



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: 16 November 2011
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision: 16 November 2011

PROSECUTOR

v.

**ANTE GOTOVINA
MLADEN MARKAČ**

PUBLIC

**DECISION ON ANTE GOTOVINA'S RENEWED
APPLICATION FOR AN ORDER PURSUANT TO RULE 54 *BIS*
DIRECTING THE GOVERNMENT OF THE REPUBLIC OF
SERBIA TO PRODUCE DOCUMENTS**

The Office of the Prosecutor

Ms. Helen Brady and Mr. Douglas Stringer

Counsel for Ante Gotovina

Mr. Gregory Kehoe, Mr. Luka Mišetić, Mr. Payam Akhavan, and Mr. Guénaél Mettraux

Counsel for Mladen Markač

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

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 “Ante Gotovina’s Renewed Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents”, filed by Ante Gotovina (“Gotovina”) on 7 September 2011 (“Application”). The Office of the Prosecutor (“Prosecution”) filed a response on 19 September 2011.¹ Gotovina filed his reply on 21 September 2011.²

I. BACKGROUND

2. On 22 June 2011, Gotovina filed a motion requesting that the Appeals Chamber order the Republic of Serbia (“Serbia”) to produce documents relating, *inter alia*, to the departure of Serb civilians from the Krajina region in August 1995.³ On 19 July 2011, the Appeals Chamber dismissed the Prior Application, reasoning that Serbia had not been afforded sufficient time to consider Gotovina’s request for documents, and that its failure to act could not reasonably be interpreted as having refused to voluntarily produce the requested documents.⁴

II. APPLICABLE LAW

3. The Appeals Chamber recalls that any request to order a state to produce documents is subject to the provisions of Rule 54 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which requires the moving party, *inter alia*, to: (i) specifically identify documents to which the request relates; (ii) indicate how the documents are relevant to any matter at issue and necessary for a fair determination of the matter; and (iii) explain steps already taken to secure a state’s assistance in obtaining the requested documents.⁵

¹ Prosecution Response to Gotovina’s Renewed Application Pursuant to Rule 54*bis*, 19 September 2011 (“Response”).

² Ante Gotovina’s Reply in Support of Renewed Rule 54 *bis* Application for an Order Directed to Serbia, 21 September 2011 (“Reply”).

³ Ante Gotovina’s Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents (public with confidential annexes), 22 June 2011 (“Prior Application”), paras 1-9, 13-17, 19-20, 24, Annex C (confidential). *See also* Prosecution Response to Gotovina’s Application Pursuant to Rule 54 *bis* (confidential), 4 July 2011 (“Prior Response”); Ante Gotovina’s Reply in Support of his Application for an Order Pursuant to Rule 54 *bis* Directing the Republic of Serbia to Produce Documents (confidential), 11 July 2011 (“Prior Reply”).

⁴ Decision on Ante Gotovina’s Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 19 July 2011 (“Prior Decision”), pp. 1-2.

⁵ Rule 54 *bis* (A) of the Rules.

III. DISCUSSION

A. Preliminary Matters

4. As a preliminary matter, the Appeals Chamber notes that Gotovina requests the Appeals Chamber to incorporate by reference arguments contained in the Prior Application.⁶ The Appeals Chamber observes that this request does not comply with the formal requirements for filings before the Tribunal and reminds Gotovina of the importance of respecting these requirements.⁷ Nevertheless, in the interests of judicial economy, noting that this issue is now ripe for consideration⁸ and that it is clear that the Application relies on contentions set out in the Prior Application and Prior Reply, the Appeals Chamber will exceptionally examine the merits of the arguments set out in the Prior Application, Prior Response, and Prior Reply.⁹

B. Submissions of the Parties

5. Gotovina contends that the Appeals Chamber should immediately order Serbia to produce the requested documents without a prior opportunity to be heard under Rule 54 *bis* (E) of the Rules.¹⁰ More specifically, Gotovina asserts that: (i) he has properly identified the documents requested;¹¹ (ii) those documents are both relevant and necessary for a fair determination of the issues, as they “might corroborate or support” other documents obtained in his investigation, which explain why Serb civilians left the Krajina;¹² (iii) he has exercised proper diligence throughout the appeal proceedings in attempting to secure the documents from Serbia;¹³ and (iv) Serbia is obliged to cooperate with requests for assistance on appeal.¹⁴ Gotovina also submits that the admissibility of the documents he seeks is not yet at issue and that it is thus premature to consider whether he exercised due diligence in attempting to discover them at trial.¹⁵

⁶ See generally Application, paras 2-8. The Prosecution asserts that the Application inappropriately incorporates prior pleadings by reference, and asks that if Gotovina’s prior pleadings are considered, the Prior Response is considered as well. Response, paras 2, 4-5.

⁷ See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 3, 16 September 2005, para. 12(c). Cf. *Mladen Naletilić v. Prosecutor*, Case No. IT-98-34-R, Decision on Mladen Naletilić’s Request for Review, 19 March 2009 (“Naletilić Decision”), para. 7.

⁸ Cf. Prior Decision, p. 1.

⁹ Cf. Naletilić Decision, paras 7-8.

¹⁰ See Application, paras 1, 5-8; Reply, paras 5-8.

¹¹ Prior Application, paras 13-17; Prior Reply, paras 15-16.

¹² Prior Application, paras 18-20; Prior Reply, paras 17-22. See also Prior Application, paras 2-8.

¹³ Prior Application paras 22-23; Prior Reply, paras 23-25. See also Prior Application, paras 9-11.

¹⁴ Prior Reply, paras 4-8.

¹⁵ Prior Application, para. 21; Prior Reply, paras 9-13, 25.

6. The Prosecution responds that the Application fails to present grounds sufficient to justify the relief requested under Rule 54 *bis* of the Rules.¹⁶ More specifically, the Prosecution maintains that: (i) Gotovina had the opportunity to discover the documents' existence earlier and failed to exercise due diligence in securing them during trial and pre-trial proceedings;¹⁷ (ii) the Prior Application failed to show that the documents requested are relevant or necessary to prevent a miscarriage of justice;¹⁸ and (iii) the "extraordinary measure" of ordering Serbia to produce documents under Rule 54 *bis* of the Rules has limited application on appeal, particularly given the strict standards for determining errors of fact and for admitting additional evidence in appeal proceedings.¹⁹ It also submits that Gotovina must show that the documents were "not available to [him] at trial through the exercise of due diligence and [...] could impact the verdict if admitted as evidence in the appeal", or alternatively, if the evidence was available at trial given due diligence, that its exclusion "would lead to a miscarriage of justice."²⁰

C. Analysis

7. Rule 54 *bis* of the Rules is not limited in scope to trial proceedings; however the power to direct sovereign states to produce documents is not one that the Tribunal treats lightly.²¹ In addition, the Appeals Chamber underscores "that an appeal is not a trial *de novo* and thus cannot be viewed as an opportunity to remedy [...] failures or oversights by a party during the pre-trial and trial phases."²² Given this context, the Appeals Chamber will compel production of evidence pursuant to Rule 54 *bis* of the Rules only "in exceptional circumstances".²³ Such circumstances arise if a failure to compel production has the potential to result in a miscarriage of justice. In analyzing individual requests, the Appeals Chamber may also consider whether the information sought could have been discovered by the moving party at trial through the exercise of due diligence.²⁴

8. The material sought by Gotovina relates, broadly, to the reasons for Serb civilians' departure from the Krajina region in August 1995 and, more specifically, to records of discussions between

¹⁶ Response, paras 2-3, 6-8; Prior Response, para. 2.

¹⁷ Prior Response, paras 2, 10-19.

¹⁸ Prior Response, paras 2, 20-23.

¹⁹ Prior Response, paras 3-9.

²⁰ Prior Response, para. 6.

²¹ Cf. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 31; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108 *Bis.2*, Decision on Request of the United States of America for Review, 12 May 2006, para. 27.

²² *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildephonse Hategekimana's Motion for Cooperation and Judicial Assistance, 5 May 2011 ("Hategekimana Decision"), para. 4 (internal quotations omitted).

²³ See Hategekimana Decision, para. 4.

²⁴ Cf. Hategekimana Decision, para. 4.


members of the Serb leadership regarding the evacuation of civilians from the area and to reports submitted by officers of the Army of the Federal Republic of Yugoslavia seconded to forces in the Krajina region.²⁵ Gotovina provides a very limited exposition of his justification for seeking an order pursuant to Rule 54 *bis* of the Rules, submitting generally that the additional documents requested “might corroborate or support” other evidence already in his possession.²⁶ The Appeals Chamber notes that the Trial Chamber reviewed extensive evidence regarding the reasons underlying Serb civilians’ departure from the Krajina, including, in relevant part, testimony from and reports composed by Serb officers in the Krajina, direct testimony from Serb refugees, and evidence on the relevant role of Supreme Defence Council of the Federal Republic of Yugoslavia meetings.²⁷ In these circumstances, the Appeals Chamber is not convinced that the new evidence sought would decisively impact the Trial Chamber’s findings.

9. Accordingly, the Appeals Chamber is not satisfied that Gotovina has demonstrated the exceptional circumstances required to justify the intervention of the Appeals Chamber pursuant to Rule 54 *bis* of the Rules. It is therefore unnecessary to address Gotovina’s remaining arguments on this issue.

IV. DISPOSITION

10. For the foregoing reasons, the Appeals Chamber **DENIES** the Application.

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



Judge Theodor Meron
Presiding

Dated this 16th day of November 2011
At The Hague,
The Netherlands

[Seal of the Tribunal]

²⁵ Prior Application, paras 2, 4-8, Annex C (confidential).

²⁶ Prior Application, para. 18. *See also* Prior Application, paras 19-20.

²⁷ *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011 (“Trial Judgement”), vol. II, paras 1511-1535, 1549-1558. *See generally* Trial Judgement, vol. II, paras 1536-1668, 1742-1745.