("Prosecution Report"), paras 2, 4, 6, Appendices A, B and D.

⁷ Prosecution Report, paras 3, 5, 7, Appendices C and E.

⁸ Prosecution Report, paras 3, 5, 7, Appendices C and E.

⁹ Prosecution Report, para. 8.

3. On 29 October 2008, the Gotovina Defence filed a request for the Chamber to order the Prosecution to conduct the photo spread interview with Witness 3.¹⁰ It argued that the parties had agreed that the Prosecution would do so, and that the Chamber had endorsed the agreement.¹¹ Regardless of the person's suspect status, the Gotovina Defence argued, he was "a person of interest" in Croatian investigations into the killing incident.¹² The Gotovina Defence also noted that it would have been entitled to show a photo spread to Witness 3 in cross-examination, and would have done so but for the agreement with the Prosecution.¹³ Finally, the Gotovina Defence argued that there was no harm in showing a photo spread to Witness 3, and that the Prosecution had provided insufficient reasons not to do it.¹⁴

4. On 4 November 2008, the Prosecution filed a response requesting that the Chamber deny the Gotovina Motion.¹⁵ It argued that the Gotovina Defence had in substance filed a motion, although it had named it a "response", since the Prosecution Report contained no request.¹⁶ The Prosecution argued further that it would be a waste of resources to show the witness a photo spread incorporating a low-quality photo of a person with very tenuous links to the killing incident.¹⁷

5. On 14 November 2008, the matter was discussed in court.¹⁸ The Gotovina Defence indicated that it had received information from the Croatian authorities that, in addition to his mother visting the graves of the victims, the alleged suspect had an extensive criminal history and had been arrested in Slovenia several days after the killing incident on unrelated charges.¹⁹ The Gotovina Defence argued that, due to the agreement with the Prosecution which the Prosecution no longer intended to respect, it had been denied the opportunity to put the photo to Witness 3 during cross-examination, in violation of Article 21 of the Statute of the Tribunal.²⁰ The Prosecution responded that the agreement between the parties was based on the Defence's representations in court on 21 April 2008, and reiterated that conducting a

¹⁰ Defendant Ante Gotovina's Response to Prosecutions's Report Regarding Suspect Identification, 29 October 2008 ("Gotovina Motion"), para. 6.

¹¹ Gotovina Motion, paras 3, 6.

¹² Gotovina Motion, para. 4.

¹³ Gotovina Motion, paras 4-5.

¹⁴ Gotovina Motion, para. 5.

¹⁵ Prosecution Response to Defence Request Regarding Suspect Identification, 4 November 2008 ("Prosecution Response"), para. 4.

¹⁶ Prosecution Response, para. 1.

¹⁷ Prosecution Response, paras 2-3.

¹⁸ T. 11840-11847.

¹⁹ T. 11840-11841.

²⁰ T. 11841-11842, 11845-11846.

photo spread with the available low-quality photo of a person with almost no link to the killing incident would be unreliable and of no assistance to the Chamber.²¹

Discussion

6. Under Rule 54 of the Tribunal's Rules of Procedure and Evidence the Chamber may issue orders necessary for the conduct of trial. There is no dispute between the parties that they agreed, on 21 April 2008, that the Defence would provide all relevant information and the photo of the alleged suspect to the Prosecution, which would prepare a photo spread according to its rules and submit it to Witness 3. The Chamber endorsed, at that time and on the basis of the information available to it then, the agreement between the parties. Since 21 April 2008, the parties have submitted, on the record, additional information regarding the alleged suspect. This information indicates that the grounds of suspicion against him are very limited and that he was never a formal suspect in a Croatian criminal investigation into the killing incident. The Gotovina Defence submits that the alleged suspect is "a person of interest" in Croatian investigations into the killing incident, and relies on the alleged suspect's mother visiting the graves of the victims, his extensive criminal history and his arrest in Slovenia several days after the killing incident on unrelated charges. The information before the Chamber does not suggest any further basis for the alleged suspect being the object of Croatian investigations into the killing incident. The reproduction of the photo contained in Appendix C of the Prosecution Report is of an insufficient quality to allow the Chamber to conclude that a meaningful photo spread interview could be conducted. The Chamber is therefore not convinced, on the basis of the present circumstances and information before it, that the order sought by the Gotovina Defence would be necessary for the conduct of the trial.

²¹ T. 11842-11844, 11846-11847.

Disposition

7. For the foregoing reasons, the Chamber **DENIES** without prejudice the Gotovina Defence's request to order the Prosecution to conduct a photo spread interview with Witness 3.

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



Judge Alphons Orié
Presiding Judge

Dated this 15th day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]