

IT-06-90-T  
D9226-D9224  
07 MAY 2008

9226 AT



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

Case No. IT-06-90-T  
Date: 7 May 2008  
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding  
Judge Uldis Ķiniš  
Judge Elisabeth Gwaunza

Registrar: Mr Hans Holthuis

Date filed: 7 May 2008

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

---

DECISION ON THE GOTOVINA DEFENCE'S MOTION TO DISMISS COUNTS 6  
AND 7 OF THE INDICTMENT

---

**Office of the Prosecutor**

Mr Alan Tieger  
Mr Stefan Waespi

**Counsel for Ante Gotovina**

Mr Luka Mišetić  
Mr Gregory Kehoe  
Mr Payam Akhavan

**Counsel for Ivan Čermak**

Mr Steven Kay, QC  
Mr Andrew Cayley  
Ms Gillian Higgins

**Counsel for Mladen Markač**

Mr Goran Mikuličić  
Mr Tomislav Kuzmanović

1. On 25 February 2008, the Gotovina Defence filed a motion requesting the Chamber to issue an order dismissing Counts 6 and 7 of the Amended Joinder Indictment (“Indictment”) as set out against Ante Gotovina (“the Accused”).<sup>1</sup> On 10 March 2008, the Prosecution filed its response requesting that the Chamber dismisses the Motion.<sup>2</sup> On 17 March 2008, the Gotovina Defence filed a motion for leave to reply to the Prosecution’s Response.<sup>3</sup> On 20 March 2008, the Chamber decided to deny the motion for leave to reply and informed the parties accordingly through an informal communication.

2. In the Motion, the Gotovina Defence submits that the “evidence” disclosed by the Prosecution demonstrates that the Prosecution has no *prima facie* case against the Accused for the murders he is alleged to have committed.<sup>4</sup> It further submits that a review of all “evidence” disclosed by the Prosecution since the start of the proceedings shows that it has absolutely no “evidence” that the Accused had any knowledge, whether actual or presumed, that any of the alleged murders charged in the Indictment were about to be committed or had been committed.<sup>5</sup> The Gotovina Defence alleges that no “evidence” of the Accused’s *mens rea* was presented to the Judge who confirmed the Indictment pursuant to Rule 47 of the Rules of Procedure and Evidence (“Rules”).<sup>6</sup> The Gotovina Defence argues that it is in the interests of justice, the integrity of proceedings, and a fair and expeditious trial, that the Chamber dismisses Counts 6 and 7 of the Indictment against the Accused.<sup>7</sup> The Gotovina Defence asserts that, when the prosecutorial discretion to withdraw a count or a full indictment is not exercised, it is the Accused’s right to request the Chamber to dismiss charges for which no *prima facie* “evidence” exists.<sup>8</sup>

3. The Prosecution asserts that a confirmed indictment cannot be challenged on the basis of a “challenge to the evidence”.<sup>9</sup> The Prosecution further argues that once an indictment is confirmed, a challenge to the “evidence” must wait until trial.<sup>10</sup> The Prosecution

<sup>1</sup> Defendant Ante Gotovina’s Rule 73 Motion to Dismiss Counts 6 and 7 of the Amended Joinder Indictment, 25 February 2008 (“Motion”).

<sup>2</sup> Prosecution’s Response to Gotovina’s Motion to Dismiss Counts 6 and 7 of the Amended Joinder Indictment, 10 March 2008 (“Response”).

<sup>3</sup> Defendant Ante Gotovina’s Motion for Leave to File a Reply to Prosecution’s Response to Gotovina’s Motion to Dismiss Counts 6 and 7 of the Amended Joinder Indictment, 17 March 2008.

<sup>4</sup> Motion, para. 2.

<sup>5</sup> Ibid., para. 6.

<sup>6</sup> Ibid., para. 14.

<sup>7</sup> Ibid., para. 12.

<sup>8</sup> Ibid., para. 19.

<sup>9</sup> Response, para. 2.

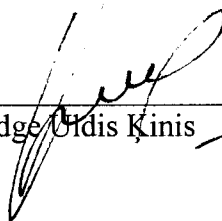
<sup>10</sup> Response, paras 1-2.

argues that the Gotovina Defence has no legal basis to challenge Counts 6 and 7 of the Indictment.<sup>11</sup>

4. In essence, the Gotovina Defence is requesting a review of the decision to confirm the Indictment against the Accused.<sup>12</sup> There is no basis in the Statute or the Rules upon which the Chamber could review the decision of the confirming judge that the material provided by the Prosecution to that judge supports the material facts pleaded in the Indictment.<sup>13</sup> Furthermore, the issue of whether there is evidence to support any charge pleaded in an indictment is an issue to be determined by the Chamber at the conclusion of the trial, or if the issue is raised, at the close of the Prosecution case pursuant to Rule 98 *bis* of the Rules.<sup>14</sup>

5. For the foregoing reasons, the Chamber **DENIES** the Motion.

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



---

Judge Uldis Kiris

Dated this seventh day of May 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>11</sup> Response, para. 2.

<sup>12</sup> The initial indictment against Ante Gotovina was confirmed on 8 June 2001 by Judge Fouad Riad pursuant to Rule 47 of the Rules in the Order on Review of the Indictment Pursuant to Article 19 of the Statute.

<sup>13</sup> *Prosecutor v. Brđanin and Talić*, Decision on Motion to Dismiss Indictment, 5 October 1999, paras 21, 23.

<sup>14</sup> *Ibid.*, paras 15, 21, 23.