Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

3 October 2012*

(Access to documents — Regulation (EC) No 1049/2001 — Request for access to certain documents exchanged with the International Criminal Tribunal for the Former Yugoslavia in the course of a trial — Refusal of access — Risk of undermining the protection of international relations — Risk of undermining the protection of court proceedings and legal advice)

In Case T-63/10,

Ivan Jurašinović, residing in Angers (France), represented by N. Amara-Lebret, lawyer,

applicant,

v

Council of the European Union, represented initially by C. Fekete and K. Zieleśkiewicz, and subsequently by C. Fekete and J. Herrmann, acting as Agents,

defendant,

ACTION principally for the annulment of the Council Decision of 7 December 2009 refusing to grant the applicant access to the decisions relating to the transmission to the International Criminal Tribunal for the Former Yugoslavia of documents requested by the applicant in connection with the trial of Mr Ante Gotovina and the entire correspondence exchanged in that connection between the institutions of the European Union and the Tribunal, including any annexes, in particular the initial requests for documents from the Tribunal and from Mr Gotovina's lawyers.

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of N.J. Forwood, President, F. Dehousse, M. Prek, J. Schwarcz (Rapporteur) and A. Popescu, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2012,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 By letter of 4 May 2009 to the Secretary General of the Council of the European Union, the applicant, Mr Ivan Jurašinović, applied for access, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), to the reports of the European Union observers present in Croatia, in the area of Knin, from 1 to 31 August 1995 ('the August 1995 reports') and to documents referenced as 'ECMM RC Knin Log reports'.

2 By decision of 21 September 2009, the Council replied to the applicant's confirmatory application of 27 June 2009 and granted partial access to eight reports of August 1995. In the decision the Council stated that it had granted access to the reports of August 1995 to the parties to Mr Gotovina's trial before the International Criminal Tribunal for the Former Yugoslavia ('the ICTY') by virtue of the principle of international cooperation with an international tribunal established by the Security Council of the United Nations Organisation ('the UNO').

3 By action brought on 19 November 2009 and bearing the reference T-465/09, the applicant sought the annulment by the Court of the Council Decision of 21 September 2009.

4 By letter of 1 October 2009 the applicant requested the Secretary General of the Council for access to the decisions relating to the transmission to the ICTY of the documents which the latter had requested at the time of Mr Gotovina's trial and the entire correspondence in that connection between the European Union (EU) institutions and the ICTY, including any annexes, and in particular the initial requests from the ICTY and defence counsel.

5 By decision of 23 October 2009 the Secretary General of the Council rejected the request for access of 1 October 2009. The Secretary General stated that he had not identified any documents matching the description of decisions relating to the transmission of documents to the ICTY and that the correspondence between himself and the office of the ICTY Prosecutor concerning access to the archives of the European Community Monitoring Mission ('the ECMM') for the purposes of the investigation and the preparation and conduct of Mr Gotovina's trial formed part of court proceedings and could not be disclosed, pursuant to Rule 70(B) of the ICTY Rules of Procedure and Evidence. The Secretary General concluded by pointing out that it was for the ICTY, and not the Council, to decide whether to disclose documents submitted to that Tribunal.

6 By letter of 3 November 2009, the applicant submitted a confirmatory application for access to the documents ('the confirmatory application').

7 By decision of 7 December 2009, the Council rejected the confirmatory application ('the contested decision').

8 In the contested decision the Council observed, first, that documents in the ECMM archives had been placed at the disposal of the ICTY Prosecutor by way of cooperation in good faith with an international tribunal established by the United Nations Security Council, and that they had been passed to the Prosecutor's office on a confidential basis pursuant to Rule 70(B) of the ICTY Rules of Procedure and Evidence. The Council then informed the applicant that it had authorised the transmission of expurgated versions of several documents from the archives to Mr Gotovina's defence counsel. With regard to the documents requested by the applicant, first the Council confirmed that there was no decision relating to the transmission of documents to the ICTY in connection with Mr Gotovina's trial. Second, the Council stated that it had listed 40 documents consisting of letters from the

Secretary General and High Representative for Foreign Affairs and Security Policy ('the SGHR'), letters from the Prosecutor and the Trial Chamber of the ICTY, as well as memoranda exchanged between Mr Gotovina's defence team and the SGHR.

9 In rejecting the confirmatory application, the Council raised against the applicant the exceptions for the protection of international relations and the protection of court proceedings, provided for by the third indent of Article 4(1)(a) and the second indent of Article 4(2) respectively of Regulation No 1049/2001. According to the Council, the documents requested contained confidential information relating to the organisation of Mr Gotovina's trial for which the ICTY was responsible, and the ICTY alone was in a position to balance the parties' interests at stake and to determine whether disclosure of the documents could prejudice one of the parties to the proceedings and preclude a fair trial. The ICTY was of the opinion that the documents were not accessible to the public. The Council took the view that, if it disclosed the documents, it would put at risk the proper conduct of pending court proceedings and cooperation in good faith with an international tribunal. In addition, publication of the reports drawn up by the ECMM during the period of its activity ('the reports') would put at risk the international relations of the European Union and the Member States with the Western Balkan countries concerned since the information in the reports was still sensitive, the confidentiality of the reports being a key factor in strengthening trust, dialogue and cooperation of the Union with the countries of that region of Europe.

10 The Council annexed to the contested decision a list of the 40 documents to which access was requested and indicated whether they were accessible or not on the court records database on the ICTY internet site.

Procedure and forms of order sought by the parties

11 By application received by the Court Registry on 10 February 2010, the applicant brought the present action.

12 The applicant claims that the Court should:

— annul the contested decision;

— order the Council to pay the applicant the sum of EUR 2 000 exclusive of tax, being EUR 2 392 inclusive of all taxes, for legal costs, with interest at the European Central Bank rate from the date of registration of the application.

13 The Council contends that the Court should:

— find that it is no longer necessary to rule on the application for the annulment of the contested decision in relation to the documents numbered 13, 14, 16, 18, 24, 27, 30 and 31 on the list annexed to the decision;

— as to the remainder, dismiss the application as unfounded;

— order the applicant to pay the costs.

14 By document lodged at the Court Registry on 6 September 2010, the applicant asked the Court to request, by way of a measure of organisation of procedure, the production of the document whereby the Council consulted with the ICTY as to the possibility of making the reports available to the applicant, together with the ICTY's reply to the Council.

15 By order of the Court of 23 September 2011, the Council was asked to produce before the Court all the documents to which the contested decision had refused the applicant access. The time limit for the production of the documents, which originally expired on 13 October 2011, was extended on three occasions at the Council's request until 16 February 2012, when the documents were produced before the Court.

16 Although the hearing had been fixed for 16 November 2011, it was deferred on three occasions, at the Council's request, until 18 December 2011, 18 January and 21 March 2012, and on one occasion, at the applicant's request, until 25 April 2012.

17 By letter of 25 October 2011, the applicant presented his observations on the first extension of the period for the production of the documents requested and on the deferral of the date of the hearing. This document was placed on the file.

18 By letter of 7 December 2011, the applicant produced before the Court a decision of Trial Chamber I of the ICTY of 14 April 2011, *The Prosecutor* v *Ante Gotovina, Ivan Čermak and Mladen Markač*, and requested the Court to exclude the Council's agents from the proceedings, in accordance with the second subparagraph of Article 41(1) of the Rules of Procedure of the General Court. The letter and the ICTY decision having been placed on the file, the Council presented its observations on 13 January 2012.

19 By letter of 31 January 2012, the applicant produced before the Court a set of five documents which, according to him, were obtained from the registry of the ICTY. The letter and the documents having been placed on the file, the Council presented its observations on 27 February 2012.

Law

The subject-matter of the dispute

20 In the application the applicant claimed that the exception for the protection of the public interest with regard to international relations could not be raised against his request for access in view of the nature of the documents requested, namely Council decisions relating to the transmission to the ICTY of documents which he had asked to see in connection with Mr Gotovina's trial and the entire correspondence between the EU institutions and the ICTY, including the annexes. The applicant concluded by stating that the disclosure of the documents was the subject of Case T-465/09 *Jurašinović* v *Council*.

21 At the hearing the applicant was asked whether he should be regarded as seeking the annulment of the contested decision only in so far as, in the decision, the Council refused access to any document other than the reports. The applicant replied that he wished all the documents to which access had been refused to be made available and the he did not exclude from the scope of his application for annulment the refusal to make available the reports included in the annexes to the correspondence exchanged between the Council and the ICTY.

Admissibility of the form of order seeking annulment

22 In the defence the Council claimed that the application for the annulment of the contested decision was partly inadmissible since there was no legal interest in bringing proceedings in so far as, at the date when the action was commenced, eight of the documents to which the applicant sought access had been published by the ICTY. The Council observed that, in the list of documents requested which was annexed to the contested decision, it was stated that those eight documents were accessible to the public by means of the ICTY court records database available on the internet.

23 First of all, it must be found that the list annexed to the contested decision states that the documents numbered 13, 14, 16, 18, 24, 27, 30 and 31 are accessible, a footnote indicating that the ICTY has made them available to the public by means of the court records database, and the Tribunal's internet address is given.

24 Second, whilst the applicant argues in reply that the dissemination by another entity of some of the documents to which he sought access does not concern the European Union and that the Council, by means of its objection, wishes to gain acceptance of the argument that the ICTY alone is justified in deciding on their disclosure, the Court observes that it has been held that an action for the annulment of a decision refusing access to documents has no purpose when the documents in question have been made accessible by a third party and the applicant can access them and use them in a way which is as lawful as if he had obtained them as a result of his application under Regulation No 1049/2001 (see, to that effect, order of the General Court of 11 December 2006 in Case T-290/05 *Weber* v *Commission*, not published in the ECR, paragraph 41).

25 However, notwithstanding the information given in the contested decision (see paragraph 23 above), it does not appear from the file that the documents numbered 13, 14, 16, 18, 24, 27, 30 and 31 were accessible to the public at the date when the action was commenced. Neither of the parties has produced a copy of those documents or given a specific reference to where they appear on the ICTY internet site. In addition, the Council stated at the hearing that it was possible that documents with public status at the date of the contested decision, under the ICTY rules on transparency, were reclassified by it as confidential. According to the Council, that applied in particular to the documents referred to in the decision *The Prosecutor* v *Ante Gotovina, Ivan Čermak and Mladen Markač* (see paragraph 18 above), in which the Trial Chamber ordered the ICTY registry to reclassify 92 incriminating documents and certain annexes as confidential.

26 In the present case, therefore, the Council's plea of inadmissibility must be dismissed because the file does not show that the documents numbered 13, 14, 16, 18, 24, 27, 30 and 31 were accessible to the public at the date when the action was commenced.

The merits of the application for annulment

27 In support of his action, the applicant raises four pleas in law respectively claiming an error in law in applying Rule 70(B) of the ICTY Rules of Procedure and Evidence as the basis for refusing access to the documents requested; that the protection of court proceedings and legal advice would not be undermined; that the protection of the public interest with regard to international relations would not be undermined, and that an overriding public interest existed.

Preliminary observations

28 First of all, it should be recalled that Regulation No 1049/2001 is intended, as is apparent from recital 4 thereto and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 33).

29 However, that right is none the less subject to certain limitations based on grounds of public or private interest (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62).

30 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 71).

31 Second, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001(see, to that effect, *Sweden and Turco* v *Council*, cited in paragraph 28 above, paragraph 35). In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (*Sweden and Turco* v *Council*, paragraph 36).

32 However, the Court of Justice has accepted that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation (*Sison* v *Council*, cited in paragraph 29 above, paragraph 35).

33 Finally, the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would 'undermine' the protection of the 'public interest' as regards, inter alia, 'international relations' (*Sison* v *Council*, cited in paragraph 29 above, paragraph 36).

34 Consequently, the General Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (*Sison* v *Council*, cited in paragraph 29 above, paragraph 34).

35 However, the Court of Justice has held that it is clear, from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope, established by those rules, of the right of access to documents (*Sweden and Others* v *API and Commission*, cited in paragraph 30 above, paragraph 79).

36 Moreover, it follows from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the objective of ensuring that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings (*Sweden and Others* v *API and Commission*, cited in paragraph 30 above, paragraph 84).

37 The exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court concerned in the case before it take place in an atmosphere of total serenity (*Sweden and Others* v *API and Commission*, cited in paragraph 30 above, paragraph 92).

38 Where the Council takes the view that disclosure of a document would undermine the protection of court proceedings as defined in the second indent of Article 4(2) of Regulation No 1049/2001, it is incumbent on it to ascertain whether there is any overriding public interest justifying disclosure despite the resulting adverse effect on the serenity of the exchange of argument and on the deliberations of the court concerned in the case in question (see, to that effect and by analogy, *Sweden and Turco* v *Council*, cited in paragraph 28 above, paragraph 44).

39 In that respect, it is for the Council to weigh up the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble

to Regulation No 1049/2001, from increased transparency, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see, to that effect and by analogy, *Sweden and Turco* v *Council*, cited in paragraph 28 above, paragraph 45).

40 The different pleas in law in the present action must be examined in the light of those considerations.

The first plea in law, claiming error in law consisting in having applied Rule 70(B) of the ICTY Rules of Procedure and Evidence in refusing access to the documents requested

41 The applicant submits that only the provisions of Regulation No 1049/2001 can form the basis for refusing access to documents and that Rule 70(B) of the ICTY Rules of Procedure and Evidence is not a relevant legal reference. Those rules concern neither the Council nor the applicant and they have no prescriptive force in EU law. Furthermore, according to the applicant, the disclosure of ICTY documents does not prohibit the Council from disclosing them to a European citizen on the basis of Regulation No 1049/2001 if they are not classified as sensitive.

42 The Council disputes the applicant's arguments.

43 The applicant bases his first plea in law on a part of the contested decision in which the Council refers to its relationship with the ICTY and the disclosure of documents from the ECMM records to the ICTY. In paragraph 5 of the contested decision, the Council states that such documents were made available to the ICTY Prosecutor 'by virtue of the principle of cooperation in good faith with an international tribunal established by the United Nations Security Council … for the purpose of investigating cases relating to the prosecution of persons presumed to be responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia'. The Council also points out that those documents 'were sent to the Office of the Prosecutor of the ICTY on a confidential basis in accordance with Rule 70(B) of the ICTY Rules of Procedure and Evidence' and cites the first paragraph of that rule.

44 It follows from the case-law cited in paragraphs 28 to 31 above that, when an institution which has received an application for access to documents pursuant to Regulation No 1049/2001 wishes to limit or refuse access, the institution must base its decision only on one or more of the exceptions to the right of access which are exhaustively listed in Article 4 of the regulation.

45 It is clear from paragraphs 8 to 17 of the contested decision that the Council based its refusal to grant the applicant access to the documents requested on the exceptions concerning, respectively, the risk of undermining the protection of the public interest as regards international relations, provided for under the third indent of Article 4(1)(a) of Regulation No 1049/2001, and the risk of undermining the protection of court proceedings and legal advice, provided for under the second indent of Article 4(2).

46 The Council's reference in paragraph 5 of the contested decision to Rule 70(B) of the ICTY Rules of Procedure and Evidence served only to explain the context in which the documents from the ECMM records had been sent to officers of the ICTY and to point out that they were classified as confidential during the proceedings before the Tribunal. Furthermore, the documents in question are not the same as those requested by the applicant. So far as the documents from the ECMM records are concerned, they may well include the reports, but certainly not the correspondence between the institutions of the European Union and the ICTY, in particular the initial requests from the ICTY and from Mr Gotovina's counsel.

47 Therefore Rule 70(B) of the ICTY Rules of Procedure and Evidence is certainly not the legal basis that the Council used in order to refuse access to the documents requested.

48 With regard to the applicant's complaint that the Council could not refuse access on the ground that the documents had been made available to the ICTY on a confidential basis because they had not been classified as sensitive within the meaning of Article 9 of Regulation No 1049/2001, this complaint is also based on the premiss that the refusal of access was based on Rule 70(B). However, as has just been stated, that is not the case and, moreover, the Council never stated that its reason for refusing access was that the documents which the applicant wished to see had been disclosed on a confidential basis to the ICTY.

49 Consequently the first plea in law must be dismissed.

The second plea in law, alleging that the protection of court proceedings and legal advice, provided for under the second indent of Article 4(2) of Regulation No 1049/2001, was not undermined.

50 In his second plea in law, the applicant presents a set of arguments divided into three parts. In the first part, he submits that the exception for the protection of court proceedings under the second indent of Article 4(2) of Regulation No 1049/2001 concerns the protection only of proceedings before the Courts of the European Union and those of its Member States and not proceedings before international courts. In the second part, the applicant expresses the view that the Council could not make itself the judge of the fairness of the judicial process before the ICTY and refuse access to the documents requested on the ground that it, the Council, had disclosed the documents to the ICTY on a confidential basis. Finally, in the third part, the applicant maintains that the contested decision would lead to depriving him of any relevant right of action because disclosure of the documents would depend on a decision of the ICTY.

51 To reply to the present plea, the Court must determine, first, whether the exception for the protection of court proceedings could be applied to the proceedings before the ICTY; second, which documents in the present case could be protected by that exception; third, whether the Council could make itself the judge of the fairness of the judicial process before the ICTY and, fourth, whether the applicant is deprived of any relevant right of action in order to obtain the documents requested.

— Application of the exception for the protection of court proceedings to the proceedings before the ICTY

52 According to the applicant, the exception under the second indent of Article 4(2) of Regulation No 1049/2001 covers only court proceedings before the Courts of the European Union and the courts of its Member States and not proceedings before international courts because that is not provided for by the regulation. The proceedings before the ICTY cannot be protected on that basis because the European Union is not a member of the UNO and cannot be subject to the jurisdiction of the ICTY.

53 The applicant's argument consists in considering that only proceedings before a Court of the European Union, that is to say, the Court of Justice, the General Court and the Civil Service Tribunal, or before a court of one of the Member States may be protected by reason of the exception laid down under the second indent of Article 4(2) of Regulation No 1049/2001.

54 The Council disputes the applicant's argument.

55 It should be recalled that, in view of the objectives pursued by Regulation No 1049/2001, the exceptions which it lays down must be interpreted and applied strictly (*Sweden and Turco* v *Council*, cited in paragraph 28 above, paragraph 36). However, Regulation No 1049/2001 does not specify, regarding the scope of the provision under the second indent of Article 4(2) of the regulation, which are the courts whose proceedings may be protected against the risk of being undermined that would arise from the disclosure of one or more documents.

56 As a general rule, the provisions of Article 4 of Regulation No 1049/2001 laying down the exceptions on the basis of which an institution receiving a request for access to documents held by it may refuse to disclose them do not establish a connection between the interests to be protected in the event of a risk of undermining their protection and the European Union or its Member States. Only the fourth indent of Article 4(1)(a) expressly provides that access to a document is to be refused where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Community or a Member State. With regard to Article 4(3) of the regulation, it also concerns the European Union since the aim of that provision is to protect the decision-making process of an institution.

57 If the interpretation of the second indent of Article 4(2) of Regulation No 1049/2001 proposed by the applicant were accepted, it could be applied to any exception provided for by Article 4. For example, if the protection of the public interest as regards public security were put forward, all that would be covered would be public security in the European Union or in one or more of the Member States. The same would apply if it were a question of protecting the commercial interests of a particular natural or legal person, which, on the basis of that reasoning, could not include the interests of natural or legal persons residing in or established outside the European Union.

58 A contextual interpretation of that kind of Article 4 of Regulation No 1049/2001 cannot be accepted. No argument based on the wording of Article 4 can lead to the conclusion that the court proceedings referred to under the second indent of Article 4(2) are solely proceedings before the Courts of the European Union or the courts of the Member States.

59 That conclusion is reinforced by a reading of the whole of Regulation No 1049/2001, which establishes a connection with the European Union or the Member States only for certain aspects of the rules which it lays down. Article 1(a) lists the EU institutions which are required to grant access to their documents. Article 2(1) of the regulation provides that the beneficiaries of the right of access are citizens of the Union and natural or legal persons residing or having a registered office in a Member State, whilst the institutions may, under Article 2(2), grant other persons access to documents. Regarding the documents to which Regulation No 1049/2001 applies, Article 2(3) states that it applies to all documents drawn up or received by an institution in all areas of activity of the European Union, including those relating to the common foreign and security policy and to police and judicial cooperation in criminal matters, as stated in recital 7 to the regulation.

60 Consequently there is nothing in Regulation No 1049/2001 that prevents the court proceedings which the exception under the second indent of Article 4(2) aims to protect from taking place before a court which does not form part of the legal system of the European Union or the legal systems of the Member States.

61 That conclusion cannot be altered by any of the applicant's arguments.

62 First, the fact that the European Union is not a member of UNO and is not subject to the jurisdiction of the ICTY does not affect the legality of the contested decision because the application of the exception for the protection of court proceedings is in no way dependent on there being any connection between the institution which receives a request for access to documents under Regulation No 1049/2001 and the court before which the said proceedings take place, in particular the connection arising from the fact that an EU institution may be a party to proceedings before that court. The right of access to documents of the institutions must be exercised without undermining the protection of court proceedings (*Sweden and Others* v *API and Commission*, cited in paragraph 30 above, paragraph 84) and no other condition may be imposed. In any case, the same applies to the argument that the ICTY is, in relation to the Council, only of factual, and not legal, relevance, and to the argument that the Council has not shown that it would incur the slightest sanction on the part of the

ICTY if it were to send the documents requested to the applicant. None of those arguments can cast doubt on the right to apply the exception for the protection of court proceedings in respect of the proceedings before the ICTY.

63 Secondly, likewise ineffective are the arguments (i) that the contested decision reflects the Council's intention to submit to the jurisdiction of the ICTY, which is not provided for by any treaty, and (ii) that non-binding international relations cannot be given precedence over the rights conferred upon European citizens by primary law. On that point, it must be observed that, in adopting the contested decision, the Council merely applied Regulation No 1049/2001, in particular, the system of exceptions which it lays down (see paragraph 45 above). Therefore it cannot be said that, in doing so, the Council submitted its authority or its acts to the jurisdiction of the ICTY or that it gave precedence to non-binding international relations over rights conferred by primary law. If it were assumed that, with this complaint, the applicant is arguing that the Council's dispatch of documents to the ICTY is contrary to primary law, it should be borne in mind that the present dispute does not concern the legality of the acts by means of which the Council dispatched information to, or exchanged information with, the ICTY or Mr Gotovina's counsel.

64 Third, nor do the arguments put forward in reply have any bearing on the legality of the contested decision in view of what has been stated in paragraphs 60 to 63 above. Since the exception under the second indent of Article 4(2) of Regulation No 1049/2001 can be relied on even though the court proceedings are before the ICTY, the arguments (i) that it cannot be inferred from the fact that the Member States are subject to the rules of the UNO that the European Union is subject to the same rules and (ii) that the obligation of candidates for accession to the European Union to cooperate with the ICTY is not a rule of law which can be relied upon as against the applicant have no bearing at all on the contested decision.

65 It follows that the exception under the second indent of Article 4(2) of Regulation No 1049/2001 may protect the court proceedings taking place before the ICTY and that, consequently, the first part of the second plea in law must be rejected.

— The documents which may be protected by the exception for the protection of court proceedings

66 First of all, it has been held that the expression 'court proceedings' is to be interpreted as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up solely for the purposes of specific court proceedings (see Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 88 and the case-law cited; see also *Sweden and Others* v *API and Commission*, cited in paragraph 30 above, paragraph 78).

67 Similarly, it has been held, in a case concerning the Commission, that the words 'documents drawn up solely for the purposes of specific court proceedings' must be understood to mean the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office, the purpose of the definition in that case of the scope of the exception being to ensure, on the one hand, the protection of work done within the Commission and, on the other, confidentiality and the safeguarding of professional privilege for lawyers (*Franchet and Byk* v *Commission*, cited in paragraph 66 above, paragraph 90).

68 Second, it is clear from paragraphs 10 to 12 of the contested decision that, on the basis of the exception under the second indent of Article 4(2) of Regulation No 1049/2001, the Council refused access to the correspondence between, on the one hand, the ICTY Prosecutor and Trial Chamber I of the ICTY and, on the other hand, the SGHR, and also to the documents annexed to the correspondence, including the reports. Thus the exception for the protection of court proceedings was applied in order to refuse access to all the documents requested.

69 Third, it must be observed that the Court has examined by way of measures of inquiry all the documents to which access was refused.

70 The documents produced before the Court comprise 40 letters: 19 from the SGHR, 15 from the Prosecutor of the ICTY and 6 from Trial Chamber I. Annexed to 37 of the letters are documents, 10 of which are lists of document which are not annexed, and 27 others, most of which are reports, but also requests or pleadings from Mr Gotovina's defence counsel and decisions or orders of the ICTY.

71 At this stage, it must be stated that the Council made two mistakes, one in paragraph 12 of the contested decision and the other in the statement in defence. First, it stated that only reports were annexed to the correspondence with the Prosecutor or Trial Chamber I of the ICTY and, secondly, that those reports were annexed to the letters from the SGHR. However, examination of the documents produced by the Council shows that reports are also annexed to seven of the letters from the ICTY Prosecutor (documents numbered 1, 2, 8, 15, 17, 22 and 23 in the annex to the contested decision) and to two of the letters from Trial Chamber I (documents numbered 4 and 16 in the annex to the contested decision).

72 With regard to the documents other than reports annexed to the letters, they are annexed to five letters from the ICTY (documents numbered 4, 13, 16, 24 and 27 in the annex to the contested decision). As mentioned in paragraph 70 above, those are decisions or orders made by Trial Chamber I of the ICTY. They are, first, an order to the SGHR to produce documents or information, accompanied by similar requests from Mr Gotovina's defence counsel, second, notification to the SGHR of a defence application, seeking the disclosure of reports and accompanied by annexes, and a request to reply, third, notification to the SGHR of a defence reply and a request to lodge a rejoinder, again concerning the disclosure of reports, fourth, notification to the SGHR of the same reply and a request to lodge a rejoinder, but in French translation, and, fifth, a request to the SGHR to search for certain reports presumed to exist on the basis of certain evidence, and to state the reasons why they are missing from the ECMM archives, if that is the case.

73 With regard to the correspondence between the Prosecutor of the ICTY and the SGHR, this all concerns the possibility of using the reports in the proceedings instigated, inter alia, against Mr Gotovina before the Tribunal. It is clear from this Court's examination of the correspondence that on several occasions the Prosecutor asked the SGHR for permission to disclose the reports to Mr Gotovina's defence counsel and to counsel for the other two accused so that the information which they might contain could be used as inculpatory evidence or, on the contrary, in exoneration. In the letters the Prosecutor also asked the SGHR to lift the confidentiality requirement of Rule 70(B) of the ICTY Rules of Procedure and Evidence in respect of the abovementioned reports, which had been imposed when they were sent to the Tribunal. The letters from the SGHR reply to the Prosecutor's requests and give the SGHR's permission to disclose the reports in the proceedings before the ICTY, at the same time sending the Prosecutor expurgated versions of the reports to be passed to Mr Gotovina's defence counsel and counsel for the other two accused. Several exchanges of letters concern the possibility, requested by the Prosecutor of the SGHR, of permitting the disclosure of new versions of the reports, with fewer redacted passages, in the proceedings before the ICTY.

74 It follows from paragraphs 70 to 73 above that, with the exception of the reports, the documents to which access was refused were drawn up solely for the purpose of court proceedings. They all had the purpose of providing evidence, whether inculpatory or exculpatory, considered necessary by the Prosecutor or Trial Chamber I for the criminal proceedings against Mr Gotovina, Mr I. Čermak and Mr M. Markač. Therefore such documents concern an aspect of the organisation of a trial and reveal the way in which the judicial authorities of the ICTY decided to conduct the proceedings, as well as the reactions of the defence and a third party from which the evidence which was requested originated, and also reveal the measures taken by the authorities to obtain the evidence necessary for the proper conduct of the proceedings.

75 Consequently those documents, which were drawn up solely for the purpose of particular court proceedings, may in principle be protected from any disclosure requested under Regulation No 1049/2001 on the basis of the exception for the protection of court proceedings, provided for under the second indent of Article 4(2) of the regulation.

76 With regard to the reports, it is not disputed that they were drawn up in the period from 1991 to 1995, that is to say, more than ten years before the beginning of the proceedings against Messrs Gotovina, Čermak and Markač and that, for that reason alone, the reports cannot be regarded as having been drawn up solely for the purposes of specific court proceedings (see *Franchet and Byk* v *Commission*, cited in paragraph 66 above, paragraph 88 and the case-law cited). It is true that the Council claimed at the hearing that the reports were covered by the exception for the protection of court proceedings because the correspondence between, on the one hand, the Prosecutor or Trial Chamber I of the ICTY and, on the other, the SGHR, formed an integral part of the documents drawn up in the context of such proceedings and that the reports should be treated in the same way as that correspondence. However, that assessment does not make it possible to determine the criteria or conditions by reference to which documents which, when they were drawn up, were not exclusively intended for specific court proceedings, could nevertheless be protected by the exception under the second indent of Article 4(2) of Regulation No 1049/2001.

77 It is therefore necessary to consider whether, in the light of the second and third parts of the second plea, the documents other than the reports, to which access was refused by the contested decision, could in the present case be protected from disclosure for the reasons put forward by the Council.

— The Council cannot make itself the judge of the fairness of the proceedings before the ICTY

78 In this part of the second plea, the applicant puts forward several complaints which are closely connected.

79 First, the applicant repeats the argument in relation to the first plea that the Council unlawfully considered that the documents requested were confidential without having classified them in accordance with Article 9 of Regulation No 1049/2001. Second, he submits that the Council made itself the judge of the fairness of the proceedings before the ICTY, although the latter, as an independent judicial body, has powers which enable it to protect its information and its documents, such as Rule 53 of the Rules of Procedure and Evidence of the ICTY, which it did not do. Third, the applicant observes that, in the contested decision, the Council seeks to make the possibility of disclosing the documents requested subject to the decision of the ICTY alone, which would result in an institution relinquishing in favour of a third entity some of its powers based on primary law. While this complaint was raised in the context of the third part of the second plea, it is clear from the reply that the applicant intended to give it a meaning which exceeds the limits of the third part. Fourth, the applicant considers that the Council used the ICTY Rules to prevent the application of Regulation No 1049/2001.

80 First of all, it is necessary to examine the third complaint which concerns the fact that, according to the contested decision, the possibility of access to documents other than the reports (see paragraph 79 above) depends on the decision of the ICTY alone.

81 After referring, in paragraph 10 of the contested decision, to the procedure in the course of which the exchanges between the SGHR and the Prosecutor or Trial Chamber I of the ICTY took place, the Council considered whether the disclosure of the documents requested risked undermining the protection of court proceedings. In paragraph 11 of the contested decision, the Council noted that ‘the documents in question contain confidential information relating to the organisation of the Gotovina trial’, responsibility for which lay with the ICTY. The Council went on to say that, in the course of such proceedings, only the ICTY ‘is in a position to weigh up the interests in question and

determine whether the disclosure of documents would cause irreparable damage to one or other of the parties or would jeopardise the fairness of the court proceedings'. According to the Council, it was clear 'from the Council's consultation of the ICTY that [the SGHR's] communications with the Prosecutor of the ICTY [were] not accessible to the public under the ICTY's rules on the transparency of its activities' and that, with regard to the correspondence between the ICTY Trial Chamber I and the SGHR and the statements exchanged between Mr Gotovina's defence team and the SGHR in the context of the Gotovina trial, 'the ICTY [had], in accordance with the relevant rules on the transparency of its activities, made the non-confidential sections of that correspondence available to the public in its court records database', but that 'another part of that correspondence [continued] to be protected from any disclosure'.

82 The Council therefore concluded, in paragraph 12 of the contested decision, that 'the disclosure of non-accessible documents concerning proceedings which are still pending before the ICTY would reveal confidential information relating to the organisation of the Gotovina trial and would thus interfere not only with the proper conduct of court proceedings pending before the ICTY, but also with the principle of cooperation in good faith with an international tribunal established by the United Nations Security Council'.

83 In the first place, it must be recalled that, in the case of third-party documents, Article 4(4) of Regulation No 1049/2001 requires the institution to consult the third party concerned with a view to assessing whether an exception under Article 4(1) or (2) is applicable, unless it is clear whether or not the document should be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent that the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents (judgment of 30 January 2008 in Case T-380/04 *Terezakis* v *Commission*, not published in ECR, paragraph 54).

84 Although the Council did not state, either in the contested decision or in its written statements, that it followed the procedure laid down in Article 4(4) of Regulation No 1049/2001 by consulting the ICTY before deciding whether it should grant access to the documents requested, it must be observed that it did so, as may be inferred from paragraphs 11 and 12 of the contested decision, even though some of the documents did not originate from the ICTY.

85 Second, it is clear from the reasons set out in paragraphs 11 and 12 of the contested decision (see paragraph 81 above) that the risk of undermining the protection of court proceedings, provided for under the second indent of Article 4(2) of Regulation No 1049/2001, arises in the present case only from the fact that the documents requested were not accessible under the ICTY rules. It can be seen from the Council's consultation of the ICTY that the correspondence between the SGHR and the ICTY Prosecutor 'are not accessible to the public under the ICTY's rules on the transparency of its activities' and that some of the correspondence between the SGHR and Trial Chamber I remains protected from disclosure under the same rules. However, according to the contested decision, it is because they are not accessible to third parties in the context of the proceedings before the ICTY that the disclosure of those documents would reveal information likely to undermine pending court proceedings.

86 In addition, the Council, in its written statements and at the hearing, placed particular emphasis on the fact that it had consulted the ICTY to ascertain the status of the documents requested under the transparency rules applicable to the ICTY. Accordingly, in its defence, the Council puts forward the fact that 32 of the 40 documents requested were not accessible according to the transparency rules applicable to the ICTY and considers that the contested decision was adopted entirely in conformity with those rules.

87 Third, consultation of a third party other than a Member State, provided for by Article 4(4) of Regulation No 1049/2001, does not bind the institution, but must enable it to assess whether an exception provided for by paragraph 1 or 2 of that article is applicable (*Terezakis* v *Commission*, cited in paragraph 83 above, paragraph 60).

88 In relying merely on the fact that the documents requested were not accessible under the ICTY transparency rules, which are not, furthermore, clearly identified in the contested decision, in order to conclude that there was a likelihood that the protection of court proceedings would be undermined, the Council must, in the present case, be regarded as having considered itself bound merely by the explanation given by the ICTY. Accordingly, the Council surrendered the discretion which it was to exercise with a view to determining whether the exceptions to access to documents provided for by Regulation No 1049/2001, in particular the second indent of Article 4(2), were applicable (*Terezakis* v *Commission*, cited in paragraph 83 above, paragraph 64).

89 That conclusion is all the more justified in that it is clear from examination of the correspondence between the SGHR and the ICTY Prosecutor or Trial Chamber I of the ICTY (see paragraphs 72 and 73 above) that, although all the correspondence relates to aspects of the organisation of the trial of Messrs Gotovina, Čermak and Markač, it does not in itself reveal any information other than the identification of the evidence liable to be used as inculpatory or exculpatory evidence by the Prosecutor and made available to Mr Gotovina's defence counsel; nor does it disclose the content of that evidence. Such evidence is in fact included in the reports, which are not covered by the exception under the second indent of Article 4(2) of Regulation No 1049/2001 (see paragraph 76 above).

90 Consequently it is unnecessary to give a ruling on the other complaints falling within the second part of the second plea or on the third part of that plea and it must be held that the Council erred in law in surrendering its discretion to decide whether access to documents other than the reports could be refused by reason of a risk of undermining the protection of court proceedings.

Third plea in law, alleging that the protection of the public interest with regard to international relations, provided for under the third indent of Article 4(1)(a) of Regulation No 1049/2001, was not undermined

91 The applicant submits that the ground of the contested decision relating to undermining the protection of the public interest as regards international relations is erroneous in view of the nature and the content of the documents which he requested.

92 In essence, the applicant complains that the Council raised against him the exception concerning the protection of international relations, whereas the documents to which he requested access are not covered by that exception because they are Council decisions concerning the transmission of documents to the ICTY in connection with Mr Gotovina's trial and the entire correspondence between the European Union institutions and the ICTY.

93 After considering whether the disclosure of the documents requested was likely to undermine the protection of court proceedings and legal advice, the Council considered in the contested decision whether there was a risk of undermining the protection of the public interest with regard to international relations, as provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001. Thus the Council found, in paragraph 13 of the contested decision, that 'disclosure of the reports … enclosed with [SGHR's] letters to the Prosecutor at the ICTY would put at risk the international relations of the European Union and its Member States with the countries concerned in the Western Balkans by releasing information revealing in detail comments, assessments and analyses of the political, military and security situation in the area exchanged on a confidential basis between the different operatives of the ECMM'. The Council went on to observe that 'that information [remained] sensitive, as [was] demonstrated by the interest it aroused in the context of the

proceedings before the ICTY' and that 'disclosure of the documents in question would create a precedent which would run counter to the European Union's objective of continuing to carry out its policy towards the Western Balkans'. The Council concluded paragraph 13 of the contested decision by observing that 'the confidentiality of the reports [was] a key factor in enhancing trust , dialogue and cooperation with the countries of the region'.

94 It must be observed that, contrary to what was argued by the Commission in the defence and at the hearing, the exception for the protection of the public interest as regards international relations is mentioned only in paragraph 13 of the contested decision and it relates only to the reports annexed to the letters exchanged between the SGHR and the Prosecutor or Trial Chamber I of the ICTY.

95 With regard to putting at risk international relations on the ground that the disclosure of documents other than the reports would prejudice the cooperation in good faith of the European Union with the ICTY, established by the United Nations Security Council, it is true that the concept of cooperation in good faith was mentioned in paragraphs 12 and 14 of the contested decision. However, it does not appear from the broad logic of the decision that the concept was used to support application of the exception for the protection of international relations. In fact, cooperation in good faith is mentioned in paragraph 12 of the contested decision in relation to the risk of undermining the proper conduct of court proceedings which were then pending before the ICTY. In paragraph 14 of the contested decision the Council claims that the obligation to cooperate with the ICTY, presented as set out in the relevant United Nations Security Council resolutions, is binding on all the Member States of the European Union and that international cooperation is one of the objectives of the common foreign and security policy listed in Article 11(1) TEU. With those observations the Commission replied to the applicant's confirmatory request, whereby the applicant maintained, with arguments which are in essence the same as those mentioned in paragraph 50 above, that it was not possible for the Council to rely on the exception for the protection of court proceedings in the case of proceedings before the ICTY. It should, moreover, be noted that it was only at the stage of the contested decision that the Council argued, for the first time, that the protection of the public interest as regards international relations was likely to be undermined.

96 In those circumstances, it must be found that, as the applicant maintains, only the reports are, in the contested decision, protected by the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001. However, that finding is of no relevance to the issue as to whether the contested decision is well founded in so far as in the decision the Council refuses access to the reports. In the application the applicant has put forward no plea or argument at all claiming that the Council had not shown that disclosure of the reports was likely to undermine the exception for the protection of international relations or that the Council had not carried out a specific, individual examination of the reports.

97 The third plea must therefore be rejected in any event.

98 Consequently the contested decision must be annulled in so far as it refuses access to documents other than the reports. The action must be dismissed as to the remainder, without it being necessary to give a ruling on the fourth plea or to grant the measure of organisation of procedure sought by the applicant in his letter of 6 December 2010.

99 With regard to the application for the exclusion of Council representatives from the proceedings pursuant to the second subparagraph of Article 41(1) of the Rules of Procedure, it must be observed that the alleged conduct of the agents in question, namely the failure to inform the Court of the decision in *The Prosecutor* v *Ante Gotovina, Ivan Čermak and Mladen Markač* (paragraph 18 above), cannot constitute a reason for exclusion from the proceedings in the present case.

Costs

100 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, according to Article 87(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

101 As the applicant and the Council have in this case each succeeded on some and failed on other heads, they must each be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the Council of the European Union of 7 December 2009 refusing to grant Mr Ivan Jurašinović access (i) to the decisions relating to the transmission to the International Criminal Tribunal for the Former Yugoslavia of documents disclosure of which had been requested in the context of the trial of Mr Ante Gotovina and (ii) to the entire correspondence exchanged in that connection between the institutions of the European Union and the Tribunal, including any annexes, in particular the initial requests for documents from the Tribunal and from Mr Gotovina's lawyers, in so far as that decision refuses access to the correspondence exchanged between the Council and the Tribunal, and to documents other than the reports drawn up by the European Community Monitoring Mission, annexed to that correspondence;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs.**

Forwood Dehousse Prek

Schwarcz Popescu

Delivered in open court in Luxembourg on 3 October 2012.

[Signatures]