



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

Case No. IT-06-90-PT
Date: 18 October 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge O-Gon Kwon, Presiding
Judge Kimberly Prost
Judge Ole Bjørn Støle, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 18 October 2006

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON REQUESTS OF REPUBLIC OF CROATIA TO
APPEAR AS *AMICUS CURIAE***

The Office of the Prosecutor:

Mr. Alan Tieger
Ms Laurie Sartorio

Counsel for the Accused:

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Čedo Prodanović and Ms Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

THIS TRIAL 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 (“Tribunal”),

BEING SEIZED OF the “Request for Leave to Appear as Amicus Curiae in Prosecutor v. Ante Gotovina”, filed on 18 September 2006 by the Government of the Republic of Croatia (“Gotovina Request”) and the “Request for Leave to Appear as Amicus Curiae in Prosecutor v. Ivan Čermak and Mladen Markač”, filed on 18 September 2006 by the Government of the Republic of Croatia (“Čermak and Markač Request”), wherein the Government of the Republic of Croatia (“Government of Croatia”) requests that the Trial Chamber grant leave to appear as *amicus curiae* in these cases, pursuant to Rule 74 of the Rules of Procedure and Evidence (“Rules”),

NOTING that by decision of 14 July 2006, the case of *Prosecutor v. Ante Gotovina* and the case of *Prosecutor v. Ivan Čermak and Mladen Markač* have been joined,¹ and that this Chamber has been assigned to the joined case,²

NOTING that the Office of the Prosecutor (“Prosecution”) filed the “Response to Requests of the Republic of Croatia to Appear as Amicus Curiae”, on 2 October 2006, (“Prosecution’s Response”), requesting that the Trial Chamber deny the Gotovina Request and the Čermak and Markač Request (“Requests”),

NOTING the “Defendant Ante Gotovina’s Response to the Request of the Republic of Croatia for Leave to Appear as Amicus Curiae”, filed by the Defence for Ante Gotovina (“Defence”) on 2 October 2006 (“Defence’s Response”), in which the Defence requests that the Trial Chamber grant the Requests,

NOTING that the Accused Čermak and Markač did not file a response to the Requests,

NOTING that in the Requests, the Government of Croatia submits that an *amicus curiae* brief would “assist in the determination of truth regarding the allegation [...] that the then state and military leadership of the Republic of Croatia participated in the joint criminal enterprise”, which allegedly took place during and after the “Operation Storm”, and that this issue is crucial for the

¹ *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 (re-filed on 17 July 2006 with the new case number IT-06-90-PT). See also, *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Registrar’s Certificate, 17 July 2006. The Registrar decided that the joined case should be assigned the new case number IT-06-90-PT, and that all documents filed from the date of 14 July 2006 in the joined case shall bear this new number.

accurate determination of the broader context of the events to which the Indictment relates, and it is also relevant for the role, conduct and criminal responsibility of the Accused,³

NOTING that according to the Requests, the *amicus curiae* brief would assist the Tribunal “in the interpretation of historical and political facts”,⁴

NOTING that the Government of Croatia further submits that the Tribunal, within its mandate, “for the sake of truth and justice, also makes a reliable historical and political record of events, as well as legal record of events surrounding international crimes committed [in the territory of the former Yugoslavia]”,⁵

NOTING that according to the Prosecution, the Requests do not meet the standard set out in Rule 74 for the following reasons: 1) the Requests do not state with sufficient clarity the matters on which the Applicant seeks to intervene;⁶ 2) the Requests seek to make interventions that are irrelevant to this case;⁷ 3) the request to make submissions on broad questions of fact cannot assist the Trial Chamber;⁸ 4) the Government of Croatia does not demonstrate impartiality sufficient to satisfy the Chamber that it can assist in the determination of the case;⁹ and 5) the Requests do not articulate what the Government of Croatia can contribute to the determination of the case that the parties cannot themselves present,¹⁰

NOTING that the Defence argues that: 1) the Tribunal’s function is not only to determine the individual criminal responsibility of the defendants, but also to create an accurate, accessible historical record;¹¹ 2) Croatia and the Tribunal share a common interest in ensuring an accurate, accessible historical record;¹² 3) the defendants cannot adequately represent the interests of

² *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Order regarding composition of Trial Chamber, filed on 16 August 2006. See also, *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT, Order appointing a Pre-Trial Judge, filed on 16 August 2006.

³ Gotovina Request, p. 2; Čermak and Markač Request, p. 2. The Government of Croatia submits that the brief would be a “co-effort of a group of renowned lawyers, historians and other scientists”, whose names are indicated in the Requests; and that, in the event its requests were granted, the Government of Croatia would notify the Tribunal of the appointment of two or three representatives who would make oral submissions before the Trial Chamber within the meaning of Rule 74 of the Rules. See Gotovina Request, p. 3-5; and Čermak and Markač Request, p. 3-5.

⁴ Gotovina Request, p. 2; Čermak and Markač Request, p. 2.

⁵ *Ibid.*

⁶ Prosecution’s Response, p. 7-8.

⁷ Prosecution’s Response, p. 9-13.

⁸ Prosecution’s Response, p. 14-19.

⁹ Prosecution’s Response, p. 20-26.

¹⁰ Prosecution’s Response, p. 27-28. The Prosecution attaches to its Response a number of documents which purport to show the lack of impartiality of the Government of Croatia to intervene as an *amicus curiae*. See Prosecution’s Response, Annexes 1-3.

¹¹ Defence’s Response, paras 2-5.

¹² Defence’s Response, paras 6-9.

Croatia;¹³ 4) the Trial Chamber has broad discretion to admit Croatia as *amicus curiae* and to allow Croatia to address contested issues of fact,¹⁴

NOTING that 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”,

CONSIDERING that Trial Chambers have granted leave to appear in the proceedings as *amicus curiae* when the proposed submissions were relevant to the case and assisted the Chamber in the proper determination of it,¹⁵ and, in general, when the *amicus curiae*’s intervention addressed questions of law,¹⁶

CONSIDERING that the issues on which the Government of Croatia seeks to intervene, although indicated in very general terms, appear to deal essentially with questions of fact, such as the existence and scope of the alleged joint criminal enterprise and the broader historical and political context in which the events referred to in the Indictment took place,

CONSIDERING that factual matters will be addressed by the parties during trial,

CONSIDERING that the Government of Croatia, if in possession of any information that could be relevant for the case, could provide such material to any of the parties in these proceedings,

CONSIDERING that the Trial Chamber is not satisfied that granting leave to the Government of Croatia to appear as *amicus curiae* on the issues indicated in the Requests would assist the Chamber in the proper determination of the case,

¹³ Defence’s Response, para. 10.

¹⁴ Defence’s Response, paras 11-13.

¹⁵ See, for example, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae, 17 March 1999, para. 2; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Amicus Curiae Request by African Concern, 23 March 2004, para. 4.

¹⁶ See, *inter alia*, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Order Granting Leave to Appear as Amicus Curiae, 11 April 1997; *Prosecutor v. Ademi and Norac*, Case No. IT-04-78-PT, Decision on Submission of an Amici Curiae Brief Pursuant to Rule 74 of the Rules, 7 February 2005; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, 11 October 2006; *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium’s Application to File an *Amicus Curiae* Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, 9 February 2001.

PURSUANT TO Rule 74 of the Rules,


HEREBY DENIES the Requests.

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

Dated this eighteenth day of October 2006

At The Hague

The Netherlands



Judge O-Gon Kwon
Presiding

[Seal of the Tribunal]