



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-AR54bis.1  
Date: 6 July 2010  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. John Hocking

**Decision:** 6 July 2010

**PROSECUTOR**

v.

**ANTE GOTOVINA, IVAN ČERMAK, AND MLADEN MARKAČ**

**PUBLIC**

**DECISION ON PROSECUTION MOTION TO STRIKE,  
GOTOVINA DEFENCE'S APPEAL PURSUANT TO RULE 54 *BIS*, AND  
GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPEAN  
UNION'S MOTION FOR EXTENSION OF TIME**

**Office of the Prosecutor**

Mr. Alan Tieger

**Counsel for the Defence**

Mr. Gregory W. Kehoe, Mr. Luka S. Mišetić, and Mr. Payam Akhavan for Mr. Ante Gotovina  
Mr. Steven Kay, Mr. Andrew T. Cayley, and Ms. Gillian Higgins for Mr. Ivan Čermak  
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mr. Mladen Markač

**General Secretariat of the Council of the European Union**

Mr. Pierre de Boissieu

**The Commission of the European Union**

**High Representative of the Union for Foreign Affairs and Security Policy**

Ms. Catherine Ashton

**The Founding Member States of the ECMM**

Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom

**The Presidency of the Council of the European Union (Spain)**

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 a “Gotovina Defence Appeal Against the Trial Chamber’s 3 June 2010 Decision”, filed on 10 June 2010 (“Appeal”); the “Prosecution’s Motion to Strike the Gotovina Defence 10 June 2010 Appeal Brief and Related Requests for Relief”, filed on 17 June 2010 (“Motion”); and the General Secretariat of the Council of the European Union’s request for an extension of time in which to respond to the Appeal, filed on 22 June 2010 (“EU Motion”).<sup>1</sup>

## I. Background

2. On 3 June 2010, Trial Chamber I issued its “Decision on the Gotovina Defence’s Request to Order the European Union to Carry Out Further Investigations on the Whereabouts of the ‘RC Knin Log-Book’” (“Impugned Decision”), in which it denied the Gotovina Defence’s request for a binding order pursuant to Rule 54 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) against the European Union and others to produce a document known as the log-book of the European Community Monitoring Mission (“ECMM”) regional centre in Knin (“Knin Log-Book”).<sup>2</sup>

## II. Submissions

3. On 10 June 2010, the Gotovina Defence filed the Appeal, requesting the Appeals Chamber to overturn the Impugned Decision and to order the Trial Chamber to order the European Union to intensify its investigation to locate the Knin Log-Book by:

- (a) contacting former ECMM officials in Knin from July through October 1995 [...] to determine whether they have any additional information which may reveal the current whereabouts of the missing RC Knin log sheets (or RC Knin Log Book);
- (b) further investigating the whereabouts of the RC Knin Log Sheets;
- (c) intensifying and broadening its investigation and providing to the Gotovina Defence all requested documents that it may find during the investigation;
- (d) providing the Trial Chamber and Gotovina Defence with a detailed report specifying the efforts taken to obtain the requested documents, including, as annexes, the documents that substantiate those efforts;

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<sup>1</sup> Letter from the General Secretariat of the Council of the European Union, filed 22 June 2010.

<sup>2</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on the Gotovina Defence’s Request to Order the European Union to Carry Out Further Investigations on the Whereabouts of the “RC Knin Log-Book”, 3 June 2010, para. 27.

- (i) The report should include the names, positions and official contact details of the persons who found the documents that the European Union will have produced and the sources from which the documents were obtained;
  - (ii) The report should further contain a detailed account of all the investigative steps that the European Union has taken with regard to any requested documents that the European Union will not have produced;
  - (iii) The report should also contain an account of the chain of custody of the requested documents, as far as can be established through the investigation, from the time the documents were produced until today;
  - (iv) The report should include the names and position of the persons that the European Union has interviewed during the course of the investigation and the transcripts or notes of those interviews;
- (e) providing the requested materials within 15 days of the date of the order.<sup>3</sup>

The Gotovina Defence argues that Rule 54 *bis* (C)(ii) of the Rules allows an appeal as of right where a Trial Chamber finds “in essence” that no reasonable steps have been taken by an applicant to obtain documents from a state. According to the Gotovina Defence, because the Trial Chamber denied the Gotovina Defence’s application “on the apparent basis that General Gotovina had failed to take reasonable steps to obtain the RC Knin Log-book”, the Appeal lies as of right.<sup>4</sup>

4. On 17 June 2010, the Prosecution filed the Motion, requesting the Appeals Chamber to (a) allow the Prosecution to be heard regarding the procedural propriety of the Appeal and, if necessary, to be heard on the merits of the Appeal, should the Appeals Chamber find it was properly filed; (b) strike the Appeal; and (c) suspend the deadline for filing responses to the Appeal.<sup>5</sup> The Prosecution argues that the Gotovina Defence does not have an appeal as of right from the Impugned Decision and that it should have sought and received leave from the Trial Chamber under Rule 73(B) of the Rules.<sup>6</sup> According to the Prosecution, the Gotovina Defence’s argument that it has an appeal as of right through a combination of Rule 54 *bis* (C)(ii) and Rule 54 *bis* (B) of the Rules is without merit because the Trial Chamber did not issue the Impugned Decision *in limine* and did not conclude that the Gotovina Defence had taken no reasonable steps to obtain the documents or information sought.<sup>7</sup> The Prosecution therefore submits that the Appeals Chamber has no authority to intervene in this matter.<sup>8</sup>

5. On 17 June 2010, the Gotovina Defence responded to the Motion, supporting the Prosecution’s request for leave to file a response to the Appeal so that the Prosecution can “address

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<sup>3</sup> Appeal, para. 19.

<sup>4</sup> Appeal, para. 3.

<sup>5</sup> Motion, para. 12.

<sup>6</sup> Motion, paras 2, 5.

<sup>7</sup> Motion, paras 5-7.

all jurisdictional and substantive matters”, but requesting that the remainder of the relief requested therein be denied.<sup>9</sup>

6. On 18 June 2010, the Prosecution filed a reply, stating that the Gotovina Defence has failed to address the central issue in the Motion, which is that the Appeal should be struck because there is no appeal as of right.<sup>10</sup>

7. Also on 18 June 2010, the Duty Judge denied the Motion in so far as it requested a suspension of the deadline for filing responses to the Appeal.<sup>11</sup> The Prosecution subsequently filed its response to the Appeal on 21 June 2010,<sup>12</sup> and the Gotovina Defence filed its reply on 25 June 2010.<sup>13</sup>

8. On 22 June 2010, the General Secretariat of the Council of the European Union requested an additional 15 days in order to respond in this matter.<sup>14</sup> On 23 June 2010, the Gotovina Defence responded to the EU Motion, requesting that the Appeals Chamber deny it.<sup>15</sup>

### III. Discussion

9. The Gotovina Defence asserts that it has brought the Appeal pursuant to Rule 54 *bis* (C)(ii) of the Rules because the Trial Chamber denied its motion *in limine* under Rule 54 *bis* (B)(ii) “on the apparent basis” that the Gotovina Defence had failed to take reasonable steps to obtain the Knin Log-Book from the European Union.<sup>16</sup> The Gotovina Defence therefore seems to rely upon a combination of Rule 54 *bis* (C)(i)(b) and Rule 54 *bis* (B)(ii) of the Rules in lodging the Appeal. The Appeals Chamber therefore must decide whether the Trial Chamber issued its decision pursuant to Rule 54 *bis* (B)(ii) in order to determine whether the Gotovina Defence has standing to appeal the Impugned Decision.

10. Rule 54 *bis* provides, in relevant part, as follows:

(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber [...].

<sup>8</sup> Motion, paras 2, 8.

<sup>9</sup> Ante Gotovina’s Response to Prosecution’s Motion to Strike Appeal, 17 June 2010, paras 1, 3.

<sup>10</sup> Prosecution’s Reply to Gotovina’s Response to the Prosecution’s Motion to Strike, 18 June 2010, para. 1.

<sup>11</sup> Decision on Prosecution Motion to Suspend Deadline, 18 June 2010, p. 3.

<sup>12</sup> Prosecution’s Response to the Gotovina Defence Appeal Against the Trial Chamber’s 3 June 2010 Decision, 21 June 2010, paras 1-2.

<sup>13</sup> Ante Gotovina’s Reply to Prosecution’s Response to the Gotovina Defence Appeal Against the Trial Chamber’s 3 June 2010 Decision, 25 June 2010.

<sup>14</sup> EU Motion.

<sup>15</sup> Ante Gotovina’s Response [to] the European Union’s Motion for Extension of Time, 23 June 2010, paras 1-2.

<sup>16</sup> Appeal, paras 1, 3; *see also* Ante Gotovina’s Reply to Prosecution’s Response to the Gotovina Defence Appeal Against the Trial Chamber’s 3 June 2010 Decision, 25 June 2010, paras 3-5.

(B) *The Judge or Trial Chamber may reject an application under paragraph (A) in limine if satisfied that:*

- (i) the documents or information are not relevant to any matter in issue in the proceedings before them or are not necessary for a fair determination of any such matter; or
- (ii) *no reasonable steps have been taken by the applicant to obtain the documents or information from the State.*

(C) (i) *A decision by a Judge or a Trial Chamber under paragraph (B) or (E) shall be subject to:*

- (a) review under Rule 108 *bis*; or
- (b) *appeal.*

- (ii) An appeal under paragraph (i) shall be filed within seven days of filing of the impugned decision. [...]

(Emphasis added.)

11. In order to properly lodge the Appeal, the Gotovina Defence must establish that, pursuant to Rule 54 *bis* (B)(ii), the Impugned Decision of the Trial Chamber was premised upon the ultimate finding that “no reasonable steps have been taken by the applicant to obtain the documents or information from the State.” The trial record, however, establishes that this is not the case. Indeed, throughout the proceedings, concerted efforts have been made by the Gotovina Defence to obtain these documents from the European Union. While the case was at the pre-trial stage, the Trial Chamber granted the Gotovina Defence access to the European Union Monitoring Mission (“EUMM”) archives so that it could search for the Knin Log-Book.<sup>17</sup> Following this grant of access, the Gotovina Defence was unable to locate the Knin Log-Book. Nevertheless, the Trial Chamber continued to engage with the Gotovina Defence and the European Union in an effort to locate the document. As stated by the Trial Chamber:

Both the extensive archive searches carried out by the EU, in connection with invitations by the Chamber, and the information provided by [two witnesses who were ECMM monitors] to the Prosecution have cast doubts on the existence of the RC Knin Log-book as identified by the Gotovina Defence. The EU has undertaken substantial efforts to locate the RC Knin Log-book, but has been unable to find it, or even confirm its existence. The Gotovina Defence has not pointed to any statement or information, either from the examinations in court or from any possible enquiries carried out by the Gotovina Defence itself, indicating that [the ECMM monitors] would be able to provide further information regarding the existence or whereabouts of the RC Knin Log-book. Under these circumstances, the Chamber will take no further action on this matter.<sup>18</sup>

<sup>17</sup> Impugned Decision, para. 1; *see also Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Order Compelling Access to Archives of the European Union Monitoring Mission, 28 February 2008, para. 11; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Defendant Ante Gotovina’s Motion to Compel Access to EUMM Archives, 28 December 2007.

<sup>18</sup> Impugned Decision, para. 26.

12. As established by the trial record, the Trial Chamber has engaged with the parties and the European Union for well over two years in order to locate the Knin Log-Book. This matter is therefore far beyond the stage of a Rule 54 *bis* (B) *in limine* ruling by the Trial Chamber, and the Impugned Decision was not issued *in limine* pursuant to Rule 54 *bis* (B) of the Rules. The Gotovina Defence thus was not entitled to appeal the Impugned Decision as of right, and it is not necessary for the Appeals Chamber to consider the merits of the Appeal. In the event that the Gotovina Defence wishes to challenge the Impugned Decision, the proper procedural avenue is to seek certification to appeal pursuant to Rule 73(B) of the Rules.


13. In light of the foregoing, the EU Motion for an extension of time in which to respond to the Appeal is now moot.

#### IV. Disposition

14. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 54 *bis* of the Rules, the Appeals Chamber hereby:

- a. **GRANTS** the Motion;
- b. **DISMISSES** the Appeal; and
- c. **DISMISSES** the EU Motion as moot.

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



Judge Patrick Robinson  
Presiding

Dated this sixth day of July 2010  
At The Hague  
The Netherlands

[Seal of the Tribunal]