

UNITED NATIONS

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: 6 February 2012

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

THE PROSECUTOR

v.

**ANTE GOTOVINA
MLADEN MARKAČ**

PUBLIC WITH CONFIDENTIAL ANNEX

PROSECUTION MOTION TO STRIKE

The Office of the Prosecutor:

Ms. Helen Brady
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

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-06-90-A

THE PROSECUTOR

v.

**ANTE GOTOVINA
MLADEN MARKAČ**

PUBLIC

PROSECUTION MOTION TO STRIKE

1. Markač's Response¹ should be rejected as untimely. It was filed 20 days after the *Amicus Curiae* Application,² well past the deadline for responding to that application.³ It was filed 10 days after the Prosecution Response⁴ to the *Amicus Curiae* Application and six days after the Gotovina Response to the *Amicus Curiae* Application.⁵ While Markač was entitled to file a Response to the *Amicus Curiae* Application, he is not entitled to do so at such a late stage. Nor has he demonstrated good cause for his late filing.⁶ Moreover, insofar as his filing amounts in substance to a "reply" to the Prosecution Response, it should also be rejected. Markač has no standing to file a reply to the Prosecution Response as he is not the applicant in the *Amicus Curiae* Application.

¹ Mladen Markač's Response to "Prosecution Response to 'Application and Proposed *Amicus Curiae* Brief' Filed on 13 January 2012," 2 February 2012 (public) ("Response").

² 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, 13 January 2012 (public) ("*Amicus Curiae* Application").

³ See Annex (confidential), para.1.

⁴ Prosecution Response to "Application and Proposed *Amicus Curiae* Brief" Filed on 13 January 2012, 23 January 2012 (public) ("Prosecution Response").

⁵ Ante Gotovina's Response to "Application and Proposed *Amicus Curiae* Brief" Filed on 13 January 2012, 27 January 2012 (public redacted version) ("Gotovina Response").

⁶ See Rule 127.

2. Instead, Markač claims that he is “responding” to the Prosecution Response, which he wrongly characterizes as a “motion.”⁷ He thereby implies that the Response is timely, since it was filed 10 days after the Prosecution Response. However, the Prosecution did not file a “motion”. In accordance with the established practice of this Tribunal when persons and organisations apply to become *amicus curiae* in a case, the Prosecution and Gotovina responded to that application.

3. Markač argues that the Prosecution had no right to file a response to the *Amicus Curiae* Application. His novel⁸ argument is contrary to a long-standing practice at the Tribunal allowing responses to such applications. He points to the lack of a specific Rule and relies on a provision in the “Information Concerning the Submission of *Amicus Curiae* Briefs.”⁹ However, he ignores the difference between a solicited *amicus* application and an unsolicited application, as occurred here.¹⁰ In the former situation, the Chamber may have already determined that the *amicus* can provide assistance, so the parties do not need to respond on this issue. Instead, parties are invited to respond to the *amicus*’ submissions themselves. In the latter situation (which applies here), the Chamber has made no such determination. Notwithstanding the lack of a Rule governing responses to *amicus* applications,¹¹ pursuant to long-standing practice at the Tribunal,¹² parties can and do respond as to whether the unsolicited *amicus* application and brief can provide assistance to the Chamber. This is what the Prosecution and Gotovina¹³ did here.

4. For the foregoing reasons, the Appeals Chamber should reject the Response. Insofar as it is a “response” to the *Amicus Curiae* Application, it is untimely. Insofar

⁷ Response, paras.1-4, 6, 8, 16-18.

⁸ Markač did not raise this issue in relation to prior Prosecution responses that opposed *amicus* applications. See Prosecution’s Response to Requests of the Republic of Croatia to Appear as *Amicus Curiae*, 2 October 2006 (public); Annex (confidential), para.2.

⁹ Response, paras.1-3.

¹⁰ *Contra* Response, paras.2-3.


¹¹ *Contra* Response, para.1.

¹² See, e.g., *Prosecutor v. Nikola Šainović et al.*, Case No.IT-05-87-A, General Ojdanić’s Response to Scheffer *Amicus Curiae* Application, 16 August 2010 (public); *Prosecutor v. Mile Mrkšić et al.*, Case No.IT-95-13/1-A, Prosecution’s Response to ICDA and NACDL Request to Appear as *Amici Curiae*, 7 December 2009 (public); *Prosecutor v. Jadranko Prlić et al.*, Case No.IT-04-74-T, Prosecution’s Response to the Request of the Republic of Croatia to Appear as *Amicus Curiae*, 2 October 2006 (public); Defendant Ante Gotovina’s Response to the Request of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, 2 October 2006 (public).


¹³ Under Markač’s theory, Gotovina had no right to file a response to the Application either. See Response, para.1. *But see* Response, para.15 (approving of Gotovina Response). As a side matter, the Prosecution notes that, while Markač claims that he filed a Joinder supporting Gotovina’s response, Response, para.15, no such Joinder has been filed on the record. The Court Management and Support

as it tries to “reply” to the Prosecution Response to the *Amicus Curiae* Application, it likewise should be rejected as Markač has no standing to do so.

Word Count: 778


Helen Brady
Senior Appeals Counsel

Dated this 6th day of February 2012
At The Hague, The Netherlands


Douglas Stringer
Senior Appeals Counsel

Services Section confirmed on 3 February 2012 to the Prosecution that it did not receive such a filing.
Cf. Annex (confidential), para.3.