



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: 14 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: 14 February 2012

PROSECUTOR

v.

**ANTE GOTOVINA
MLADEN MARKAČ**

PUBLIC

**DECISION ON APPLICATION AND
PROPOSED *AMICUS CURIAE* BRIEF**

Office of the Prosecutor

Ms. Helen Brady and Mr. Douglas Stringer

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Counsel for Mladen Markač

Mr. Goran Mikuličić, Mr. Tomislav Kuzmanović, Mr. John Jones, and Mr. Kai Ambos

Applicants

Ms. Laurie R. Blank, Mr. Bill Boothby, Mr. Geoffrey S. Corn, Mr. William J. Fenrick, Mr. C.H.B. Garraway, Mr. Donald J. Guter, Mr. Walter B. Huffman, Mr. Eric Talbot Jensen, Mr. Mark E. Newcomb, Mr. Thomas J. Romig, Mr. Raymond C. Ruppert, and Mr. Gary Solis

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 “Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm”, filed by Ms. Laurie R. Blank, Mr. Bill Boothby, Mr. Geoffrey S. Corn, Mr. William J. Fenrick, Mr. C.H.B. Garraway, Mr. Donald J. Guter, Mr. Walter B. Huffman, Mr. Eric Talbot Jensen, Mr. Mark E. Newcomb, Mr. Thomas J. Romig, Mr. Raymond C. Ruppert, and Mr. Gary Solis (collectively “Applicants”) on 13 January 2012 (“Application”). The Office of the Prosecutor (“Prosecution”) filed a response on 23 January 2012,¹ and Ante Gotovina (“Gotovina”) filed a response on 27 January 2012.² Mladen Markač (“Markač”) filed a response to the Prosecution Response on 2 February 2012.³ The Prosecution subsequently filed a motion to strike the Markač Response on 7 February 2012.⁴

I. BACKGROUND

2. On 15 April 2011, Trial Chamber I of the Tribunal (“Trial Chamber”) found that Gotovina and 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.⁵ 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.⁶ Gotovina and Markač have appealed the Trial Judgement.⁷

¹ Prosecution Response to “Application and Proposed *Amicus Curiae* Brief” Filed on 13 January 2012, 23 January 2012 (“Prosecution Response”).

² Ante Gotovina’s Response to “Application and Proposed *Amicus Curiae* Brief” Filed on 13 January 2012, 27 January 2012 (public redacted version) (“Gotovina Response”).

³ Mladen Markač’s Response to “Prosecution Response to ‘Application and Proposed *Amicus Curiae* Brief’ Filed on 13 January 2012”, 2 February 2012 (“Markač Response”). The Appeals Chamber notes that the Markač Response is formally described as a response to the Prosecution Response and not the Application. The Appeals Chamber, however, considers that the substance of the Markač Response directly addresses the relevancy of the Application. Therefore, the Appeals Chamber will consider the Markač Response as a response to the Application.

⁴ Prosecution Motion to Strike, 7 February 2012 (public with confidential annex) (“Motion to Strike”).

⁵ *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.

⁶ Trial Judgement, Vol. II, paras 2372-2375, 2584-2587.

II. APPLICABLE LAW

3. Rule 74 of the Rules of Procedure and Evidence of the Tribunal (“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.” Granting leave to make such submissions pursuant to Rule 74 of the Rules is within the discretion of the Appeals Chamber.⁸ The primary criterion for the Appeals Chamber in determining whether to grant leave to file an *amicus curiae* brief is whether this would assist the Appeals Chamber in its consideration of the questions at issue on appeal.⁹ As a general matter, “*amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged”.¹⁰ Chambers have generally allowed *amicus* submissions in relation to questions of law.¹¹

III. PRELIMINARY MATTERS

4. The Appeals Chamber observes that while the Application does not state its word length, it is self-evident that it exceeds 3,000 words in length.¹² The Prosecution certifies that the Prosecution Response is 5,842 words in length.¹³ The Practice Direction on the Length of Briefs and Motions (“Practice Direction on Length”) provides that motions shall not exceed 3,000 words unless specifically exempted from this limit.¹⁴ The Appeals Chamber further recalls that parties must seek authorisation in advance before exceeding the word limit and provide an explanation of the exceptional circumstances that necessitate an oversized filing.¹⁵ The Application and the Prosecution Response exceed the 3,000 word limit set out in the Practice Direction on Length, and the Appeals Chamber considers that the Applicants and the Prosecution should have sought authorisation to exceed the word

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

⁸ See *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.

⁹ See Šainović Decision, p. 2; Hartmann Decision, para. 4.

¹⁰ Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, 27 March 1997 (“*Amicus Curiae* Guidelines”), para. 5(b). See also Hartmann Decision, para. 5.

¹¹ Hartmann Decision, para. 5 and references cited therein.

¹² See generally Application.

¹³ Prosecution Response, para. 3.

¹⁴ IT/184 Rev. 2, 16 September 2005, para. 5.

¹⁵ See Practice Direction on Length, para. 7.

limit in advance. However, in light of the need to facilitate expeditious proceedings, the Appeals Chamber finds that it will consider these filings in their entirety.¹⁶

5. The Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (“Practice Direction on Appeal Proceedings”) states that a response to a motion filed during appeals from judgement shall be filed within ten days of the filing of the motion.¹⁷ The Appeals Chamber notes that the Markač Response was filed 20 days after the Application, and therefore does not comply with the Practice Direction on Appeal Proceedings. In the interests of judicial expediency, and given the minimal prejudice arising from the late filing, the Appeals Chamber will consider the Markač Response as validly filed.¹⁸

IV. ARGUMENTS OF THE PARTIES

6. The Applicants request leave to file an *amicus curiae* brief (“Proposed *Amicus Curiae* Brief”) in the present proceedings.¹⁹ The Applicants assert that they can assist the Appeals Chamber by providing “insights of military and civilian [international humanitarian law] experts who have studied, and in many cases applied, this complex process [of targeting in a populated area] in hostilities.”²⁰ They submit that “it is impossible to overstate the importance of the analysis and conclusions of any criminal adjudication of targeting decision-making in a context such as that reflected in the facts of this case.”²¹

7. The Proposed *Amicus Curiae* Brief addresses various issues relating to international humanitarian law and operational targeting. It reviews, *inter alia*, established case law regarding the legality of targeting, particular operational considerations relevant to military personnel, and the interaction between the two.²² It also provides perspectives on whether particular artillery attacks which were analyzed by the Trial Chamber complied with specific tenets of international humanitarian law.²³

¹⁶ Cf. Decision on Gotovina’s Motion to Exceed Word Limit, 26 October 2011, p. 1.

¹⁷ IT/155 Rev. 3, 16 September 2005, para. 13. 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.

¹⁸ Cf. Practice Direction on Appeal Proceedings, para. 19.

¹⁹ Application, p. 3.

²⁰ Application, para. 1.

²¹ Application, para. 2.

²² See generally Application, paras 3-27.

²³ Application, paras 19, 24-27.

8. The Prosecution maintains that the Appeals Chamber should reject the Application.²⁴ It submits that the Proposed *Amicus Curiae* Brief cannot assist the Appeals Chamber in its consideration of the present case,²⁵ given that the questions addressed in the Proposed *Amicus Curiae* Brief, are, in most instances, irrelevant to the issues on appeal or repeat evidence heard at trial.²⁶ Additionally, the Prosecution contends that the Proposed *Amicus Curiae* Brief addresses only factual matters²⁷ and that it reflects an erroneous understanding of the Trial Judgement.²⁸ The Prosecution further contends that the Applicants are not objective.²⁹ More specifically, it submits that the Application fails to note that Geoffrey S. Corn (“Corn”) served as an expert witness for Gotovina’s defence during trial proceedings and that Eric Talbot Jensen (“Jensen”) serves as “a Defense Expert Consultant” for Gotovina.³⁰ Finally, the Prosecution asserts that granting the Application would circumvent the procedures for admission of additional evidence on appeal.³¹

9. Gotovina submits that the Appeals Chamber should grant the application because the Applicants have satisfied the criteria for acceptance of an *amicus* brief.³² Gotovina contends that the experience of the Applicants will assist the Appeals Chamber in addressing, *inter alia*, the Trial Chamber’s findings regarding the burden of proof, whether Gotovina issued an illegal order, whether the attacks were disproportionate, and the Trial Chamber’s application of the “200 metre standard”.³³ Gotovina further contends that the Application represents an objective and independent assessment³⁴ and that the Prosecution never suggested at trial or on appeal that Corn was biased or lacked objectivity.³⁵ Gotovina also submits that Jensen has never provided advice to Gotovina’s defence team, and that Jensen’s *curriculum vitae* should be understood as referring only to the Applicants’ consultations concerning the Proposed *Amicus Curiae* Brief.³⁶

10. Markač states that the Appeals Chamber should reject the Prosecution Response.³⁷ He contends that the Prosecution proposes an overly restrictive approach to the admission of *amicus* briefs which is

²⁴ Prosecution Response, para. 1. *See also* Prosecution Response, para. 30.

²⁵ Prosecution Response, para. 1.

²⁶ Prosecution Response, paras 1, 4-8.

²⁷ Prosecution Response, paras 1, 9-14.

²⁸ Prosecution Response, paras 1, 15-25.

²⁹ Prosecution Response, paras 1, 26-29. *See also* Prosecution Response, para. 10.

³⁰ Prosecution Response, paras 27-29. The Prosecution also maintains that the mere severance of Corn and Jensen from the Applicants would not cure the impartiality of the *Amicus Curiae* Brief. Prosecution Response, para. 29.

³¹ Prosecution Response, para. 2. *See also* Prosecution Response, paras 10, 12; Rule 115 of the Rules.

³² Gotovina Response, para. 1.

³³ Gotovina Response, paras 1, 9.

³⁴ Gotovina Response, paras 2, 3, 11.

³⁵ Gotovina Response, paras 2, 12.

³⁶ Gotovina Response, para. 2, n. 3.

³⁷ Markač Response, para. 18.

not supported by the Tribunal's case law.³⁸ Markač argues that there is no requirement that *amicus* submissions should be confined to legal issues³⁹ or to evidence on the record.⁴⁰ He contends that the Proposed *Amicus Curiae* Brief would assist the Appeals Chamber in its consideration of the issues on appeal.⁴¹

V. DISCUSSION

11. The Appeals Chamber recalls that appellate proceedings at the Tribunal are largely party-driven and that the parties will assist the Appeals Chamber through submissions on issues of fact.⁴² The Appeals Chamber notes that the Proposed *Amicus Curiae* Brief addresses numerous factual issues⁴³ and provides interpretations of evidence on the record. In this respect, it repeats the task undertaken by the Trial Chamber and by the appeal briefs of Gotovina and the Prosecution.⁴⁴ The Appeals Chamber also observes that the three expert reports included in the Application are included amongst the reports appended to Gotovina's motion to admit additional evidence under Rule 115 of the Rules.⁴⁵ The Appeals Chamber notes that these reports will be appropriately considered in relation to Gotovina's Rule 115 Motion and that Rule 74 of the Rules is not intended to serve as a vehicle for the presentation of new evidence on appeal.

12. The Appeals Chamber further observes that nowhere in the Application do the Applicants disclose Corn's prior role as an expert witness testifying for the Gotovina Defence. The Appeals Chamber recalls that paragraph 3(f) of the *Amicus Curiae* Guidelines states that an application to submit an *amicus* brief should include "a statement identifying and explaining any contact or relationship the applicant had, or has, with any party to the case." The Appeals Chamber considers that the Application's failure to refer to Corn's prior association with the Gotovina defence team or Jensen's apparent claim that he serves as a consultant to the defence team raises some additional

³⁸ Markač Response, paras 8-10.

³⁹ Markač Response, paras 11-13.

⁴⁰ Markač Response, para. 14.

⁴¹ Markač Response, paras 15-17.

⁴² *Hartmann* Decision, para. 7.

⁴³ *See, e.g.*, Application, paras 2, 19, 24-27, and three attached reports.

⁴⁴ Compare Application, paras 2, 7-9, 13-27 with Appellant's Brief of Ante Gotovina, 2 August 2011 (public redacted version), paras 11-22, 86-87, 101-109, 129-135; Trial Judgement, Vol. I, paras 1161-1508; Trial Judgement, Vol. II, paras 1892-1947, 2368-2375.

⁴⁵ *See* Appellant Ante Gotovina's Motion to Admit New Evidence Pursuant to Rule 115, 4 November 2011 (public redacted version), ("Gotovina's Rule 115 Motion"), Annexes, Exhibits 20-22.

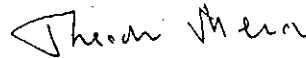
concerns about the objectivity of the Proposed *Amicus Curiae* Brief as a document filed to assist the Appeals Chamber.⁴⁶

13. In view of the foregoing the Appeals Chamber is not convinced that the Applicants' submissions would assist in determining the issues on appeal, and thus declines to grant leave to file the Proposed *Amicus Curiae* Brief.

VI. DISPOSITION

14. Accordingly, the Appeals Chamber **DENIES** the Application.

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



Judge Theodor Meron
Presiding

Dated this 14th day of February 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁴⁶ The Appeals Chamber notes the Applicants' intent to "submit this Brief for the *sole purpose* of offering the Appeals Chamber the insights of military and civilian [international humanitarian law] experts". Application, para. 1 (emphasis added).