

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-04-74-A
Date: 18 July 2016
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Liu Daqun
Judge Fausto Pocar
Judge Theodor Meron
Judge Bakone Justice Moloto

Registrar: Mr. John Hocking

Decision of: 18 July 2016

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON APPLICATION BY THE REPUBLIC OF CROATIA FOR
LEAVE TO APPEAR AS *AMICUS CURIAE* AND TO SUBMIT
AMICUS CURIAE BRIEF**

The Office of the Prosecutor:

Mr. Douglas Stringer, Ms.

Counsel for the Defence:

Mr.

Ms. Senka Nožica and Mr. Karim A.

Ms. Nika Pinter and Ms. Natacha Fauveau-Ivanović for Mr.

Ms. Vesna Alaburić and Mr. Davor Lazić for Mr. Milivoj Petković

Ms. Dijana Tomašegović-Tomić and Mr.

Mr. Fahrudin Ibrišimović and Mr.

Republic of Croatia:

Mr. Ante Šprlje, Minister of Justice

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 seized of the “Application by the Republic of Croatia for Leave to Appear as *Amicus Curiae* and to Submit *Amicus Curiae* Brief”, filed publicly by the Republic of Croatia (“Croatia”) on 22 March 2016 (“Application”).

and a corrigendum to the Response on 1 April 2016.²

I. BACKGROUND

2. On 29 May 2013, Trial Chamber III of the Tribunal (“Trial Chamber”) convicted Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić (together, “Six Accused”) of crimes against humanity and war crimes on the basis of their participation in a joint criminal enterprise with a common criminal purpose which was the “domination by the [Croats from the Croatian Republic of Herceg-Bosna] through ethnic cleansing of the Muslim population”³ from the territories claimed to form part of Herceg-Bosna (“JCE”).⁴ The Trial Chamber further found that the ultimate political purpose of the JCE was to establish a Croatian entity in Bosnia and Herzegovina, reconstituting in part the borders of the Croatian Banovina,⁵ to facilitate the reunification of the Croatian people.⁶ It found that the JCE included, among others, the Six Accused as well as Franjo Tuđman, Gojko Šušak, Janko Bobetko and Mate Boban.⁷ The Trial Judgement was appealed by the Prosecution and the Six Accused.⁸

¹ Prosecution Response to the Application by the Republic of Croatia to Appear as *Amicus Curiae* and to Submit an *Amicus Curiae* Brief, 31 March 2016 (“Response”).

² Corrigendum to Prosecution Response to the Application by the Republic of Croatia to Appear as *Amicus Curiae* and to Submit an *Amicus Curiae* Brief, 1 April 2016 (“Corrigendum”). The Appeals Chamber notes that the Corrigendum includes, as Annex A, a corrected Response (“Corrected Response”). The Appeals Chamber will therefore refer to the Corrected Response, rather than the Response, throughout this decision.

³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Judgement, 6 June 2014 (French original filed on 29 May 2013) (“Trial Judgement”), Vol. 4, para. 41.

⁴ Trial Judgement, Vol. 4, paras 41, 43-44, 65-68. The Trial Chamber found the Six Accused guilty of crimes including persecution on political, racial or religious grounds (Count 1), murder (Count 2), willful killing (Count 3), rape (Count 4), inhuman treatment (sexual assault) (Count 5), deportation (Count 6), unlawful deportation of a civilian (Count 7), inhumane acts (forcible transfer) (Count 8), unlawful transfer of a civilian (Count 9), imprisonment (Count 10), unlawful confinement of a civilian (Count 11), inhumane acts (conditions of confinement) (Count 12), inhuman treatment (conditions of confinement) (Count 13), inhumane acts (Count 15), inhuman treatment (Count 16), unlawful labour (Count 18), extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly (Count 19), destruction or wilful damage to institutions dedicated to religion or education (Count 21), appropriation of property not justified by military necessity and carried out unlawfully and wantonly (Count 22), plunder of public or private property (Count 23), unlawful attack on civilians (Count 24), and the unlawful infliction of terror on civilians (Count 25). Trial Judgement, Vol. 1, para. 26; Vol. 4, Disposition.

⁵ The Croatian Banovina was a territorial entity which existed from 1939 (“1939 Banovina”). Trial Judgement, Vol. 1, para. 16; Vol. 4, para. 14.

⁶ Trial Judgement, Vol. 4, paras 24, 43-44.

⁷ Trial Judgement, Vol. 4, para. 1231.

⁸ Prosecution Notice of Appeal, 27 August 2013; Jadranko Prlić’s Corrigendum to His Notice of Appeal, 13 January 2015; Bruno Stojić’s Notice of Appeal, 4 August 2014; Corrigendum to Slobodan Praljak’s Notice of Appeal with Annex, 29 July 2013; Milivoj Petković’s Notice of Appeal, 5 August 2014; Re-Filed Notice of Appeal

II. SUBMISSIONS

3. Croatia requests leave to file an *amicus curiae* brief and to appear as *amicus curiae* in the present proceedings, in relation to the Trial Chamber's factual findings that the three deceased officials of the Republic of Croatia, namely Franjo Tuđman, Gojko Šušak and Janko Bobetko (together, "Three Croatian Officials"), were members of the JCE.⁹ Croatia submits that, if granted *amicus curiae* status, it "would 'assist [the Appeals Chamber] in the proper determination of the case'" by making factual and legal submissions on behalf of the Three Croatian Officials, all times relevant to the Indictment were acting in their *ex officio* capacities".¹⁰ Croatia first contends that the Trial Judgment lacks evidence to support the conclusion that the Three Croatian Officials were responsible for "directing and coordinating events on the ground to commit the crimes" or that they otherwise intended the commission of crimes.¹¹ More specifically, it submits that the Trial Chamber: (i) relied upon only three pieces of evidence to establish that the Croatian leadership intended for crimes to be committed against the Bosnian Muslim population in Herceg-Bosna, which after careful review "in no way suggest that the leadership of Croatia intended for the commission of crimes against Bosnian Muslims";¹² and (ii) conflated the "political objective" to annex the 1939 Banovina to Croatia with the intent to use criminal means to achieve this objective, and incorrectly concluded that the Three Croatian Officials were members of the JCE solely on the basis of findings on the "political objective".¹³

4. Second, Croatia submits that by identifying the Three Croatian Officials, who were all deceased before the indictment in this case was filed, as members of the JCE, the Trial Chamber violated their presumption of innocence as guaranteed by Article 6(2) of the European Convention on Human Rights.¹⁴ In its view, the Trial Chamber should have refrained from making any statements contradicting the presumption that the Three Croatian Officials were "innocent of allegations" that they were members of the JCE.¹⁵ Croatia contends that the Trial Chamber's findings of guilt against the Six Accused in this case also amounted to a "posthumous conviction" of the Three Croatian Officials.¹⁶

Filed on Behalf of Mr. Valentin Ćorić, 23 December 2014; Re-Filing of the Notice of Appeal on Behalf of Berislav Pušić, 13 March 2014.

⁹ Application, paras 1-3. See also Application, Annex 1.

¹⁰ Application, para. 4.

¹¹ Application, para. 2. See Application, paras 5-19.

¹² Application, para. 9. See Application, paras 10-19, referring to Exhibits P00089, P00021 and P00466.

¹³ Application, paras 5-8.

¹⁴ Application, paras 2, 21-29, referring to European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, entered into force 3 September 1953. ETS 5 ("ECHR").

¹⁵ Application, para. 22.

¹⁶ Application, para. 29.

5. The Prosecution responds that the Appeals Chamber should deny the Application on the grounds that Croatia does not meet the standard for standing as *amicus curiae* under Rule 74 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), as the information that Croatia proposes to introduce would not assist the Chamber in the “proper determination” of the issues pending on appeal.¹⁷ The Prosecution contends that the issues on which Croatia seeks to intervene are questions of fact, whilst *amicus curiae* submissions are generally limited to matters of law. In this regard, the Prosecution further asserts that: (i) Croatia mischaracterises the Trial stating that the Three Croatian Officials were found to be members of the JCE solely on the basis of a “political objective”;¹⁸ (ii) the Trial determine whether there was a plurality of persons forming a joint criminal enterprise, considered that the Three Croatian Officials were among such plurality of persons who “consulted each other to devise and implement the common criminal purpose”;²⁰ and (iii) Croatia’s reliance on, and misinterpretation of, three isolated pieces of evidence does not show an error in the Trial conclusion.²¹

6. The Prosecution further responds that the Three Croatian Officials do not benefit from the presumption of innocence as they were not indicted or prosecuted for any crimes alleged in this case.²² In this regard, it argues that the Appeals Chamber has confirmed that a trial chamber’s findings on criminal responsibility are binding only on the accused, and the mere fact that a person has been found to be involved in culpable activity in a case charging another accused, does not give the mentioned person the right to intervene in that case.²³

III. APPLICABLE LAW

7. Rule 74 of the Rules provides that “[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber. Submissions pursuant to Rule 74 of the Rules is within the discretion of the Appeals Chamber.”²⁴

¹⁷ Corrected Response, paras 1-2.

¹⁸ Corrected Response, para. 3.

¹⁹ Corrected Response, para. 4.

²⁰ Corrected Response, para. 4, referring to Trial Judgement, Vol. 4, para. 1231.

²¹ Corrected Response, para. 5.

²² Corrected Response, paras 6-7. The Prosecution contends that the presumption of innocence as provided by the International Covenant on Civil and Political Rights, the ECHR, and the jurisprudence of the European Court of Human Rights, only apply to persons charged with a criminal offence. Corrected Response, para. 6 and references cited therein.

²³ Corrected Response, para. 8 and references cited therein.

²⁴ *Prosecutor v. Radovan Karadžić*, Case No. 1T-95-5/18-AR98bis.1, Decision on Application for Leave to Submit an *Amicus Curiae* Brief, 21 September 2012 (“*Karadžić* Decision”), p. 1; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. 1T-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012 (“*Gotovina and Markač* Decision of 14 February 2012”), para. 3; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on David J. Scheffer’s Application to File an *Amicus Curiae* Brief, 7 September 2010 (“*Šainović*

The primary criterion for the Appeals Chamber in determining whether to grant leave to file an *amicus curiae* brief is whether such a submission would assist the Appeals Chamber in its consideration of the questions at issue on appeal.²⁵ The Appeals Chamber recalls that “[i]n general, *amicus curiae* submissions shall be limited to questions of law, and shall not include factual evidence relating to elements of a crime charged”.²⁶ Accordingly, Chambers have generally allowed *amicus curiae* submissions in relation to questions of law.²⁷

IV. ANALYSIS

8. The Appeals Chamber recalls that appellate proceedings at the Tribunal are largely party-driven and that the parties assist the Appeals Chamber through making submissions on, *inter alia*, issues of fact.²⁸ The Appeals Chamber notes that Croatia provides its own interpretation of certain evidence relied upon in the Trial Judgement to establish the existence of the common purpose of the JCE.²⁹ As such, it repeats the task undertaken by the Trial Chamber and the parties in their submissions on appeal.³⁰ The Appeals Chamber thus finds that Croatia’s proposed submissions would not assist the Appeals Chamber in its consideration of the questions at issue on appeal.

9. In addition, the Appeals Chamber emphasises that findings of criminal responsibility made in a case before the Tribunal are binding only on the accused in a specific case.³¹ In this regard, Appeals Chamber observes that the Three Croatian Officials were not indicted or charged in the present case. Furthermore, the Trial Chamber made no explicit findings concerning their participation in the JCE and did not find them guilty of any crimes.

Chamber considers that the Trial Chamber’s findings regarding the mere existence and membership of the JCE do not – and cannot – constitute findings of criminal responsibility on the part of any

Decision”), p. 2; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010 (“*Hartmann* Decision”), para. 4 and references cited therein.

²⁵ *Karadžić* Decision, p. 2; *Gotovina and Markač* Decision of 14 February 2012, para. 3; *Šainović* Decision, p. 2 and references cited therein.

²⁶ Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122/Rev.1, 16 February 2015, para. 9(a). See *Karadžić* Decision, p. 2; *Gotovina and Markač* Decision of 14 February 2012, para. 3; *Hartmann* Decision, para. 5.

²⁷ See *Gotovina and Markač* Decision of 14 February 2012, para. 3; *Hartmann* Decision, para. 5 and references cited therein.

²⁸ See *Karadžić* Decision, p. 2; *Gotovina and Markač* Decision of 14 February 2012, para. 11; *Hartmann* Decision, para. 7.

²⁹ See Application, paras 2, 5-20.

³⁰ See *Karadžić* Decision, p. 2; *Gotovina and Markač* Decision of 14 February 2012, para. 11. The Appeals Chamber has previously denied *amicus curiae* applications concerning alleged errors of facts on the ground that the proposed submissions would not be helpful to its determination of the appeal. See, e.g., *Karadžić* Decision, pp. 2-3; *Gotovina and Markač* Decision of 14 February 2012, paras 11-13.

³¹ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014, para. 142, referring to *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012 (“*Gotovina and Markač* Decision of 8 February 2012”), para. 12.

persons who were not charged and convicted in this case.³² Thus, the Trial Judgement is binding *only* on the Six Accused, and the presumption of innocence of the Three Croatian Officials is not impacted.³³ The Appeals Chamber further observes that the Tribunal's jurisdiction is restricted to "natural persons" and the Tribunal does not have the competency to make findings on state responsibility.³⁴ Accordingly, the Appeals Chamber emphasises that the findings in the Trial Judgement regarding the Three Croatian Officials in no way constitute findings of responsibility on the part of the state of Croatia.³⁵ The Appeals Chamber therefore finds Croatia's submissions to be without merit and dismisses them.

10. In light of the above, the Appeals Chamber declines to grant Croatia leave to submit an *amicus curiae* brief and to appear as *amicus curiae* in this case.

V. DISPOSITION

11. For the foregoing reasons, pursuant to Rule 74 of the Rules, the Appeals Chamber:

DENIES the Application.

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

Dated this eighteenth day of July 2016,
At The Hague,
The Netherlands



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]

³² The Appeals Chamber recalls that for criminal liability pursuant to joint criminal enterprise, with regard to the objective element it must be established that the accused participated in a joint criminal enterprise. Three elements must be established in order to make such a finding, namely: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute of the Tribunal; and (iii) the participation of the accused in this common purpose. See *Prosecutor v. Radoslav Brdamin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 364; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 227.

³³ International Covenant on Civil and Political Rights, entered into force 23 March 1976, United Nations Treaty Series, vol. 999, p.171, Article 14(2); ECHR, Article 6(2). These provisions specify that the right to be presumed innocent applies to persons "charged with a criminal offence".

³⁴ Statute of the Tribunal, Arts 1, 6-7. See also *Gotovina and Markač* Decision of 8 February 2012, para. 12.

³⁵ See *Gotovina and Markač* Decision of 8 February 2012, para. 12.