



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-AR73.5  
Date: 14 February 2011  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Andrésia Vaz  
Judge Theodor Meron

**Registrar:** Mr. John Hocking

**Decision of:** 14 February 2011

**PROSECUTOR**

v.

**ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ**

***PUBLIC***

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**DECISION ON GOTOVINA DEFENCE APPEAL AGAINST  
12 MARCH 2010 DECISION ON REQUESTS FOR PERMANENT  
RESTRAINING ORDERS DIRECTED TO THE REPUBLIC OF  
CROATIA**

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**Office of the Prosecutor:**

Mr. Alan Tieger

**Republic of Croatia:**

via the Embassy of the Republic of Croatia to The Netherlands, The Hague

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Mr. Gregory W. Kehoe, Mr. Luka S. Mišetić and Mr. Payam Akhavan for Ante Gotovina  
Mr. Stephen Kay QC and Ms. Gillian Higgins for Ivan Čermak  
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mladen Markač

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1. The Appeals Chamber of the 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of an Appeal filed on 28 April 2010 by Counsel for Ante Gotovina (“Gotovina”)<sup>1</sup> against the “Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia” rendered by Trial Chamber I (“Trial Chamber”) on 12 March 2010 (“Impugned Decision”).<sup>2</sup> The Office of the Prosecutor (“Prosecution”) filed its response on 13 May 2010.<sup>3</sup> Gotovina filed his reply on 17 May 2010.<sup>4</sup>

## I. BACKGROUND

2. On 13 June 2008, the Prosecution requested the Trial Chamber to issue an order pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) directing the Republic of Croatia (“Croatia”) to produce military documents relevant to artillery operations carried out during “Operation Storm” (“Operation Storm Documents”).<sup>5</sup> In its application, the Prosecution contended that the Operation Storm Documents existed, but that Croatia was unwilling to provide them and had in fact removed or concealed some of them from use in the *Ante Gotovina et al.* case.<sup>6</sup>

<sup>1</sup> Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 28 April 2010 (“Appeal”).

<sup>2</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 12 March 2010.

<sup>3</sup> Re-Filed Prosecution’s Response to Gotovina Defence Appeal Concerning Permanent Restraining Orders to the Republic of Croatia, 13 May 2010 (“Response”). Following the filing of the Appeal on 28 April 2010, the Prosecution filed its Initial Response on 10 May 2010. *See* Prosecution’s Response to Gotovina Defence Appeal Concerning Permanent Restraining Orders to the Republic of Croatia, 10 May 2010 (public with public and confidential annexes) (“Initial Response”). However, on 13 May 2010, the Appeals Chamber found that the Initial Response unjustifiably exceeded the word limit and ordered the Prosecution to re-file it no later than 17 May 2010, and Gotovina to file his reply, if any, within four days of the re-filing of the Prosecution’s Initial Response. *See* Decision on Ante Gotovina’s Motion to Strike the Prosecution’s Response Due to Violation of the Practice Direction on Length of Briefs and Motions, 13 May 2010, pp. 2-3.

<sup>4</sup> Ante Gotovina’s Reply in Support of His Interlocutory Appeal Against 12 March 2010 Decision, 17 May 2010 (“Reply”).

<sup>5</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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 (public with public and confidential annexes) (“Application of 13 June 2008”), paras 1, 5, 61, Annex D (confidential). The Prosecution alternatively requested that Croatia report to the Trial Chamber and Prosecution on Croatia’s progress in locating the Operation Storm Documents. *See ibid.*, paras 5, 61. The document request is also referred to as the “Artillery Document Request” in the Application of 13 June 2008. *See ibid.*, paras 15(a), 61, Annex D (confidential). In this Application, the Prosecution additionally sought “Special Police documents relevant to the activities and operations of Mladen Markač and his subordinate Special Police units during and following Operation Storm”. *See ibid.*, para. 1. These documents are also referred to as “RFA 739” in the Application of 13 June 2008, but are not the subject of this appeal. *See ibid.*, paras 15(b), 61, Annex E (confidential). *See also* *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Corrigendum to Prosecution’s Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 19 June 2008.

<sup>6</sup> Application of 13 June 2008, paras 3, 43-53, Annex N (confidential).

3. On 18 July 2008, the Prosecution confidentially filed further submissions with an annexed report from Croatia dated 14 July 2008, which informed the Prosecution of the results of the investigations conducted so far with respect to the Operation Storm Documents and listed the investigative steps it intended to take in continuing to search for them.<sup>7</sup> On the same day, the Trial Chamber held a hearing, during which the representatives of Croatia requested that the Trial Chamber reject the Application of 13 June 2008 and allow its authorities to continue investigations in search of the Operation Storm Documents.<sup>8</sup> Croatia further indicated that the Operation Storm Documents may not or no longer exist due to the conditions prevailing at the time of "Operation Storm".<sup>9</sup> Croatia refuted the Prosecution's claim that it was unwilling to cooperate and asserted that it was not obstructing the Prosecution's case.<sup>10</sup> Croatia reaffirmed its willingness to comply with its obligations to cooperate with the Tribunal and to take all the necessary steps to obtain the Operation Storm Documents. It further submitted that it initiated an investigation to search for the Operation Storm Documents, which has yielded positive results and is ongoing.<sup>11</sup>

4. On 16 September 2008, the Trial Chamber deferred its decision on the Prosecution's Application of 13 June 2008 and ordered Croatia to intensify and broaden its investigation in search of the Operation Storm Documents and to provide the Prosecution with any requested material it found during the investigation.<sup>12</sup> It further ordered Croatia to provide the Trial Chamber and the Prosecution with a detailed report by 20 October 2008 specifying the efforts taken by Croatia to obtain the Operation Storm Documents.<sup>13</sup> Since the issuance of the 16 September 2008 Order,

<sup>7</sup> Letter from the Department for the Cooperation with International Criminal Courts of the Ministry of Justice of the Republic of Croatia addressed to the ICTY Liaison Office in Zagreb Re. "ICTY OTP Request for Assistance No. 723 and 739 – delivery of response and documentation", dated 14 July 2008 (confidential) ("Croatia Report of 14 July 2008"), pp. 8-14, attached as confidential Annex A to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, 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, 18 July 2008 (confidential with confidential Annex A).

<sup>8</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Transcript, 18 July 2008 ("Transcript of 18 July 2008"), p. 6766.

<sup>9</sup> *Ibid.*, p. 6763 ("In relation to this specific request by the Prosecution, it's true that the Republic of Croatia is encountering certain problems, and problems are of the following objective nature: In reference to the so-called artillery diaries, because these military wartime documents were not adequately maintained because of the conditions prevailing at the time and because of some failings in this aspect in our archives, it has not been possible until now to find all the requested documents. Probably, it doesn't exist or some of it doesn't exist in our official archives, but the Prosecutor's office is insinuating, in a way, that these documents have deliberately been taken away or concealed. We cannot accept such accusations. These accusations are something that we most forcefully reject."). See also *ibid.*, pp. 6769-6770, 6775; Croatia Report of 14 July 2008, p. 10.

<sup>10</sup> Transcript of 18 July 2008, pp. 6761-6763.

<sup>11</sup> *Ibid.*, pp. 6763-6764.

<sup>12</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order in Relation to the Prosecution's Application for an Order Pursuant to Rule 54 *bis*, 16 September 2008 ("16 September 2008 Order"), paras 16-17.

<sup>13</sup> *Ibid.*, para. 18.

Croatia has regularly reported to the Trial Chamber on the progress of its investigations in pursuit of the Operation Storm Documents sought by the Prosecution.<sup>14</sup>

5. On 1 April 2009, while investigations pursuant to the 16 September 2008 Order were ongoing, Gotovina requested the Trial Chamber to issue a restraining order against the Croatian authorities ordering them to cease all criminal investigations and prosecutions against Mr. Marin Ivanović (“Ivanović”), an investigator for the Gotovina Defence team, and “any other person which emanate from acts related to the Defence’s fulfillment of its function” in his case.<sup>15</sup> Gotovina made this request after the Municipal State Prosecutor’s Office in Zagreb filed an indictment on 17 November 2008 against Ivanović charging him with alleged concealment of archival material.<sup>16</sup> Gotovina contended that the criminal investigation was based on an allegation that, in 2007, Mr. Ante Kardum, a commander during Operation Storm, gave Ivanović two documents during a witness interview.<sup>17</sup> According to Gotovina, these documents were not sought by the Prosecution, but were relevant to his defence case.<sup>18</sup> Gotovina asserted that the States of the former Yugoslavia are “obligated under Article 29 of the Statute to allow the Defence to discharge its duties ‘free from any possible impediment or hindrance.’”<sup>19</sup> He submitted that this included the right of Ivanović to

<sup>14</sup> In the interim between the 16 September 2008 Order and the Impugned Decision filed on 12 March 2010, Croatia submitted fifteen reports. It further submitted three additional reports until 15 June 2010. For a summary of the reports, see *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution’s Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Croatia to Produce Documents or Information, 26 July 2010 (“26 July 2010 Decision”), paras 3-11. On 4 June 2009, Croatia informed the Trial Chamber that it “is certain that it fulfilled all the obligations pursuant to [...] the 16 September 2008 Order.” It therefore requested a decision on the Prosecution’s Application of 13 June 2008 for an order pursuant to Rule 54 *bis* of the Rules.<sup>14</sup> See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, The Government of the Republic of Croatia’s Urgent Request for a Decision in relation to the Prosecution’s Application for an Order pursuant to Rule 54 *bis*, 4 June 2009 (“Request of 4 June 2009”), paras 13-14, 22 (The Request of 4 June 2009 was made public per instruction from Croatia. See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Letter from the Director General of Directorate for International Cooperation, International Legal Aid and Cooperation with the International Criminal Courts of the Ministry of Justice of the Republic of Croatia addressed to the Senior Legal Officer of Trial Chamber I Re. “The Government of the Republic of Croatia’s Urgent Request for a Decision in relation to the Prosecution’s Application for an Order pursuant to Rule 54 *bis*”, 9 June 2009). On 8 September 2009, Croatia wrote a letter to the Trial Chamber seeking information regarding its Request of 4 June 2009.<sup>14</sup> On 11 September 2009, the acting Senior Legal Officer of the Trial Chamber responded to Croatia that “[u]ntil any new order is issued, the Order of 16 September 2008 remains in force.”<sup>14</sup> See Letter from the Director General of Directorate for International Cooperation, International Legal Aid and Cooperation with the International Criminal Courts of the Ministry of Justice of the Republic of Croatia addressed to the Senior Legal Officer of Trial Chamber I Re. “The Government of the Republic of Croatia’s Urgent Request for a Decision in relation to the Prosecution’s Application for an Order pursuant to Rule 54 *bis*”, dated 8 September 2009, attached as an annex to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Letter from the Acting Senior Legal Officer of Trial Chamber I addressed to the Director General of Directorate for International Cooperation, International Legal Aid and Cooperation with the International Criminal Courts of the Ministry of Justice of the Republic of Croatia, 11 September 2009.

<sup>15</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Motion for a Restraining Order Against the Republic of Croatia Pursuant to Rule 54, 1 April 2009 (“Motion of 1 April 2009”), para. 21(a). See *ibid.*, para. 1.

<sup>16</sup> *Ibid.*, para. 2, Annex A.

<sup>17</sup> *Ibid.*, para. 2, Annex A. See also Appeal, para. 7.

<sup>18</sup> Motion of 1 April 2009, para. 2; Appeal, para. 7.

<sup>19</sup> Motion of 1 April 2009, para. 3, citing *Prosecutor v. Tihomir Blaškić*, 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 (“*Blaškić Decision*”), para. 53.

be free from legal process “for acts emanating solely from the Defence’s performance of its function before the ICTY.”<sup>20</sup>

6. On 23 July 2009, the Trial Chamber denied the Motion of 1 April 2009, finding that Ivanović had not “invoked functional immunity as a ground for dismissal” of the case against him in the Croatian court, nor established that invoking functional immunity before the Croatian court “would necessarily result in [its] rejection”.<sup>21</sup> Thus, the Trial Chamber concluded that Gotovina “has not demonstrated the exceptional circumstances necessary to justify the requested intervention in the Croatian proceedings against [...] Ivanović”.<sup>22</sup>

7. On 29 September 2009, Gotovina again requested a restraining order against Croatia pursuant to Rule 54 of the Rules to terminate the criminal proceedings against Ivanović.<sup>23</sup> Gotovina argued that the Municipal Criminal Court in Zagreb had denied Ivanović’s motion to cease the proceedings on the basis that he did not have functional immunity as a defence investigator for Gotovina at the Tribunal.<sup>24</sup>

8. The Motion of 29 September 2009 for a restraining order against the Croatian authorities was pending when, on 9 December 2009, the Croatian authorities arrested Ivanović<sup>25</sup> and also detained Mr. Jozo Ribičić (“Ribičić”), another member of the Gotovina Defence team, and Mr. Željko Hučić (“Hučić”), a former member of the Gotovina Defence team.<sup>26</sup> The Croatian authorities also conducted searches of several locations and seized material and computers affiliated with the Gotovina Defence.<sup>27</sup> Following this action by the Croatian authorities, on 10 December 2009, pursuant to Rule 73 of the Rules, Gotovina requested the Trial Chamber to issue temporary and permanent restraining orders against Croatia to: (i) cease all actions against Ivanović; (ii) stop all searches of records and computers already in its custody; and (iii) desist from future searches directed at the Gotovina Defence offices or members.<sup>28</sup> On 10 December 2009,

<sup>20</sup> Motion of 1 April 2009, para. 20.

<sup>21</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Defendant Ante Gotovina’s Motion for a Restraining Order Against the Republic of Croatia, 23 July 2009 (“23 July 2009 Decision”), paras 20-22.

<sup>22</sup> *Ibid.*, para. 21.

<sup>23</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Renewed Motion for a Restraining Order Against the Republic of Croatia Pursuant to Rule 54, 29 September 2009 (“Motion of 29 September 2009”), para. 3.

<sup>24</sup> *Ibid.*, para. 2, Annex A.

<sup>25</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Motion for *Subpoena Duces Tecum* to Prosecutor Serge Brammertz to Appear at the Hearing of 16 December 2009, 10 December 2009 (“Motion of 10 December 2009”), para. 5; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Transcript, 10 December 2009 (“Transcript of 10 December 2009”), pp. 26009, 26011. *See also ibid.*, p. 26003.

<sup>26</sup> Transcript of 10 December 2009, pp. 26009, 26012. *See also* Motion of 10 December 2009, para. 5.

<sup>27</sup> Transcript of 10 December 2009, pp. 26003-26004, 26009, 26011-26012. *See also* Motion of 10 December 2009, para. 5. For details on the Gotovina Defence locations searched and material seized by Croatian authorities, *see* Impugned Decision, para. 19.

<sup>28</sup> Transcript of 10 December 2009, pp. 26023-26024, 26028-26030.

Mladen Markač (“Markač”) joined Gotovina, also requesting a temporary and permanent restraining order directed at Croatia to desist from any future actions against its Defence members and offices, as a preventive measure.<sup>29</sup>

9. On 11 December 2009, the Trial Chamber issued an oral interim order (“11 December 2009 Interim Order”) directing Croatia, until further notice, to stop all inspection of the items in its custody and belonging to the present or former members of the Gotovina Defence team or their relatives. It further ordered Croatia to keep the materials under seal and in its possession until further notice.<sup>30</sup> On 18 December 2009, the Trial Chamber denied the remaining requests for temporary restraining orders, invited Croatia, Gotovina and the Prosecution to file written submissions regarding the requests for permanent restraining orders, and noted that Markač and Ivan Čermak were not precluded from doing the same.<sup>31</sup> On the same day, the Trial Chamber provided its written reasoning for the 11 December 2009 Interim Order.<sup>32</sup>

10. On 4 January 2010, Gotovina filed a written submission requesting the Trial Chamber to issue a permanent restraining order to prevent Croatia from taking investigative steps against any member of the Gotovina Defence team without prior order from the Trial Chamber.<sup>33</sup> The Prosecution, Croatia and the Markač Defence team also filed submissions pursuant to the 18 December 2009 Invitations.<sup>34</sup> The Prosecution requested that the Trial Chamber deny Gotovina’s requests and, instead, apply a procedural mechanism to ensure that searches of seized Defence

<sup>29</sup> *Ibid.*, p. 26024.

<sup>30</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Transcript, 11 December 2009 (“Transcript of 11 December 2009”), pp. 26160-26161.

<sup>31</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber’s Order of 11 December 2009, 18 December 2009 (“18 December 2009 Decision”), paras 13-14, 18; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Invitations to the Republic of Croatia, the Gotovina Defence, and the Prosecution in Relation to the Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 18 December 2009 (“18 December 2009 Invitations”).

<sup>32</sup> 18 December 2009 Decision, paras 15-17.

<sup>33</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Response to the Trial Chamber’s Invitation of 18 December 2009, 4 January 2010 (confidential), para. 46. *See also* *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Additional Submission in Response to the Trial Chamber’s Invitation of 18 December 2009, 21 January 2010 (confidential) (“Gotovina Submission of 21 January 2010”), para. 38; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Submission of Witness Statement of Marin Ivanovic [*sic*], 22 January 2010 (confidential).

<sup>34</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Response to Gotovina’s Submission of 4 January 2010, 11 January 2010 (confidential with confidential annex) (“Prosecution Submissions of 11 January 2010”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Corrigendum to Prosecution’s Response to Gotovina’s Submission of 4 January 2010, 12 January 2010 (confidential) (“Corrigendum to Prosecution Submissions of 11 January 2010”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Submission by State in Response to Trial Chamber’s Invitation of 18 December 2009, 14 January 2010 (confidential) (“Croatia Submissions of 14 January 2010”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Submissions Pursuant to the Trial Chamber’s 18 December 2009 Invitation, 21 January 2010 (confidential with public annexes) (“Prosecution Submissions of 21 January 2010”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Mladen Markač’s Joinder and Supplement to Defendant Ante Gotovina’s Additional Submission in Response to the Trial Chamber’s Invitation of 18 December 2009, 26 January 2010 (confidential) (“Markač Submissions of 26 January 2010”).

materials did not conflict with the rights of the accused.<sup>35</sup> The Markač Defence argued that “a reasonable likelihood” existed that members or offices of its own Defence team would be investigated and/or searched and requested the Trial Chamber to issue a permanent cease and desist order to prevent Croatia from taking investigative steps against any member of the Markač Defence team without a prior order of the Trial Chamber.<sup>36</sup>

11. On 12 March 2010, the Trial Chamber issued its Impugned Decision, in which it addressed Gotovina’s request for permanent restraining orders against Croatia pursuant to Rule 54 of the Rules, and the Markač request for a restraining order precluding Croatia from taking investigative steps against any members of the Markač Defence without a prior order of the Trial Chamber. The Trial Chamber: (i) lifted the 11 December 2009 Interim Order, which directed Croatia to stop all inspection of the materials in its custody and belonging to the Gotovina Defence team and its present or former members or their relatives; (ii) established a procedure for review of the seized materials in order to preserve Gotovina’s rights under Rules 70 (A) and 97 of the Rules; (iii) ordered Croatia to treat as confidential any information contained in the seized materials and subject to protective measures; (iv) denied the request for a permanent restraining order directing Croatia to stop all searches of records and computers in its custody which were seized from offices or members of the Gotovina Defence; (v) denied the requests for permanent restraining orders precluding Croatia from taking investigative steps against any member and/or office of the Gotovina or Markač Defence teams without a prior order of the Chamber; and (vi) denied the requests for a permanent restraining order directing Croatia to cease its preliminary investigations and criminal prosecutions against Ivanović and Ribičić.<sup>37</sup>

12. Gotovina’s request for interlocutory appeal against the Impugned Decision was granted on 21 April 2010.<sup>38</sup> In the Certification Decision, the Trial Chamber suspended the deadlines set out in relation to the orders directed at Gotovina and Croatia in paragraphs 77(4)(c) through (f) of the Impugned Decision, pending final resolution of the Appeal by the Appeals Chamber.<sup>39</sup>

<sup>35</sup> Prosecution Submissions of 11 January 2010, para. 35; Corrigendum to Prosecution Submissions of 11 January 2010, para. 35; Prosecution Submissions of 21 January 2010, paras 19-22.

<sup>36</sup> Markač Submissions of 26 January 2010, paras 8-10.

<sup>37</sup> Impugned Decision, para. 77.

<sup>38</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Defence Request for Certification to Appeal the Trial Chamber Decision of 12 March 2010, 21 April 2010 (“Certification Decision”). See also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Mladen Markač’s Joinder to Defendant Ante Gotovina’s Request for Certificate to Appeal the Trial Chamber’s Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 8 April 2010. This motion was dismissed by the Trial Chamber as it was filed out of time. See Certification Decision, paras 1, 11.

<sup>39</sup> Certification Decision, para. 11. The suspended orders included the procedure that was to be instituted in relation to documents seized by Croatia from the Gotovina Defence that Gotovina claimed were protected pursuant to Rules 70 (A) and 97 of the Rules. See Impugned Decision, para. 77(4).

13. On 11 June 2010, the Trial Chamber re-affirmed the continued effect of the 16 September 2008 Order and emphasised that the decision of whether or when the 16 September 2008 Order has been complied with remains solely within its competence.<sup>40</sup> Finally, on 26 July 2010, after deferring its decision for two years, the Trial Chamber denied the Prosecution's Application of 13 June 2008.<sup>41</sup> The Trial Chamber found that, "[h]aving considered the uncertainties [...] regarding [the] creation, continued existence and/or whereabouts of the documents requested by the Prosecution", it would not be appropriate to issue an order to Croatia pursuant to Rule 54 *bis* of the Rules to produce the Operation Storm Documents.<sup>42</sup>

## II. STANDARD OF REVIEW

14. The Appeals Chamber recalls that Rule 54 of the Rules allows a judge or a Trial Chamber, at the request of either party or *proprio motu*, to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. The Appeals Chamber recalls that an interlocutory appeal of such orders is not a *de novo* review of the Trial Chamber's order but is limited to establishing whether a Trial Chamber has abused its discretion by committing a "discernible error".<sup>43</sup> The Appeals Chamber will grant relief with respect to such a discretionary decision only where it is found to be: (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>44</sup>

<sup>40</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Transcript, 11 June 2010, p. 28983: "The decision to grant the request in part and the [16 September 2008 O]rder to intensify and broaden the investigation and report the results of the investigation to the Chamber and the Prosecution were issued pursuant to Rule 54. This is indicated in the [16 September 2008 O]rder itself. The order remains in force in its entirety until it is amended or replaced by another order or decision issued by the Chamber. The Chamber did not set a time-limit on the validity of the order, although it did set a deadline for the Republic of Croatia to report to the Prosecution and the Chamber. The Chamber notes that Croatia has indicated in various filings that, in its view, it has complied with the order; while the Prosecution has made indications that, in its view, Croatia has not done so. The Chamber has understood these indications only as submissions by the Prosecution and by the Republic of Croatia and emphasises that the decision of whether or when the order has been complied with remains solely within the competence of the Chamber. And this concludes the Chamber's decision."

<sup>41</sup> 26 July 2010 Decision, para. 129 (the Appeals Chamber notes that this is the second paragraph numbered 129 and is on p. 53).

<sup>42</sup> *Ibid.*, para. 137.

<sup>43</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.8, Decision on Appeal From Order on the Trial Schedule, 19 July 2010 ("Karadžić Decision"), para. 5; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007 ("Šeparović Decision"), para. 11; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007 ("Lukić and Lukić Decision"), paras 4-5; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("Stanišić Decision"), para. 6.

<sup>44</sup> *Karadžić Decision*, para. 5; *Šeparović Decision*, para. 11; *Lukić and Lukić Decision*, para. 5; *Stanišić Decision*, para. 6.



### III. DISCUSSION

15. In the Appeal, Gotovina argues that the Trial Chamber erred in: (i) concluding that the requested relief would amount to a significant intervention in Croatia's domestic jurisdiction and that therefore only exceptional circumstances would justify such intervention (first ground of appeal);<sup>45</sup> (ii) concluding without taking testimony from witnesses that Croatia's actions against members of the Gotovina Defence were not attributable to the Prosecution, and that the Prosecution did not commit professional misconduct (second ground of appeal);<sup>46</sup> (iii) failing to take measures to protect the confidentiality of material protected under Rules 70 (A) and 97 of the Rules and improperly referring the matter to the President of the Tribunal ("President") (third ground of appeal);<sup>47</sup> (iv) failing to order the termination of domestic criminal proceedings against members of the Gotovina Defence for conduct that was consistent with the fulfilment of their official Tribunal functions (fourth ground of appeal);<sup>48</sup> (v) failing to preclude Croatia from taking further investigative steps against members of the Gotovina Defence, absent an order or warrant issued by the Trial Chamber (fifth ground of appeal);<sup>49</sup> and (vi) finding that members of the defence do not enjoy functional immunity under Article 30(4) of the Statute (sixth ground of appeal).<sup>50</sup>

16. Gotovina accordingly requests the Appeals Chamber to issue an order, pursuant to Rule 54 of the Rules, requiring Croatia to: (i) cease all criminal proceedings against members of the Gotovina Defence for acts which fall within the fulfilment of their official functions before the Tribunal; (ii) cease and desist from all current and future investigative activities against members of the Gotovina Defence for such acts, including searches of Defence members or premises, absent an order or search warrant issued by the Trial Chamber; and (iii) return all materials seized from members of the Gotovina Defence.<sup>51</sup>

17. The Appeals Chamber will first address the sixth ground of appeal, as the determination of whether members of the Gotovina Defence enjoy functional immunity under Article 30(4) of the Statute impacts upon the outcome of other grounds of appeal.

<sup>45</sup> Appeal, paras 17(a), 21-27, 60(a).

<sup>46</sup> *Ibid.*, paras 17(b), 28-39, 60(b).

<sup>47</sup> *Ibid.*, paras 17(c), 40-42, 60(c).

<sup>48</sup> *Ibid.*, paras 17(d), 43-50, 60(d).

<sup>49</sup> *Ibid.*, paras 17(e), 51-54, 60(e).

<sup>50</sup> *Ibid.*, paras 17(f), 55-59, 60(f).

<sup>51</sup> *Ibid.*, para. 60(g).

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## A. Sixth Ground of Appeal

### 1. Trial Chamber findings

18. In the Impugned Decision, the Trial Chamber considered whether members of the Gotovina Defence should be granted functional immunity for acts related to the fulfilment of their official functions before the Tribunal.<sup>52</sup> It began by considering whether defence investigators fall within the scope of Article 30(4) of the Statute.<sup>53</sup> It stated that:

Articles 30 (2) and 30 (3) of the Statute provide the privileges and immunities that the judges, the Prosecutor, the Registrar, and the staff of the Prosecutor and of the Registrar shall enjoy. Article 30 (4) of the Statute provides that other persons required at the seat of the Tribunal shall be accorded such treatment as is necessary for the proper functioning of the Tribunal.<sup>54</sup>

With respect to defence counsel, the Trial Chamber found that they are required at the seat of the Tribunal to defend the accused and thus can avail themselves of Article 30(4) of the Statute.<sup>55</sup> The Trial Chamber also found that the tasks performed by defence investigators are necessary to enable defence counsel to fulfil their functions, and therefore, they should also benefit from protection under Article 30(4) of the Statute.<sup>56</sup>

19. In considering the treatment that should be accorded to members of the defence under Article 30(4) of the Statute, the Trial Chamber stated that, unlike Articles 30(2) and 30(3) of the Statute, Article 30(4) of the Statute does not refer to the Vienna Convention on Diplomatic Relations or the Convention on the Privileges and Immunities of the United Nations.<sup>57</sup> The Trial Chamber also noted that Article 30(4) of the Statute does not otherwise explicitly provide for personal or functional immunity for members of the defence.<sup>58</sup> Further, the Trial Chamber recalled that the treatment to be accorded to members of the defence has not been further defined by a resolution of the Security Council, a multilateral treaty, or a bilateral agreement with Croatia.<sup>59</sup>

20. The Trial Chamber also considered an opinion by Mr. Larry D. Johnson, Assistant Secretary-General for the Office of Legal Affairs of the United Nations, which was provided to the Registrar of the International Criminal Tribunal for Rwanda (“ICTR”) and addressed the question

<sup>52</sup> Impugned Decision, paras 48-61.

<sup>53</sup> *Ibid.*, para. 50.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, paras 51-53, referring to Vienna Convention on Diplomatic Relations, 18 April 1961, U.N.T.S. vol. 500, p. 95; Convention on the Privileges and Immunities of the United Nations, adopted by General Assembly Resolution A/RES/22(1)A, 13 February 1946, U.N.T.S. vol. 1, p. 15 (“UN Convention on Privileges and Immunities”).

<sup>58</sup> Impugned Decision, para. 53.

<sup>59</sup> *Ibid.* See also *ibid.*, para. 49, where the Trial Chamber indicated that it had been previously inclined to accept that functional immunity exists for defence counsel before the Tribunal, but that the observance of functional immunity

of whether defence investigators at the ICTR should be entitled to functional immunity in the execution of their duties.<sup>60</sup> The Chamber found that the Johnson Legal Opinion could not assist in the current matter as it did not conclude that members of the defence enjoy functional immunity under Article 29(4) of the Statute of the ICTR, which mirrors Article 30(4) of the Statute of the Tribunal.<sup>61</sup> In this regard, the Trial Chamber noted that the Johnson Legal Opinion suggested that functional immunity existed for defence investigators on the basis of the Agreement between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the ICTR (“ICTR Headquarters Agreement”) and did not refer to Article 29(4) of the Statute of the ICTR.<sup>62</sup>

21. The Trial Chamber further considered that domestic jurisdictions do not generally provide immunity from legal process to members of the defence or prosecution regarding the performance of their duties before domestic criminal courts, and that functional immunity was therefore not indispensable for the parties to fulfil their functions in a criminal trial.<sup>63</sup> The Trial Chamber noted that it was also important that States be permitted to investigate and prosecute crimes committed in their territory and that an obligation to refrain from doing so might frustrate this legitimate State interest.<sup>64</sup>

22. In light of these considerations, the Trial Chamber concluded that members of the defence do not enjoy personal or functional immunity from legal process under Article 30(4) of the Statute.<sup>65</sup> However, it found that, under Article 30(4) of the Statute, a State may not improperly subject members of the defence to legal process “with regard to acts that fall within the defence’s fulfilment of its official function before the Tribunal, with the intended or foreseeable result of substantially impeding or hindering the performance by defence members of their functions.”<sup>66</sup>

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would “primarily be a matter to be resolved between said counsel, Croatia, and the United Nations”, referring to 23 July 2009 Decision, paras 19-20.

<sup>60</sup> Impugned Decision, paras 55-56, referring to Legal Opinion of the United Nations Assistant Secretary-General for Legal Affairs, Larry D. Johnson, addressed to ICTR Registrar Re. “Pending Rukundo Motion Seeking Acknowledgement of an Immunity from Legal Process Benefiting a Former ICTR Defence Investigator”, dated 26 November 2007 (“Johnson Legal Opinion”), attached as Annex A to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Defendant Ante Gotovina’s Additional Submission in Support of His Motion for Restraining Order Against the Republic of Croatia, 2 April 2009.

<sup>61</sup> Impugned Decision, para. 55.

<sup>62</sup> *Ibid.*, referring to Agreement between the United Nations and the United Republic of Tanzania Concerning the Headquarters of the International Criminal Tribunal for Rwanda, 31 August 1995, annexed to UN Doc. A/51/399-S/1996/778.

<sup>63</sup> Impugned Decision, para. 58.

<sup>64</sup> *Ibid.*, para. 59.

<sup>65</sup> *Ibid.*, para. 61.

<sup>66</sup> *Ibid.*

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## 2. Arguments of the parties

23. Gotovina submits that the Trial Chamber erred in finding that members of the defence do not enjoy functional immunity under Article 30(4) of the Statute.<sup>67</sup> Gotovina asserts that international criminal justice recognises the need for functional immunity of defence members for activities pertaining to the fulfilment of their functions before an international court.<sup>68</sup> He further argues that the Trial Chamber erred in concluding that members of the defence could be granted some form of immunity only if the State possesses the *mens rea* to substantially impede or hinder the performance by members of the defence of their functions before the Tribunal.<sup>69</sup>

24. The Prosecution responds that: (i) defence members were excluded from the immunities granted to other Tribunal organs under Article 30 of the Statute;<sup>70</sup> (ii) statutes or treaties governing other institutions, not binding on the Tribunal, are not instructive;<sup>71</sup> and (iii) the Johnson Legal Opinion, which recognised functional immunity of defence investigators at the ICTR, relied upon a bilateral agreement between the United Nations and the United Republic of Tanzania, which does not apply to the Tribunal.<sup>72</sup> The Prosecution further argues that the Trial Chamber did not err in deciding to intervene only if it is proven that Croatia intends to and does exercise its jurisdiction in a manner that would impede Gotovina's right to a fair trial.<sup>73</sup> Finally, the Prosecution contends that granting "absolute" functional immunity to members of the defence would allow them to violate domestic criminal laws with impunity.<sup>74</sup>

25. In his Reply, Gotovina notes that both the Trial Chamber in the Impugned Decision and the Prosecution in its Response have acknowledged that functional immunity can be granted under Article 30(4) of the Statute under certain conditions.<sup>75</sup> The error, according to Gotovina, emanates from the Trial Chamber's addition of a State's *mens rea* requirement to the grant of functional immunity.<sup>76</sup>

<sup>67</sup> Appeal, paras 17(f), 55-59, 60(f).

<sup>68</sup> *Ibid.*, paras 55-57, referring to Article 48 of the Rome Statute of the International Criminal Court, 17 July 1998, U.N.T.S. vol. 2187, p. 3; Article 18 of the Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, U.N.T.S. vol. 2271, p. 3; Article XIX of the Agreement between the United Nations and the Kingdom of The Netherlands Concerning the Headquarters of the 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, 27 May 1994, annexed to UN Doc. S/1994/848; Johnson Legal Opinion, para. 7.

<sup>69</sup> Appeal, para. 58, referring to Impugned Decision, para. 61.

<sup>70</sup> Response, para. 53.

<sup>71</sup> *Ibid.*, para. 54.

<sup>72</sup> *Ibid.*, para. 55.

<sup>73</sup> *Ibid.*, para. 56.

<sup>74</sup> *Ibid.*, para. 57.

<sup>75</sup> Reply, para. 28, referring to Impugned Decision, para. 61; Response, para. 56 (In his Reply, Gotovina refers to paragraph 55 of the Response. However, the Appeals Chamber notes that Gotovina mistakenly refers to paragraph 55 of the Initial Response, which was numbered paragraph 56 in the re-filed Response. See *supra*, fn. 3).

<sup>76</sup> Reply, para. 28.

### 3. Analysis

26. The Appeals Chamber is satisfied that the Trial Chamber correctly found that defence investigators benefit from the same protections as defence counsel under Article 30(4) of the Statute of the Tribunal.<sup>77</sup> Article 30(4) of the Statute provides that:

[o]ther persons, including the accused, required at the seat of the [...] Tribunal shall be accorded such treatment as is necessary for the proper functioning of the [...] Tribunal.

27. The Appeals Chamber considers that defence counsel fall within the category of “other persons” required at the seat of the Tribunal to defend the accused. Accordingly, pursuant to Article 30(4) of the Statute, they are to be provided such treatment as is necessary for the proper functioning of the Tribunal.<sup>78</sup> Defence investigators, who facilitate the performance of the duties of defence counsel, have a derivative right to such necessary protections *via* the defence counsel. If such treatment is not extended to defence investigators, defence counsel’s ability to represent the accused may be frustrated.<sup>79</sup>

28. The Appeals Chamber finds, however, that the Trial Chamber erred in finding that defence members do not enjoy functional immunity from legal process under Article 30(4) of the Statute, that is immunity from legal process “with respect to words spoken or written and acts done by them in the course of the performance of their duties as [defence members] before the Tribunal, in order to allow for the proper functioning of the Tribunal in accordance with Article [30] of the Statute.”<sup>80</sup> In particular, it erred in concluding that the absence of an explicit reference to the Vienna Convention on Diplomatic Relations and the UN Convention on Privileges and Immunities from the text of Article 30(4) of the Statute indicated that defence members were denied functional immunity.<sup>81</sup> The Appeals Chamber finds that the Trial Chamber placed undue emphasis on this textual omission. Instead, the Trial Chamber should have focused on what protection was “necessary for the proper functioning of the [...] Tribunal” pursuant to Article 30(4) of the Statute. Similarly, the Trial Chamber erred in emphasising that there was no Security Council Resolution, multilateral treaty, or bilateral agreement with Croatia that defines the treatment to be accorded to

<sup>77</sup> See Impugned Decision, para. 50, where the Trial Chamber considered that “the tasks performed by defence investigators are necessary for the performance by defence counsel of their functions, and that if such treatment is not extended to defence investigators, defence counsel’s ability to carry out their functions would be frustrated” and found that “defence investigators should enjoy such treatment under Article 30(4) of the Statute also.”

<sup>78</sup> *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, 6 October 2010 (“*Erlinder Decision*”), paras 19, 26.

<sup>79</sup> Johnson Legal Opinion, para. 7. See also Impugned Decision, para. 50.

<sup>80</sup> *Erlinder Decision*, para. 26.

<sup>81</sup> Impugned Decision, paras 51-53.

members of the defence, including investigators.<sup>82</sup> Again, the Appeals Chamber finds that the relevant question is whether functional immunity for defence members is “necessary for the proper functioning of the [...] Tribunal”, not whether another treaty or Security Council Resolution provides for such immunity.

29. The Appeals Chamber further observes that the Johnson Legal Opinion did not rely on the ICTR Headquarters Agreement as the sole basis for finding that functional immunity was applicable to defence investigators at the ICTR. While the Johnson Legal Opinion noted, in its conclusion, that a defence investigator should be entitled to immunity pursuant to the ICTR Headquarters Agreement,<sup>83</sup> it also noted that Article 29(4) of the Statute of the ICTR could be interpreted as providing immunity for members of the defence.<sup>84</sup> It stated that the argument for immunity under Article 29(4) was “strengthened” by the ICTR Headquarters Agreement.<sup>85</sup> Accordingly, the Trial Chamber erred by relying upon the Johnson Legal Opinion in support of its conclusion that members of the Gotovina Defence were not entitled to functional immunity under the Statute.

30. The Appeals Chamber further finds that the Trial Chamber erred in concluding that, because functional immunity is not generally provided to the defence or prosecution in domestic criminal trials, it is not “indispensable” to criminal trials.<sup>86</sup> The Appeals Chamber considers that in drawing this conclusion, the Trial Chamber failed to properly consider the fundamental differences between a domestic court and an international criminal tribunal.

31. In this regard, the Appeals Chamber recalls that “the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension.”<sup>87</sup> The Appeals Chamber considers that members of the defence working in an international criminal court operate in a different legal environment than those working in domestic criminal courts. Finding and interviewing witnesses, conducting on-site investigations, and gathering evidence in a State’s territorial jurisdiction may be more difficult without the grant of functional immunity, as there is always a risk that a State could interfere by exercising its jurisdiction in such a way as to impede or hinder the activities of the defence.<sup>88</sup>

<sup>82</sup> *Ibid.*, para. 53.

<sup>83</sup> Johnson Legal Opinion, para. 20.

<sup>84</sup> *Ibid.*, paras 6-7.

<sup>85</sup> *Ibid.*, para. 8.

<sup>86</sup> See Impugned Decision, para. 58.

<sup>87</sup> *Blaškić* Decision, para. 40.

<sup>88</sup> Cf. *Blaškić* Decision, para. 53, where the Appeals Chamber held that, in the case of the States of the former Yugoslavia, “to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardise investigations by the Prosecutor or defence counsel. In particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the [...] Tribunal to have State officials present on such occasions. The States [...]

Permitting freedom of action in these situations by virtue of a grant of functional immunity protects individuals before the Tribunal in a manner unnecessary in domestic courts, where individuals can rely upon the State's judicial apparatus and other entities to protect their ability to perform their functions in a criminal trial.

32. The Appeals Chamber further finds that the Trial Chamber erred in concluding that members of the defence are not entitled to functional immunity under Article 30(4) of the Statute, but are entitled to protection from legal process only when a State substantially impedes or hinders, in an intentional or foreseeable manner, performance by members of the defence in fulfilment of their official functions before the Tribunal.<sup>89</sup> The Appeals Chamber notes that the Trial Chamber did not cite any legal authority in support of this proposition.<sup>90</sup> Although a State may not intend or foresee that its actions will interfere with a defence investigation, such actions may nonetheless have this effect if the State arrests a member of the defence who is acting in his or her official capacity. Prioritising the State's exercise of its domestic jurisdiction over a defence investigation does not accord with providing defence members protection "necessary for the proper functioning of the [...] Tribunal" under Article 30(4) of the Statute.

33. The Appeals Chamber accordingly finds that members of the defence, including defence investigators, enjoy functional immunity under Article 30(4) of the Statute with regard to acts that fall within the fulfilment of their official functions before the Tribunal due to their functions being "necessary for the proper functioning of the [...] Tribunal". Failure to accord functional immunity to defence investigators could impact upon the independence of defence investigations, as investigators may fear legal process for actions related to their official Tribunal functions.<sup>91</sup>

34. Finally, contrary to the Prosecution's argument, the Appeals Chamber does not consider that granting functional immunity to members of the defence would allow them to violate domestic criminal laws with impunity.<sup>92</sup> Prosecution investigators, for example, are entitled to immunity under Articles 30(1) and 30(3) of the Statute and those investigators are not permitted to commit crimes with impunity.<sup>93</sup> In any event, the Appeals Chamber recalls that Article 30(4) of the Statute

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of the former Yugoslavia are obliged to cooperate with the [...] Tribunal in such a manner as to enable the [...] Tribunal to discharge its functions. This obligation [...] also requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance."

<sup>89</sup> See Impugned Decision, para. 61.

<sup>90</sup> *Ibid.*

<sup>91</sup> Cf. *Erlinder* Decision, para. 19, where the Appeals Chamber stated: "The proper functioning of the Tribunal requires that Defence Counsel be able to investigate and present arguments in support of their client's case without fear of repercussions against them for these actions. Without such assurance, Defence Counsel cannot be reasonably expected to adequately represent their clients."

<sup>92</sup> See Response, para. 57.

<sup>93</sup> Cf. Article V, Section 20 and Article VI, Section 23 of the UN Convention on Privileges and Immunities specifying that the Secretary-General of the United Nations shall have the right and the duty to waive the immunity granted to

provides immunity only to individuals performing acts necessary “for the proper functioning of the [...] Tribunal” and not for actions taken in their personal capacity.<sup>94</sup> Consequently, functional immunity for members of the defence, as with Prosecution staff, is limited to the actions in fulfilment of their official functions before the Tribunal and in the interests of the United Nations. It does not allow them to violate domestic criminal laws with impunity.

35. For the foregoing reasons, the Appeals Chamber finds that, under Article 30(4) of the Statute, members of the Gotovina Defence, including investigators, are provided with functional immunity, thereby allowing them to independently exercise their official functions, namely to assist the accused in the preparation of his or her defence. Gotovina’s sixth ground of appeal is accordingly granted.

36. There appears to be no dispute that the investigations, seizures, and prosecution at issue here derive from acts performed by members of the Gotovina Defence in fulfilment of their official functions before the Tribunal.<sup>95</sup> The Appeals Chamber finds that, because members of the Gotovina Defence enjoy functional immunity under Article 30(4) of the Statute with regard to acts performed in the fulfilment of their official functions before the Tribunal, Croatia is barred from continuing criminal proceedings and taking any further investigative steps against them for such acts. Accordingly, it is not necessary for the Appeals Chamber to consider Gotovina’s fourth or fifth grounds of appeal, which argue, respectively, that the Trial Chamber erred in failing to order the termination of criminal proceedings against members of the Gotovina Defence for conduct in fulfilment of their official functions and in failing to bar further investigative steps being taken against members of the Gotovina Defence, absent an order or warrant issued by the Trial Chamber.

## **B. First Ground of Appeal**

### **1. Trial Chamber findings**

37. The Trial Chamber noted its prior finding that pursuant to Rule 54 of the Rules, it is competent to make a significant intervention in a domestic jurisdiction only in exceptional circumstances, and found that given, *inter alia*, the intrusive nature of the requested restraining orders, issuing such orders would constitute a significant intervention in Croatia’s domestic jurisdiction.<sup>96</sup>

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officials and experts “in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.”

<sup>94</sup> Cf. *Erlinder* Decision, para. 28.

<sup>95</sup> See Reply, para. 1. See also Appeal, para. 7.

<sup>96</sup> Impugned Decision, para. 32.



## 2. Arguments of the parties

38. Gotovina argues that the Trial Chamber erred in law in finding that protecting members of the defence from domestic prosecution for acts performed in the fulfilment of their official functions before the Tribunal by issuing restraining orders against Croatia would constitute a “significant intervention in the domestic jurisdiction of Croatia” only justified in exceptional circumstances.<sup>97</sup>

39. Gotovina contends that Croatia’s actions against members of the Gotovina Defence were not taken pursuant to its own domestic interests, but rather pursuant to the 16 September 2008 Order.<sup>98</sup> Gotovina further contends that Croatia was not pursuing its own domestic investigation but instead was serving as the “quasi-enforcement arm of the Prosecution”, given that the Prosecution was directing the activities of Croatia’s Task Force (“Task Force”).<sup>99</sup>

40. Gotovina argues that when a State is implementing investigative steps pursuant to an order of the Trial Chamber or suggestions by the Prosecution, Article 20(1) of the Statute requires that the Trial Chamber ensure that the investigation respects the rights of the accused and the Rules.<sup>100</sup> He argues that the Trial Chamber failed to meet its obligation to supervise Croatia’s compliance with the 16 September 2008 Order and the “suggestions” of the Prosecutor, and in doing so, erred in finding that requiring Croatia to abide by the Rules in any action against the Gotovina Defence team would constitute a substantial interference in Croatia’s domestic jurisdiction.<sup>101</sup>

41. The Prosecution responds that Gotovina’s first ground of appeal should be summarily dismissed because Gotovina merely repeats his position before the Trial Chamber and misrepresents the Trial Chamber’s factual findings.<sup>102</sup> The Prosecution argues that there is no evidence that the Prosecution ever directed or encouraged Croatia’s criminal investigations against members of the Gotovina Defence and that the Trial Chamber’s findings in this regard are supported by the trial record.<sup>103</sup> It further argues that the Trial Chamber correctly held that imposing restraining orders to halt Croatia’s domestic criminal proceedings against Croatian nationals would amount to a significant intervention in the domestic jurisdiction of Croatia not justified under the circumstances.<sup>104</sup> In this regard, the Prosecution argues that such orders would frustrate the State’s legitimate interest in investigating and prosecuting possible crimes, particularly when a member of

<sup>97</sup> Appeal, para. 21, referring to Impugned Decision, para. 32.

<sup>98</sup> Appeal, para. 22, referring to Impugned Decision, paras 32, 71.

<sup>99</sup> Appeal, paras 23-24. See *infra*, para. 57 and fn. 140.

<sup>100</sup> Appeal, para. 26.

<sup>101</sup> *Ibid.*, para. 27.

<sup>102</sup> Response, paras 10-13.

<sup>103</sup> *Ibid.*, paras 15-19.

<sup>104</sup> *Ibid.*, para. 21, referring to Impugned Decision, para. 32.

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the defence is a national of the State in question and the alleged crime was committed on the State's territory.<sup>105</sup>

42. In his Reply, Gotovina argues that the Prosecution erroneously identifies the issues under his first ground of appeal and misapplies the standard of review.<sup>106</sup> He contends that the Prosecution fails to offer any valid rationale or authority to support the Trial Chamber's legal conclusion that the issuance of restraining orders would constitute a significant intervention that could be only granted in exceptional circumstances.<sup>107</sup>

43. Gotovina also notes that neither the Prosecution nor the Trial Chamber defined "what interests an ex-Yugoslav State might have in investigating and/or prosecuting Tribunal Activities, particularly where such actions infringe upon the State's *Blaškić* [*sic*] obligation to allow the Defence and Prosecution to 'fulfil their tasks free from any possible impediment or hindrance.'"<sup>108</sup> He further contends that although, according to the Prosecution, "nationals of the former Yugoslavia in particular should be subject to investigation and prosecution for Tribunal Activities", the Prosecution fails to explain "why a Defence member's citizenship should impact the Tribunal's interest in ensuring unobstructed performance of Tribunal Activities in the former Yugoslavia."<sup>109</sup>

44. Gotovina argues that the Trial Chamber erred in law by inverting its conclusion in considering whether to issue a restraining order under Rule 54 of the Rules.<sup>110</sup> He argues that instead of considering whether a restraining order could be characterised as a "substantial intervention" in Croatia's domestic jurisdiction only justifiable in exceptional circumstances, the Trial Chamber "should have concluded that Croatia's domestic investigation and prosecution of Defence members" for actions carried out in furtherance of their official functions "amounted to a 'substantial intervention' in the Tribunal's jurisdiction", which could only be justified in exceptional circumstances.<sup>111</sup>

<sup>105</sup> Response, para. 21. The Prosecution adds that even if Gotovina had shown that the Trial Chamber erred in failing to attribute Croatia's action to the Prosecution, he failed to show that this error would have changed the Trial Chamber's ultimate conclusion not to grant restraining orders. *See ibid.*, para. 22.

<sup>106</sup> Reply, para. 6.

<sup>107</sup> *Ibid.*, para. 7.

<sup>108</sup> *Ibid.*, para. 8, citing *Blaškić* Decision, para. 53, where the Appeals Chamber held: "The States [...] of the former Yugoslavia are obliged to cooperate with the [...] Tribunal in such a manner as to enable the [...] Tribunal to discharge its functions. This obligation [...] also requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance."

<sup>109</sup> Reply, para. 8, referring to Response, para. 21.

<sup>110</sup> Reply, para. 9.

<sup>111</sup> *Ibid.*

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### 3. Analysis

45. The Appeals Chamber recalls its holding that members of the defence enjoy functional immunity under Article 30(4) of the Statute for acts performed in the fulfilment of their official functions before the Tribunal.<sup>112</sup> In this case, a member of the Gotovina Defence, Ivanović, asserted functional immunity before the Croatian court, and the Croatian court rejected that assertion.<sup>113</sup> The Appeals Chamber considers that in the particular circumstances of this case, the Trial Chamber erred in not issuing such orders as necessary to ensure respect for the functional immunity of members of the Gotovina Defence. Gotovina's first ground of appeal is accordingly granted.

#### C. Second Ground of Appeal

##### 1. Trial Chamber findings

46. In the Impugned Decision, the Trial Chamber found that Gotovina's submissions alleging that the Prosecution directed or encouraged Croatia's criminal investigations or prosecutions of members of the Gotovina Defence were not established but rather "indicate that the Prosecution made suggestions regarding the administrative investigation, with a view to finding the missing documents."<sup>114</sup>

47. The Trial Chamber also found that suggestions made by the Prosecution to Croatia in relation to Croatia's investigation to locate the Operation Storm Documents sought by the Prosecution were not "*per se* inappropriate, because the administrative investigation may (and should) be conducted in such a manner so as not to infringe upon the Accused's rights."<sup>115</sup> The Trial Chamber accordingly held that Gotovina had failed to establish a factual basis demonstrating that Croatia's actions were attributable to the Prosecution or substantiating its allegations of prosecutorial misconduct.<sup>116</sup>

##### 2. Arguments of the parties

48. Gotovina argues that the Trial Chamber erred in concluding that Croatia's searches of members of the Gotovina Defence absent a Trial Chamber's order or warrant were not attributable to the Prosecution and that the Prosecution did not commit professional misconduct.<sup>117</sup>

<sup>112</sup> See *supra*, paras 33, 35-36.

<sup>113</sup> See *supra*, paras 6-7; Motion of 29 September 2009, para. 2, Annex A; Appeal, para. 12.

<sup>114</sup> Impugned Decision, para. 32.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Appeal, paras 17(b), 28-39.

49. Gotovina submits that “Croatia conceded that the Prosecutor exerted his coercive power to impede Croatia’s accession to the European Union in his negative assessments of Croatia’s cooperation with the Tribunal.”<sup>118</sup> He asserts that due to this coercion, Croatia established a Task Force to implement the Prosecutor’s “suggestions and objections”, which included that Croatia take investigative steps against Ivanović.<sup>119</sup> Gotovina asserts that when “a third party acting under the substantial influence of the prosecuting authority deprives an accused of his fundamental rights, the conduct of the third party is attributed to the prosecution.”<sup>120</sup>

50. Gotovina also argues that the Trial Chamber erroneously held that the Prosecution’s “suggestions” were not “*per se* inappropriate, because the [Croatian] administrative investigation may (and should) be conducted in such a manner so as not to infringe upon the Accused’s rights”.<sup>121</sup> According to Gotovina, this finding contradicts the Trial Chamber’s 3 April 2009 Decision, which found that the Prosecution could only obtain an order from the Trial Chamber requiring Gotovina to produce documents if, pursuant to Rule 54 of the Rules, it could identify the information sought or describe it by its general nature and show a legitimate forensic purpose for the order sought.<sup>122</sup> Gotovina argues that the Trial Chamber compounded its error when it held, in its Impugned Decision, that the 3 April 2009 Decision’s holding “does not preclude the parties from seeking the production of documents by other means than an order of the Chamber.”<sup>123</sup> He argues that, in essence, this holding allows the Prosecution to circumvent Rule 54 of the Rules by suggesting that a State take police action against the Defence in order to determine whether documents exist, and if so, to seize them.<sup>124</sup> He contends that if the Prosecution or Croatia had an evidentiary basis to suspect that the Gotovina Defence is in possession of documents they seek, they should have sought to obtain those documents through an order pursuant to Rule 54 of the Rules and, at a minimum, sought to obtain a search warrant from the Trial Chamber to ensure that any search comported with the rights of the accused.<sup>125</sup>

51. The Prosecution responds that Gotovina’s second ground of appeal should be summarily dismissed because Gotovina merely repeats his position before the Trial Chamber and misrepresents the Trial Chamber’s factual findings.<sup>126</sup> The Prosecution argues that Gotovina

<sup>118</sup> *Ibid.*, para. 31.

<sup>119</sup> *Ibid.*, paras 31-34.

<sup>120</sup> *Ibid.*, para. 29.

<sup>121</sup> *Ibid.*, para. 35, citing Impugned Decision, para. 32.

<sup>122</sup> Appeal, para. 35, referring to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution’s Motion Seeking the Production of Documents Obtained by the Gotovina Defence, 3 April 2009 (confidential) (“3 April 2009 Decision”), para. 13.

<sup>123</sup> Appeal, para. 36, citing Impugned Decision, para. 34 and referring to 3 April 2009 Decision, para. 13.

<sup>124</sup> Appeal, para. 36.

<sup>125</sup> *Ibid.*, para. 37.

<sup>126</sup> Response, paras 10-13.

conflates Croatia's administrative investigation with its criminal proceedings, although the Trial Chamber clearly distinguished between the two types of proceedings in the Impugned Decision, finding that the Prosecution's "suggestions" to Croatia were merely in the context of the administrative investigation.<sup>127</sup>

52. The Prosecution argues that the Trial Chamber's conclusion that the Prosecution did not encourage or direct Croatia's criminal proceedings accurately reflects the trial record, as "[t]here is no evidence that the Prosecution 'directed or encouraged' Croatia to take criminal action against members of the Defence team, and no evidence that the Prosecution was involved in the criminal proceedings for which Gotovina has requested a restraining order."<sup>128</sup> The Prosecution submits that to the contrary, the evidence demonstrates that the Prosecution's interaction with Croatia has been limited to its administrative investigation aimed at locating the Operation Storm Documents. The Prosecution further submits that "[t]his includes making suggestions to Croatia's Task Force, which was set up to facilitate the administrative investigation."<sup>129</sup> The Prosecution explains that, during the administrative investigation, the Task Force found that Ivanović and Ribičić might be in possession of documents in violation of Croatian criminal law, and on this basis, the Croatian police investigated the issue *ex officio*.<sup>130</sup>

53. The Prosecution also contends that Gotovina has not demonstrated that the Trial Chamber erred in finding that the Prosecution did not engage in misconduct.<sup>131</sup> In this regard, the Prosecution asserts that the Trial Chamber correctly rejected the Defence argument that the Prosecution was precluded from seeking the Operation Storm Documents because the Chamber had already declined to issue an order for production of documents pursuant to Rule 54 of the Rules.<sup>132</sup> The Prosecution refutes Gotovina's argument that, in drawing this conclusion, the Trial Chamber ignored its holding in the 3 April 2009 Decision, arguing that this Decision pertained only to the Prosecution's request for an order pursuant to Rule 54 of the Rules and not to other potential means of obtaining documents.<sup>133</sup>

54. In his Reply, Gotovina submits that the Prosecution has failed to justify the manner in which it encouraged Croatia to focus its administrative investigation on members of the Gotovina

<sup>127</sup> *Ibid.*, para. 15, referring to Impugned Decision, para. 32.

<sup>128</sup> Response, para. 16.

<sup>129</sup> *Ibid.*, para. 17.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, para. 25.

<sup>132</sup> *Ibid.*, referring to Impugned Decision, para. 34 and 3 April 2009 Decision.

<sup>133</sup> Response, para. 25.

Defence.<sup>134</sup> Gotovina claims that this encouragement made it foreseeable to the Prosecution that the Croatian authorities would target the Gotovina Defence, search their offices and seize documents.<sup>135</sup>

55. Gotovina further contends that the Trial Chamber abused its discretion “[t]o the extent that the Impugned Decision allows the Prosecution to ask third party States to execute searches and seizures of Defence teams without an ICTY order”, and that searches and seizures involving Tribunal defence teams should be subject to a warrant or order from the Tribunal.<sup>136</sup>

### 3. Analysis

56. The Appeals Chamber observes that the Prosecution repeatedly identified Ivanović during the course of Croatia’s administrative investigation as someone who may be in possession of the Operation Storm Documents. On 19 January 2009, the Prosecution filed a submission in relation to the 16 September 2008 Order, noting that Ivanović may have the documents sought.<sup>137</sup> On 19 June 2009, the Prosecution again suggested that “further investigative steps that should be taken may include [...] [i]nvestigating the activities [...] of] other intelligence operatives that have been identified in the course of the investigation, including Marin Ivanović [...], including by obtaining and reviewing their official correspondence from the relevant times.”<sup>138</sup>

57. On 19 June 2009, the Prosecution also alleged that “Croatia has never acknowledged – let alone investigated – Marin Ivanović’s known involvement as a Croatian Intelligence (SIS) operative who participated in the efforts to collect and conceal documents from the Tribunal with respect to other cases and has ignored the possibility that he and/or others may have been involved in similar efforts with respect to Operation Storm [D]ocuments.”<sup>139</sup> On or shortly after 28 September 2009, Croatia established the Task Force for the purpose of checking and implementing objections and suggestions made by the Prosecution for improving the quality and efficiency of Croatia’s investigation to locate and produce the Operation Storm Documents pursuant to the 16 September 2008 Order.<sup>140</sup> In light of information obtained by the Task Force, Croatia discovered that Ivanović might be holding documents from the Croatian archives in

<sup>134</sup> Reply, para. 10.

<sup>135</sup> *Ibid.*, para. 12.

<sup>136</sup> *Ibid.*, paras 13-14.

<sup>137</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Submission in Relation to Croatia’s Reports Pursuant to the Chamber’s Rule 54 *bis* Order, 19 January 2009 (public with public and confidential annexes), Annex A (confidential), paras 42, 61, 67. *See also* Response, para. 19.

<sup>138</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution’s Response to Croatia’s 2 June 2009 Request, 19 June 2009 (public with public and confidential annexes), Annex A (confidential), para. 42.

<sup>139</sup> *Ibid.*, Annex A (confidential), para. 40. *See also* Gotovina Submission of 21 January 2010, para. 13.

<sup>140</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Submission by State in Response to Trial Chamber’s Order of 16 September 2008 (Task Force Report), 9 December 2009 (confidential), Registry pages pp. 30438-30435, 30397.

contravention of Croatian domestic law and police inquiries were conducted on that basis.<sup>141</sup> The search and seizure measures were conducted on 9 and 10 December 2009 at locations affiliated with the Gotovina Defence.<sup>142</sup>

58. The Appeals Chamber finds that, although the Prosecution's actions in relation to Croatia's administrative investigation may have been taken with disregard as to whether they would provoke a criminal investigation and subsequent search and seizure of Gotovina Defence materials, Gotovina has not provided any evidence to establish that the Prosecution directed or encouraged Croatia to take such action. Rather, as noted by the Trial Chamber in the Impugned Decision, Croatia initiated its criminal investigations and prosecutions based on information obtained from its administrative investigation into the location of the Operation Storm Documents.<sup>143</sup> Although the administrative investigation was influenced by the Prosecution's suggestions, the Prosecution was permitted to make such suggestions pursuant to the 16 September 2008 Order. In light of the foregoing, the Appeals Chamber finds no discernible error in the Trial Chamber's finding that the Prosecution did not direct or encourage the arrest of Ivanović or the search and seizure measures against the Gotovina Defence.

59. Similarly, the Appeals Chamber finds no error on the part of the Trial Chamber in concluding that Gotovina failed to substantiate his allegations of prosecutorial misconduct. The Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that the Prosecution's suggestions were not "*per se* inappropriate".<sup>144</sup> Contrary to Gotovina's contention, the Appeals Chamber does not consider that this holding contradicts the Trial Chamber's 3 April 2009 Decision. That Decision was limited to the Prosecution's request for an order pursuant to Rule 54 of the Rules compelling the Gotovina Defence to produce the Operation Storm Documents and did not contemplate other means by which these documents may be sought.<sup>145</sup>

60. Finally, the Appeals Chamber finds that Gotovina has not identified any error on the part of the Trial Chamber in concluding that parties are not precluded from seeking the production of documents by other means than a Trial Chamber order pursuant to Rule 54 of the Rules. Such a limitation is not supported by the Rules or the jurisprudence of the Tribunal. Accordingly, Gotovina's second ground of appeal is dismissed.

<sup>141</sup> Croatia Submissions of 14 January 2010, p. 4; Transcript of 11 December 2009, pp. 26084-26089.

<sup>142</sup> Croatia Submissions of 14 January 2010, pp. 4-7.

<sup>143</sup> See Impugned Decision, para. 32.

<sup>144</sup> *Ibid.*

<sup>145</sup> See 3 April 2009 Decision.

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## D. Third Ground of Appeal

### 1. Trial Chamber findings

61. In the Impugned Decision, the Trial Chamber lifted the 11 December 2009 Interim Order directing Croatia to stop all inspection of the contents of all documents and other objects, including computers, in its custody which were seized on 9 and 10 December 2009 and to keep the materials under seal and in its possession until further notice.<sup>146</sup> However, in doing so, the Trial Chamber considered Croatia's indication that it might provide the Tribunal with any documents sought by the Prosecution from among the seized materials but noted the risk that such documents may include items protected by Rule 70 (A) of the Rules, governing work product privilege, and Rule 97 of the Rules, governing attorney-client privilege. The Trial Chamber considered that the procedure to be applied to the seized materials must respect the rights protected in Rules 70 (A) and 97 of the Rules.<sup>147</sup> The Trial Chamber accordingly established a procedure for Croatia's inspection of the documents that it considered sufficient to protect Gotovina's rights.<sup>148</sup>

62. The Trial Chamber ordered that Croatia initially refrain from inspecting the content of the seized materials and keep them under seal.<sup>149</sup> Croatia would then provide the Gotovina Defence with access to the seized materials so that the latter could review their content with a view to determining what material it considers to be protected under Rules 70 (A) and 97 of the Rules.<sup>150</sup> The Trial Chamber directed Croatia and Gotovina, after this review, to seek agreement regarding which items are and are not protected under those Rules.<sup>151</sup> The Trial Chamber noted that Gotovina could seek assistance from an independent third party, such as the Tribunal's Association of Defence Counsel, in communicating with Croatia.<sup>152</sup>

63. In the event of a dispute with regard to which documents were privileged, the Trial Chamber ordered Gotovina to contact the President "with a view to seeking a determination of the matter by an independent body".<sup>153</sup> The Trial Chamber considered that the independent body, established by the President, could include "a Judge of the Tribunal not working on the *Gotovina et al.* case and possibly involve consultation with the Advisory Panel".<sup>154</sup> If the independent body ruled that a document was privileged, it would be returned to Gotovina and would not be subject to review by

<sup>146</sup> Impugned Decision, para. 77(3).

<sup>147</sup> *Ibid.*, para. 38.

<sup>148</sup> *Ibid.*, para. 77(4).

<sup>149</sup> *Ibid.*, paras 41, 77(4)(a).

<sup>150</sup> *Ibid.*, paras 41, 77(4)(b)-(c).

<sup>151</sup> *Ibid.*, paras 41, 77(4)(d).

<sup>152</sup> *Ibid.*, para. 41.

<sup>153</sup> *Ibid.*, paras 43, 77(4)(e).



Croatia.<sup>155</sup> However, Croatia was permitted to inspect any items which the independent body considered not privileged. Because the Trial Chamber concluded that this procedure ensured that the protections of Rules 70 (A) and 97 of the Rules would be upheld, the Trial Chamber found it unnecessary to issue a permanent restraining order directing Croatia to stop the inspection of the seized materials.<sup>156</sup>

## 2. Arguments of the parties

64. Gotovina argues that the Trial Chamber correctly concluded that the items seized by Croatia on 9 and 10 December 2009 may include Gotovina Defence materials that fall within the scope of Rules 70 (A) and 97 of the Rules.<sup>157</sup> He asserts that the Trial Chamber was therefore duty-bound under Article 20(1) of the Statute to ensure that any materials protected under these Rules would not be disclosed to the Prosecution, Croatia, or any third party.<sup>158</sup> Gotovina submits that the Trial Chamber violated Article 20(1) of the Statute by failing to protect the confidentiality of these materials and erroneously shifting this obligation onto the President.<sup>159</sup>

65. The Prosecution responds that Gotovina fails to show that the procedure put in place by the Trial Chamber violated its obligation to ensure a fair trial under Article 20(1) of the Statute.<sup>160</sup> The Prosecution contends that it was not an error for the Trial Chamber to refer the matter to the President if Gotovina and Croatia could not agree on which materials seized by Croatia were privileged.<sup>161</sup> The Prosecution further contends that the procedure did not require the President to review potentially privileged materials but instead delegated this task to an independent body.<sup>162</sup>

66. In his Reply, Gotovina argues that the Trial Chamber itself should render a privilege determination in relation to these materials, in accordance with the Trial Chamber's precedent where it supported its own review of certain Prosecution documents.<sup>163</sup>

<sup>154</sup> *Ibid.*, para. 44, referring to the Directive on the Assignment of Defence Counsel (Directive No. 1/94) (IT/73/Rev.11), 11 July 2006, Articles 32-33.

<sup>155</sup> Impugned Decision, para. 77(4)(f).

<sup>156</sup> *Ibid.*, para. 44.

<sup>157</sup> Appeal, para. 40, referring to Impugned Decision, para. 35.

<sup>158</sup> Appeal, para. 40.

<sup>159</sup> *Ibid.*, para. 41, referring to Impugned Decision, para. 43. Gotovina contends this could lead to the President being required to recuse himself in any future appeal. Finally, Gotovina argues that the Trial Chamber failed to explain how the decisions of this independent body could be subject to appellate proceedings under Article 25 of the Statute. *See* Appeal, para. 42.

<sup>160</sup> Response, para. 27.

<sup>161</sup> *Ibid.*, para. 28.

<sup>162</sup> *Ibid.*, para. 30. The Prosecution also notes that even if the President was involved in some manner in reviewing potentially privileged materials, there are other judges in the Appeals Chamber that could resolve a potential appeal. Finally, the Prosecution asserts that Gotovina's right to appeal would remain the same under Article 25 of the Statute. *See ibid.*, paras 31, 33.

<sup>163</sup> Reply, paras 17-18.

### 3. Analysis

67. The Appeals Chamber recalls that, because members of the Gotovina Defence enjoy functional immunity under Article 30(4) of the Statute for acts performed in the fulfilment of their official functions before the Tribunal, Croatia is barred from continuing criminal proceedings and taking any further investigative steps against them for these acts<sup>164</sup> and must, therefore, return all material seized from members of the Gotovina Defence.

68. The Appeals Chamber further recalls that in issuing the 11 December 2009 Interim Order, the Trial Chamber took measures to protect Gotovina's rights under Rules 70 (A) and 97 of the Rules as soon as it was apprised that Croatia had seized potentially privileged materials from the Gotovina Defence. Since that time, as outlined above, the Trial Chamber has consistently taken measures to ensure that materials falling within the ambit of these Rules are not disclosed to the Prosecution, Croatia, or a third party.<sup>165</sup> As Gotovina did not present the Appeals Chamber with any evidence indicating that material protected by these Rules had been improperly disclosed, the Appeals Chamber rejects Gotovina's contention that the Trial Chamber violated Article 20(1) of the Statute by failing to protect the confidentiality of Gotovina Defence materials falling within the scope of Rules 70 (A) and 97 of the Rules.

69. With respect to Gotovina's argument that the Trial Chamber erroneously shifted to the President its obligation to ensure that the seized documents did not contain privileged materials protected under Rules 70 (A) and 97 of the Rules, the Appeals Chamber notes that the procedure established by the Trial Chamber to protect the documents bestowed an obligation on the President that has no foundation in the Statute or the Rules. The Appeals Chamber observes that the President is not endowed with the right to establish an independent body. The President is only permitted, pursuant to his or her role under Rule 19 of the Rules, to coordinate the work of the Chambers, supervise the activities of the Registry and assign the resolution of judicial matters to a Trial Chamber, a bench of three judges, or a single judge. The President's delimited powers under the Statute and Rules of the Tribunal do not permit him to assign judicial matters to any other entity. Thus, the Appeals Chamber finds that the Trial Chamber acted *ultra vires* of the Rules and Statute in establishing this procedure, constituting an abuse of discretion.

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<sup>164</sup> See *supra*, para. 36.

<sup>165</sup> The Appeals Chamber recalls that, in the Impugned Decision, the Trial Chamber lifted the 11 December 2009 Interim Order, but instituted a procedure for reviewing the seized materials. Pursuant to that procedure, Croatia was ordered to refrain from inspecting the content of the materials and keep it in its custody under seal until either Gotovina or an independent body determined that the material is not protected. See *supra*, paras 9, 11, 61-63. Furthermore, the Appeals Chamber notes that, in the Certification Decision, the Trial Chamber stayed the procedure for reviewing the materials pending the determination of this Appeal. See *supra*, para. 12; Certification Decision, para. 11, where the Trial Chamber suspended the procedure that was to be instituted in relation to documents seized by Croatia from the Gotovina Defence that Gotovina claimed were protected pursuant to Rules 70 (A) and 97 of the Rules.

70. Nevertheless, the Appeals Chamber notes that the procedure established by the Trial Chamber has not yet been put into effect. Furthermore, in light of the finding that members of the Gotovina Defence enjoy functional immunity under Article 30(4) of the Statute, the procedure will not take effect in the future. Consequently, the Appeals Chamber finds that the Trial Chamber's error has not caused Gotovina any prejudice.

#### IV. DISPOSITION

71. For the foregoing reasons, the Appeals Chamber


**GRANTS** the Appeal in part;

**ORDERS** the Trial Chamber to issue an order pursuant to Rule 54 of the Rules to Croatia in which it will require Croatia to:

1. Cease all criminal proceedings against members of the Gotovina Defence for acts performed in the fulfilment of their official function before the Tribunal;
2. Cease and desist from all current and future investigative activities against members of the Gotovina Defence for acts performed in the fulfilment of their official function before the Tribunal, including searches of their persons or premises; and
3. Return, as soon as practicable, all material seized from members of the Gotovina Defence, including but not limited to documents, computers, CD-ROMs and diskettes.

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

Done this fourteenth day of February 2011  
At The Hague,  
The Netherlands.

  
Judge Fausto Pocar  
Presiding

[Seal of the Tribunal]