

4-06-90-AR108 bis.1
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13 December 2006

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UNITED
NATIONS



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-AR108bis.1
Date: 13 December 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Mehmet Güney
Judge Andrézia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Hans Holthuis

Decision: 13 December 2006

PROSECUTOR

v.

Ante GOTOVINA
Ivan ČERMAK
Mladen MARKAČ

**DECISION ON PROSECUTION'S MOTION TO STRIKE
REQUEST FOR REVIEW UNDER RULE 108BIS**

The Office of the Prosecutor:

Mr. Alan Tieger

The Government of Croatia:

H.E. Ana Lovrin
Minister of Justice

Counsel for the Accused:

Mr. Gregory W. Kehoe, Mr. Luka S. Mišetić, 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

1. The Appeals Chamber of the International Criminal 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 “State Request for Review of the Decision of the Trial Chamber II on the Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*” (“Rule 108bis Request”), filed by the Government of the Republic of Croatia (“Croatia”). It is also seized of the “Prosecution’s Motion to Strike Request for Review Under Rule 108bis of Trial Chamber’s Decision Denying Request of Republic of Croatia to Appear as *Amicus Curiae*” (“Motion”).

A. Procedural Background

2. On 18 October 2006, Trial Chamber II issued a “Decision on Requests of the Republic of Croatia to Appear as *Amicus Curiae*” (“Impugned Decision”), in which it denied Croatia’s requests for leave to appear as *amicus curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence (“Rules”) in the cases of *Prosecutor v. Gotovina*¹ and *Prosecutor v. Čermak and Markač*.² The two cases were joined subsequent to the filing of the requests.³ Croatia filed its Rule 108bis Request on 25 October 2006. On 1 November 2006, the Prosecution submitted its Motion, asking the Appeals Chamber to strike as inadmissible the Rule 108bis Request. The Appeals Chamber issued a Scheduling Order on 10 November 2006, in which it set out a schedule according to which Croatia and the Defence were allowed to respond to the Prosecution’s Motion and the Prosecution was allowed to reply.⁴ Defendant Mladen Markač and Croatia each filed a response to the Motion on 20 November 2006.⁵ The Prosecution replied on 24 November 2006.⁶

B. Submissions of the Parties

3. In its Motion, the Prosecution states that Rule 108bis does not provide a basis for appealing the denial of an attempt by a non-party State to appear before a Chamber to make submissions as

¹ *Prosecutor v. Ante Gotovina*. Case No. IT-01-45-PT, Request for Leave to Appear as *Amicus Curiae* in *Prosecutor v. Ante Gotovina*, 18 September 2006.

² *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Request for Leave to Appear as *Amicus Curiae* in *Prosecutor v. Ivan Čermak and Mladen Markač*, 18 September 2006.

³ *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 (refiled on 17 July 2006 with the new case number IT-06-90-PT). Trial Chamber II was assigned to the joined case. See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Order regarding composition of Trial Chamber, 16 August 2006.

⁴ Scheduling Order, 10 November 2006.

⁵ Response of the Government of the Republic of Croatia to the Prosecution Motion filed on 1 November 2006 to Strike Request for Review Under Rule 108bis, 20 November 2006 (“Croatia Response”); Accused Mladen Markač’s Response to Prosecution’s Motion to Strike Request for Review Under Rule 108bis of the Trial Chamber’s Decision Denying Request of Republic of Croatia to Appear as *Amicus Curiae*, 20 November 2006 (“Markač Response”). Mr. Markač’s co-defendants, Ante Gotovina and Ivan Čermak, did not respond to the Motion to Strike.

⁶ Prosecution’s Reply to Oppositions to Motion to Strike Appeal Filed under Rule 108bis of Trial Chamber’s Decision on Requests of Republic of Croatia to Appear as *Amicus Curiae*, 24 November 2006 (“Reply”).

amicus curiae.⁷ It claims that the Impugned Decision fails to affect Croatia in the direct manner prescribed by Rule 108bis and notes that the application of Rule 108bis has previously been limited to circumstances in which the Tribunal has issued orders for a State to take action.⁸ It further argues that the Impugned Decision “manifestly does not concern an issue relating to the powers of the Tribunal, much less an issue of ‘general importance’ relating to those powers”.⁹

4. In response, Croatia argues that Rule 108bis is not limited to circumstances in which the Tribunal has issued orders for a State to take action but “should cover all other important issues of a substantive and procedural nature”.¹⁰ In its view, the Impugned Decision implicated issues of procedural fairness, in that “the Trial Chamber dismissed *a limine* the request to grant *amicus curiae* status in this case, in which numerous unindicted persons on all levels of the Croatian Government, both known and unknown, are named as members of a joint criminal enterprise, while they did not have and do not have the opportunity to defend themselves from public branding for the most serious crimes.”¹¹ Mr. Markač similarly argues that Croatia is directly affected by the Impugned Decision.¹²

5. The Prosecution replies that Croatia is not named as a participant in a joint criminal enterprise and that its arguments ignore the Tribunal’s statute and jurisprudence, which are grounded on individual criminal responsibility.¹³ It argues that neither Croatia nor Mr. Markač correctly identifies a power of the Tribunal that is implicated by the Impugned Decision, adding that the decision does not raise the power of the Tribunal to charge or prosecute under the concept of joint criminal enterprise but only its undisputed power to decline the alleged assistance offered by a non-party.¹⁴

C. Discussion

6. Rule 108bis provides a mechanism by which a State affected by an interlocutory decision of a Trial Chamber may request review of that decision by the Appeals Chamber. The Appeals Chamber will consider the merits of a State’s request under Rule 108bis if it finds that the State has demonstrated that the request is admissible. Admissibility is governed by Rule 108bis(A), which provides:

⁷ Motion, paras 1, 6.

⁸ *Ibid.*, paras 7-8.

⁹ *Ibid.*, para. 9.

¹⁰ Croatia Response, para. 1.

¹¹ *Ibid.*

¹² Markač Response, para. 9. Croatia and Defendant Markač advance in their responses several arguments relating to the merits of the Rule 108bis Request. As these arguments do not relate to the issue of the admissibility of the Rule 108bis Request, which is the basis for the Motion, they will not be considered here.

¹³ Reply, para. 2.

¹⁴ *Ibid.*, para. 4.

(A) A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, seek a review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal.

Thus, to meet the threshold test for admissibility, a State must demonstrate: (1) that it is directly affected by the Trial Chamber's decision, and (2) that the decision concerns issues of general importance relating to the powers of the Tribunal.

7. The Impugned Decision denied Croatia's request to make submissions as *amicus curiae* under Rule 74 of the Rules. Rule 74 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."¹⁵ As it is within the Trial Chamber's discretion to decide whether submissions by a non-party are desirable for the proper determination of the case, Croatia has no right to make *amicus curiae* submissions. Likewise, *amici* may be invited to participate in oral argument "at the Chamber's sole discretion" but have no right to be heard.¹⁶ As the decision of the Trial Chamber is a discretionary one, which does not impinge upon a right of Croatia or place an obligation upon it, the Appeals Chamber is not satisfied that Croatia is directly affected by the decision of the Trial Chamber in the sense contemplated by Rule 108bis.

8. In this regard, the Appeals Chamber recalls that "Rule 108bis was adopted to permit States directly affected by an interlocutory decision to seek a review where it is claimed that an interlocutory decision of a Trial Chamber has impacted upon its *legal* rights, such as when a State is ordered to produce documents or records from its archives".¹⁷ Croatia's argument that the Impugned Decision implicates its right and that of its top officials to "defend themselves from public branding for the most serious crimes" is misplaced. The Impugned Decision, in denying Croatia an opportunity to assist the court as an *amicus curiae*, did not impact upon Croatia's legal rights. As noted above, a State has no legally cognizable interest in providing assistance to the Trial Chamber as *amicus curiae*, let alone in doing so in respect of an issue of its choice. Hence, a State that is denied the opportunity to participate as an *amicus* is not directly affected by that decision within the meaning of Rule 108bis and thus has no standing to challenge the merits of that decision.

¹⁵ The Information Concerning the Submission of *Amicus Curiae* Briefs (IT/122), 27 March 1997, further provides, at paragraph 3(e), that States, organisations, or persons wishing to submit an amicus brief or to appear as amicus curiae must file an application specifying, *inter alia*, "the applicant's reasons for believing his submission will aid in the proper determination of the case."

¹⁶ *Ibid.*, para. 2.

¹⁷ *Prosecutor v. Janko Bobetko*, Case No. IT-02-62-AR54bis & IT-02-62-AR108bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 November 2002, para. 11.

9. Having concluded that Croatia is not directly affected by the Impugned Decision within the meaning of Rule 108*bis*, the Appeals Chamber need not consider whether the decision concerns issues of general importance relating to the powers of the Tribunal.

D. Disposition

10. For the foregoing reasons, the Prosecution's Motion is **GRANTED** and Croatia's Rule 108*bis* Request is **DENIED**.

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

13 December 2006

The Hague,

The Netherlands.



Judge Mohamed Shahabuddeen
Presiding

[Seal of the International Tribunal]