



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-A  
Date: 8 February 2012  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Carmel Agius  
Judge Patrick Robinson  
Judge Mehmet Güney  
Judge Fausto Pocar

**Registrar:** Mr. John Hocking

**Decision of:** 8 February 2012

**PROSECUTOR**

v.

**ANTE GOTOVINA  
MLADEN MARKAČ**

***PUBLIC***

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**DECISION ON MOTION TO  
INTERVENE AND STATEMENT OF  
INTEREST BY THE REPUBLIC OF CROATIA**

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**The Office of the Prosecutor**

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**Republic of Croatia**

Mr. Orsat Miljenić, 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 seised of the “Motion to Intervene and Statement of Interest by the Republic of Croatia” filed confidentially by the Republic of Croatia (“Croatia”) on 16 December 2011 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed a confidential response with confidential annexes on 30 December 2011.<sup>1</sup> Croatia filed a confidential reply on 3 January 2012.<sup>2</sup>

## I. BACKGROUND

2. On 18 October 2006, Trial Chamber II of the Tribunal rejected Croatia’s request for leave to appear in the case of *Prosecutor v. Ante Gotovina et al.* as an *amicus curiae*.<sup>3</sup> On 15 April 2011, Trial Chamber I of the Tribunal (“Trial Chamber”) found that Ante Gotovina (“Gotovina”) and Mladen Markač (“Markač”) participated in a joint criminal enterprise by making significant contributions to its common purpose of permanently removing the Serb civilian population from the Krajina region of Croatia by force or threat of force, amounting to persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer.<sup>4</sup> The Trial Chamber further concluded that Gotovina and Markač were guilty of the deviatory crimes of murder, inhumane acts, cruel treatment, plunder, destruction, and unlawful detention, ascribing liability to them on the basis of the third, extended form of joint criminal enterprise.<sup>5</sup> The Trial Chamber specified that members of the joint criminal enterprise included Gotovina; Markač; Croatia’s former President, Franjo Tuđman; the former Minister of Defence, Gojko Šušak; the former Deputy Prime Minister, Jure Radić; and others in Croatia’s political and military leadership.<sup>6</sup> Gotovina and Markač have appealed the Trial Judgement.<sup>7</sup>

## II. APPLICABLE LAW

3. The Appeals Chamber recalls that pursuant to Rules 54 and 107 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), it may issue such orders, summonses, subpoenas, warrants and

<sup>1</sup> Prosecution Response to Republic of Croatia’s Motion to Intervene and Statement of Interest (“Response”).

<sup>2</sup> Reply in Support of Motion to Intervene and Statement of Interest by the Republic of Croatia (“Reply”).

<sup>3</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Requests of Republic of Croatia to Appear as *Amicus Curiae*, 18 October 2006, pp. 3-4.

<sup>4</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011 (“Trial Judgement”), Vol. II, paras 2369-2371, 2375, 2579-2583, 2587.

<sup>5</sup> Trial Judgement, paras 2372-2375, 2584-2587.

<sup>6</sup> Trial Judgement, paras 2316-2319, 2375, 2587.

<sup>7</sup> Notice of Appeal of Ante Gotovina, 16 May 2011; Mladen Markač’s Notice of Appeal, 16 May 2011 (confidential).

transfer orders as may be necessary. The Appeals Chamber further recalls that pursuant to Rules 74 and 107 of the Rules, it may grant leave to a state to appear before it and make submissions as *amicus curiae*.

### III. PRELIMINARY MATTERS

#### A. Over-sized Filing

4. The Motion numbers 10,117 words.<sup>8</sup> In the Motion, Croatia acknowledges the guidelines set out in the Practice Direction on the Length of Briefs and Motions<sup>9</sup> (“Practice Direction on Length”), but submits that it is not applicable and that no clear procedural rule addresses the unique nature of the Motion.<sup>10</sup> Croatia maintains that the word count is reasonable because the Motion is comprised of two pleadings: a motion to intervene numbering 1,852 words and a substantive statement of interest numbering 8,266 words.<sup>11</sup> Croatia submits that it is willing to amend its pleading to conform to any word limit required by the Appeals Chamber.<sup>12</sup> The Prosecution objects to the Motion and contends that Croatia has failed to demonstrate exceptional circumstances justifying the Motion’s length.<sup>13</sup>

5. The Practice Direction on Length provides that motions shall not exceed 3,000 words unless specifically exempted from this limit.<sup>14</sup> A review of the Motion indicates that it is a single submission, and therefore the 10,117 word length of the Motion exceeds the specified limit. The Appeals Chamber recalls that parties must seek authorisation in advance before exceeding the word limit and provide an explanation of the exceptional circumstances that necessitate the oversized filing.<sup>15</sup> However, the Appeals Chamber finds that in light of the need to facilitate expeditious appeals proceedings it will consider the Motion in its entirety.<sup>16</sup>

#### B. Late Filing of Response

6. Croatia submits that the Response was filed three days later than provided for by the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the

<sup>8</sup> Motion, p. 29.

<sup>9</sup> IT/184 Rev. 2, 16 September 2005.

<sup>10</sup> Motion, p. 29, n. 80. *See also* Reply, para. 5.

<sup>11</sup> Motion, p. 29, n. 80; Reply, para. 8.

<sup>12</sup> Motion, p. 29, n. 80; Reply, para. 8.

<sup>13</sup> Response, para. 4.

<sup>14</sup> Practice Direction on Length, para. 5.

<sup>15</sup> Practice Direction on Length, para. 7.

<sup>16</sup> *Cf.* Decision on Gotovina’s Motion to Exceed Word Limit, 26 October 2011, p. 1.

International Tribunal<sup>17</sup> (“Practice Direction on Appeal Proceedings”), and should therefore be rejected.<sup>18</sup> On 5 January 2012, the Prosecution filed the confidential “Prosecution Motion to Vary Time-Limit” (“Prosecution Motion”), asserting that the Practice Direction on Appeal Proceedings is not applicable to the Response as Croatia is not a “party” to the proceedings, and maintaining that the Response was properly filed within 14 days of the Motion in compliance with Rule 126 *bis* of the Rules.<sup>19</sup> Even if the Practice Direction on Appeal Proceedings applies to the Response, the Prosecution asserts that the unusual non-party intervention, the over-sized length of the Motion, and uncertainty regarding the applicable time-limit constitute good cause for a late filing.<sup>20</sup> Croatia replies that the Prosecution provides no basis for its decision to rely upon Rule 126 *bis* of the Rules rather than the Practice Direction on Appeal Proceedings.<sup>21</sup> Croatia recognises, however, that it suffered only minimal prejudice from the timing of the Response’s filing.<sup>22</sup>

7. The Appeals Chamber finds that the Prosecution should have complied with the time limits set by the Practice Direction on Appeal Proceedings.<sup>23</sup> However the Appeals Chamber retains the discretion to consider any motion as validly filed after the expiration of a prescribed time-limit.<sup>24</sup> The Appeals Chamber finds that, given the Prosecution’s uncertainty as to the time limit and in light of Croatia’s admission that it suffered minimal prejudice from the late filing, the Appeals Chamber will consider the Response as validly filed.

### C. Confidential Status of Filings

8. A review of the relevant submissions demonstrates that they do not contain information which raises confidentiality concerns. The Appeals Chamber, therefore, sees no rationale that justifies maintaining the confidential status of the Motion, Response, Reply, Prosecution Motion, and Response to Prosecution Motion.

<sup>17</sup> IT/155 Rev. 3, 16 September 2005.

<sup>18</sup> Reply, paras 3, 4, *citing* Practice Direction on Appeal Proceedings, para. 13.

<sup>19</sup> Prosecution Motion, para. 1.

<sup>20</sup> Prosecution Motion, para. 2.

<sup>21</sup> Response of the Republic of Croatia to Prosecution Motion to Vary Time-Limit, 9 January 2012 (confidential) (“Response to Prosecution Motion”), para. 2.

<sup>22</sup> Response to Prosecution Motion, para. 4.

<sup>23</sup> The Appeals Chamber notes that the Practice Direction on Appeal Proceedings is explicitly directed towards “written submissions in appeal proceedings before the [...] Tribunal” without exception. *See* Practice Direction on Appeal Proceedings, p. 2. The Appeals Chamber also notes that the Prosecution Motion should have been filed prior to the Response. *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.2, Decision on Prosecution Request for Extension of Time, 15 January 2008, p. 2 (“Considering that in seeking an extension of time, a party should file its request so as to allow the Appeals Chamber enough time to determine its merits prior to the expiry of the deadline.”).

<sup>24</sup> Practice Direction on Appeal Proceedings, para. 19; Rule 127(A)(ii)-(B) of the Rules.

#### IV. MOTION TO INTERVENE AND STATEMENT OF INTEREST

##### A. Arguments of the Parties

9. Croatia asserts that the Appeals Chamber should permit it to intervene in Gotovina's and Markač's appeals against the Trial Judgement or, alternatively, requests that the Motion be recognised as a "Statement of Interest" in the appeals.<sup>25</sup> As a general matter, Croatia suggests that allowing states the right to intervene or to file a statement of interest in judicial proceedings is a desirable innovation for the Tribunal, particularly given the development of jurisprudence related to joint criminal enterprise liability.<sup>26</sup> More specifically, Croatia contends, *inter alia*, that the Trial Chamber's finding that Gotovina, Markač, and other leaders of the Croatian Government were part of a joint criminal enterprise effectively held Croatia liable for the crimes encompassed by the joint criminal enterprise.<sup>27</sup> Croatia submits that where a state is found to have participated in a crime by reason of actions taken by individual members of that state's government, the state should have "at least" a limited right to intervene and explain its interest.<sup>28</sup>

10. Croatia further asserts that customary international law recognises that a state may be a party of interest or a primary party in judicial proceedings, notes that other national and international courts allow state interventions or statements of interest,<sup>29</sup> and submits that "nothing prevents the Tribunal from hearing the interests of third parties".<sup>30</sup> Furthermore, Croatia maintains that its interests are distinct from the interests of the appellants.<sup>31</sup> In this respect, it contends that the Trial Judgement could negatively impact future Croatian public office holders' ability to make foreign policy and defence-related decisions, harm Croatia's legitimacy before international institutions, and detract from the Croatian people's belief in the legitimacy of international institutions.<sup>32</sup> Croatia also submits that the Trial Judgement's findings are being used as negative precedent in cases against Croatia before other international and national fora.<sup>33</sup>

<sup>25</sup> Motion, paras 1, 12, 65.

<sup>26</sup> See Motion, paras 3-13.

<sup>27</sup> See Motion, para. 3. See also Motion, paras 2, 4, 6, 8.

<sup>28</sup> Motion, para. 6. See also Motion, paras 8, 30, 33.

<sup>29</sup> Motion, paras 9-11. Croatia notes, in particular, that the Statute of the International Court of Justice permits a state to submit a request to intervene in a case. Motion, para. 9. Croatia also asserts that states may be parties to proceedings before "the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, United Nations' tribunals, and a variety of domestic proceedings." Motion, para. 11.

<sup>30</sup> Motion, para. 4.

<sup>31</sup> Motion, para. 19.

<sup>32</sup> Motion, para. 21.

<sup>33</sup> Motion, paras 2, 31-33.

11. The Prosecution responds, *inter alia*, that the Statute of the Tribunal (“Statute”) and the Rules do not provide states the right to intervene or file a statement of interest before the Tribunal.<sup>34</sup> Furthermore, it asserts that there are no convincing reasons that justify granting Croatia the right to intervene or file a statement of interest.<sup>35</sup>

## B. Analysis

12. As an initial matter, the Appeals Chamber underscores that findings of criminal responsibility made in a case before the Tribunal are binding only for the individual accused in that specific case. Thus, the Trial Judgement’s binding applicability is limited to addressing the individual criminal liability of Gotovina, Markač, and Ivan Čermak in respect of the charges brought against them. The Appeals Chamber emphasises that the Trial Chamber’s findings regarding the existence of a joint criminal enterprise in no way constitute findings of responsibility on the part of the state of Croatia. It also notes that factual findings in particular cases are not even binding with respect to other cases being heard before the Tribunal.<sup>36</sup>

13. The Appeals Chamber further underscores that the Statute and Rules set out particular roles that individual states may play in the Tribunal’s operations, including certain rights and obligations. These include cooperating with the Tribunal’s investigations and prosecutions, complying with requests for judicial assistance, and potentially serving as *amicus curiae*.<sup>37</sup> In appropriate circumstances, states are also entitled to appeal interlocutory decisions of Trial Chambers which concern issues of general importance to the powers of the Tribunal, especially in situations where states’ legal rights are impacted.<sup>38</sup>

14. Turning to the Motion, the Appeals Chamber observes that Croatia effectively invites it, “as a mechanism of an *ad hoc* and developing criminal tribunal”, to interpret the Statute as providing states a

<sup>34</sup> Response, paras 1, 5, 6.

<sup>35</sup> Response, paras 1, 5, 7-16.

<sup>36</sup> Cf. *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, paras 20-23; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011, paras 17-18; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009, para. 269; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras 39-42, 47.

<sup>37</sup> See, e.g., Article 29 of the Statute; Rule 74 of the Rules.

<sup>38</sup> See Rule 108 *bis* of the Rules. An example of such a situation is where a state has been ordered by a Trial Chamber to produce documents or records from its archives. See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR108*bis*.1, Decision on Prosecution’s Motion to Strike Request for Review Under Rule 108*bis*, 13 December 2006 (“Gotovina Decision”), para. 8.

right to intervene or file statements of interest in judicial proceedings conducted by the Tribunal.<sup>39</sup> The Appeals Chamber notes that Croatia cites no relevant provision in the Statute or judicial precedent of the Tribunal upon which the Appeals Chamber could base such an interpretation.<sup>40</sup>

15. Croatia has acknowledged that its request is aimed at ensuring consideration of state interests during the adjudication of criminal cases brought against individuals and heard by the Tribunal.<sup>41</sup> However, Article 1 of the Statute limits the competence of the Tribunal to “persons”; Article 6 of the Statute underscores that the Tribunal “shall have jurisdiction over natural persons pursuant to the provisions of the present Statute”; and Article 7 of the Statute requires the Tribunal to consider “Individual criminal responsibility”.<sup>42</sup> Croatia’s suggestion, that individual criminal trials and appeals become a forum for exposition and consideration of state interests different from those of accused individuals, would both expand the Tribunal’s jurisdiction beyond the limits set in the Statute and detract from the Tribunal’s focus on individual criminal responsibility. The Appeals Chamber considers that Croatia’s proposal would thus involve an impermissible departure from the text and spirit of the Statute.<sup>43</sup>

16. Insofar as Croatia suggests that the Tribunal should follow the practices of other national or international courts that allow states to intervene or submit statements of interest,<sup>44</sup> it does not establish the relevance of precedent established by other judicial institutions. The other courts referred to by Croatia draw their authority from different statutes, codes, or other operative texts, are endowed with different jurisdictions, and/or address different types of cases than the Tribunal. Croatia does not demonstrate how the Tribunal could adopt the relevant practices of these other courts, given the specific competencies of the Tribunal set out in the Statute. Croatia also provides no argument or

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<sup>39</sup> Motion, para. 1. *See also* Motion, para. 2.

<sup>40</sup> *See generally*, Motion.

<sup>41</sup> Motion, paras 2-7.

<sup>42</sup> *See Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010, para. 6. *Cf. Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 186 (“The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability”); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN. Doc. S/25704 (3 May 1993), paras 50 (“the ordinary meaning of the term ‘persons responsible for serious violations of international humanitarian law’ would be natural persons to the exclusion of juridical persons”), 53 (“[a]n important element in relation to the competence ratione personae (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility.” (emphasis in the original)).

<sup>43</sup> The Appeals Chamber notes that rights provided by Rule 108 *bis* of the Rules are much narrower in scope than the broad right to intervene or file statements of interest sought by Croatia. *Cf. Gotovina Decision*, para. 8.

<sup>44</sup> *See* Motion, paras 9-12.

citation to support its apparent claim that the right of states to participate in individual criminal proceedings is provided for by customary international law.<sup>45</sup>

17. In view of the foregoing, the Appeals Chamber dismisses Croatia's request to intervene in the proceedings and submit a statement of interest.

## V. REQUEST TO SERVE AS *AMICUS CURIAE*

18. Croatia requests leave to address issues related to its interest in the outcome of these proceedings through the submission of an *amicus curiae* brief, if denied the right to intervene or submit a statement of interest.<sup>46</sup> It contends that the Motion demonstrates that it is qualified to submit an *amicus curiae* brief.<sup>47</sup> Croatia maintains that as *amicus curiae* it will raise novel issues of law and that its submission will assist the Appeals Chamber.<sup>48</sup>

19. The Prosecution responds that Croatia's request to file an *amicus curiae* submission should be denied,<sup>49</sup> asserting, *inter alia*, that Croatia has failed to demonstrate that it meets the relevant requirements for serving as *amicus curiae*.<sup>50</sup>

20. The Appeals Chamber has held that "the primary criterion for the Appeals Chamber in determining whether to grant leave to an *amicus curiae* to submit a brief or to offer oral argument is whether such submission would assist the Appeals Chamber in its consideration of the questions at issue on appeal."<sup>51</sup> Granting leave to make submissions pursuant to Rule 74 of the Rules falls within the discretion of the Chamber.<sup>52</sup>

21. The Appeals Chamber finds that the locus of the Motion's arguments, Croatia's national interests, is beyond the scope of the issues on appeal.<sup>53</sup> Accordingly, the Appeals Chamber is not satisfied that granting Croatia leave to submit an *amicus curiae* brief would assist in the proper determination of Gotovina's and Markač's appeals against the Trial Judgement.

<sup>45</sup> See, e.g., Motion, paras 9, 11.

<sup>46</sup> Motion, paras 1, 65.

<sup>47</sup> Reply, para. 13. See also Reply, paras 9-11.

<sup>48</sup> Reply, paras 14-15. See also Motion, para. 64.

<sup>49</sup> Response, paras 2, 17, 24, 33.

<sup>50</sup> Response, paras 2, 18, 22-33.

<sup>51</sup> *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 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.

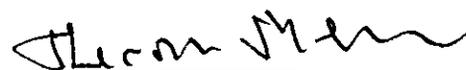
<sup>52</sup> See Šainović Decision, p. 2; Hartmann Decision, para. 4.

<sup>53</sup> See *supra*, paras 14-17.

**VI. DISPOSITION**

22. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion in its entirety, and **DIRECTS** the Registry to lift the confidential status of the Motion, Response, Reply, Prosecution Motion, and Response to Prosecution Motion.

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



Judge Theodor Meron  
Presiding

Dated this 8th day of February 2012,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]