

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

Case No. IT-06-90-PT

BEFORE TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr Hans Holthuis

Date Filed: 18 January 2007

THE PROSECUTOR

v.

ANTE GOTOVINA, IVAN CERMAK AND MLADEN MARKAC

**DEFENDANT ANTE GOTOVINA'S PRELIMINARY MOTION
CHALLENGING JURISDICTION PURSUANT TO RULE 72(A)(i)
OF THE RULES OF PROCEDURE AND EVIDENCE**

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For Mladen Markac:

Mr. Miroslav Separovic
Mr. Goran Mikulicic

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I. INTRODUCTION

1. General Ante Gotovina respectfully submits this Preliminary Motion pursuant to Rule 72(A)(i), D(i) and (iv). This Motion supplements his Rule 72 Motion dated 28 April 2006. It sets forth six substantial grounds for challenging jurisdiction. Some counts are so manifestly inconsistent with the ICTY Statute and jurisprudence, that they cast the very basis of the Joinder Indictment into doubt.

2. Rule 72 recognizes that a matter as fundamental as jurisdiction "should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial."¹ The "higher interest of justice" would not be served "by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial."² In view of the expedited trial date of 7 May 2007,³ if counts falling outside the Tribunal's jurisdiction are not dismissed *in limine litis*, the preparation of General Gotovina's defence will be seriously jeopardized.

¹ **Prosecutor v. Dusko Tadic**, *Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1, at paragraph 6 (2 October 1995) (hereinafter referred to as the "Tadic Jurisdiction Decision").

² Tadic Jurisdiction Decision, *id.*

³ See **Prosecutor v. Ante Gotovina, Ivan Cermak, and Mladen Markac**, *Scheduling Order*, Case No. IT-06-90-PT, (17 January 2007).

3. Furthermore, considering the far-reaching consequences of these challenges both for this trial and ICTY jurisprudence in general, General Gotovina hereby requests oral argument so that the parties can fully present their views before the Chamber.

II. THE “EXTENDED” JCE CATEGORY DOES NOT INCLUDE THE MERE FORESIGHT OF A “POSSIBLE” RATHER THAN A “PREDICTABLE” CONSEQUENCE

4. Paragraph 12 states that “it was foreseeable that the crimes of murder, inhumane acts and cruel treatment were a *possible consequence* in the execution of the [joint criminal] enterprise.”⁴ Paragraph 43 further states that the crimes were “the natural and foreseeable consequence of the JCE ... and each accused was aware of this *possible consequence*”.⁵
5. JCE requires foresight that the additional crimes were “a *predictable consequence* of the execution of the common design”.⁶ In terms of *mens rea*, there is significant difference between foresight of a “possible” rather than a “predictable” consequence. The Appeals Chamber has held that: “[t]he knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law.”⁷ Under this standard, “any military commander who issues an order would be criminally responsible, because there is always a *possibility* that violations could occur.”⁸ The Prosecutor’s dilution of the already broad “extended” JCE standard attempts to

⁴ Emphasis added.

⁵ Emphasis added.

⁶ **Prosecutor v. Dusko Tadic**, *Appeals Chamber Judgment*, Case No. IT-94-1-A, at paragraph 204 (15 July 1999) (hereinafter referred to as the “Tadic Appeals Judgment”) (emphasis added); cited with approval in **Prosecutor v. Milomar Stakic**, *Appeals Chamber Judgment*, Case No. IT-97-24-A, at paragraph 65 (22 March 2006) (hereinafter referred to as the “Stakic Appeals Judgment”). See also, **Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic, and Dragoljub Prcaic**, *Appeals Chamber Judgment*, Case No. IT-98-30/1-A, at paragraph 83 (28 February 2005).

⁷ **Prosecutor v. Tihomir Blaskic**, *Appeals Chamber Judgment*, Case No. IT-95-14-A, at paragraph 41 (29 July 2004).

⁸ Emphasis added. *Id.*

substitute *dolus eventualis* with strict liability⁹ thereby transforming virtually every military commander into a war criminal.

6. Accordingly, by seeking to attribute individual criminal liability under the JCE “extended” category based on foresight of a “possible” rather than a “predictable” consequence, Counts 1 to 9 substantively expand the scope of JCE under the Statute and customary law, violate the *nullem crimen sine culpa*¹⁰ principle, fall outside the Tribunal’s jurisdiction *ratione personae*¹¹ within the ambit of Rule 72(D)(i), and should thus be stricken from the Joinder Indictment.

III. THE CRIME OF “DEPORTATION AND FORCIBLE TRANSFER” (COUNTS 1 TO 3) DOES NOT APPLY TO INTERNAL ARMED CONFLICTS CONCERNING WHICH THE SUBSTANTIVELY DIFFERENT STANDARD OF “FORCED MOVEMENT OF CIVILIANS” APPLIES

7. The Joinder Indictment does not allege that an international armed conflict existed between Croatia and SVK forces. Paragraph 56 simply alleges that an “armed conflict” existed “in the Krajina region of the Republic of Croatia” (defined in paragraph 25 as UNPA Sectors North and South) implying an internal armed

⁹ See Tadic Appeals Judgment, at paragraph 220: “In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).”

¹⁰ See Tadic Appeals Judgment, at paragraph 186: “nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”

¹¹ **Prosecutor v. Milan Milutinovic, Nikola Sainovic, and Dragoljub Ojdanic**, *Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise*, Case No. IT-99-37-AR72, at paragraph 21, (21 May 2003): “In order to come within the Tribunal’s jurisdiction *ratione personae*, any form of liability must satisfy three [*sic*] pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.”

conflict. By default, the Trial Chamber must conclude that the Prosecution is alleging the existence of a non-international armed conflict only.¹²

8. The ICRC Study on Customary International Law clearly indicates that the crime of “deportation and forcible transfer” does not apply to non-international armed conflicts. The applicable *lex specialis* differs in substance from the humanitarian law applicable to international armed conflict, as set forth in Rule 129 of the ICRC Study:

“A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.”¹³

The Rule 129(B) standard is based on Article 17(1) of Protocol II, which is also incorporated under Article 8(2)(e)(viii) of the ICC Statute.¹⁴ It is a narrower standard than Rule 129(A) because it requires proof that the perpetrator actually “ordered” the displacement of a civilian population.¹⁵

9. Accordingly, by improperly pleading “deportation and forcible transfer” in relation to an internal armed conflict, and expanding the applicable standard of

¹² **Prosecutor v. Hadzihasanovic and Kubura**, *Trial Chamber Judgement*, Case No. IT-01-47-T, at paragraph 27 (15 March 2006).

¹³ Henckaerts, J.M. and Doswald-Beck, L., *ICRC Study on Customary International Humanitarian Law, Vol. I: Rules*, at p. 457 (Cambridge 2005) (hereinafter referred to as the “ICRC Study”); cited in Stakic Appeals Judgment, at paragraph 296.

¹⁴ Article 8(2)(e)(viii), *Rome Statute of the International Criminal Court*, Doc: A/Conf.183/9 (1 July 2002) (hereinafter referred to as the “Rome Statute”), as found on the Internet at: www.icc-cip.net/about.html.

¹⁵ See, e.g., Article 8(2)(e)(viii), *International Criminal Court, Elements of Crimes*, U.N.Doc. PCNICC/2000/1/Add2 (2000) (hereinafter referred to as “ICC Elements of Crimes”), containing the requirement that: “1. The perpetrator *ordered* a displacement of a civilian population.” (Emphasis added). As found on the Internet at: <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html>.

“forced movement of civilians” under customary law, Counts 1 to 3 violate the *nullem crimen sine lege* principle, fall outside the Tribunal’s jurisdiction *ratione materiae* within the ambit of Rule 72(D)(iv),¹⁶ and should thus be stricken from the Joinder Indictment.

IV. THE CRIME OF “DEPORTATION AND FORCIBLE TRANSFER” (COUNTS 1 TO 3) CANNOT INCLUDE ALLEGED CONDUCT OF HOSTILITIES VIOLATIONS COMMITTED PRIOR TO RESTORATION OF CROATIAN AUTHORITY OVER “KRAJINA”

10. Counts 2 and 3 charge General Gotovina with “deportation and forcible transfer” under Articles 5(d) and (i) of the Statute, and paragraph 60 incorporates Counts 2 and 3 under Count 1, which charges persecutions pursuant to Article 5(h). These counts are at the core of the Prosecutor’s allegation of “ethnic cleansing”.
11. Paragraph 29 states that the alleged expulsion campaign “began *before* the major military operation [i.e. Operation Storm] commenced on 4 August 1995, *largely* by the use of propaganda, disinformation and psychological warfare” which filled the Serbian population “with panic and fear”.¹⁷ It also alleges that in furtherance of this campaign, “Croatian forces shelled civilian areas”, and paragraph 35 alleges that they engaged in “extensive shelling of civilian areas and an aerial attack on fleeing civilians.” These allegations are incorporated in Counts 1 to 3 by reference in paragraphs 49 and 50 respectively.
12. These alleged acts relate solely to the ruses of war or conduct of hostilities prior to or during Operation Storm, and not to the deportation of persons from territory under the authority of Croatian forces.
13. Notwithstanding the applicability of Article 17(1) of Protocol II to internal armed conflicts as discussed above,¹⁸ the customary law definition of deportation and

¹⁶ For the view that expanding criminal responsibility by giving greater scope to the crime of deportation violates the *nullem crimen sine lege* principle, see Stakic Appeals Judgment at paragraph 302.

¹⁷ Emphasis added.

¹⁸ See *supra* at paragraphs 7-8.

forcible transfer under Articles 5(d) and (i) of the Statute as pleaded in the Joinder Indictment is contained in Article 49(1) of Geneva Convention IV:¹⁹ “[i]ndividual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”²⁰ Article 85(4)(a) of Protocol I prohibits: “the deportation or transfer of all or parts of the population of *the occupied territory* within or outside this territory, in violation of Article 49 of the Geneva Convention”.²¹ Rule 129 of the ICRC Study also requires a state of occupation.²² There is no legal basis to apply deportation to situations other than occupied territory.²³

14. Under customary law: “[t]erritory is considered occupied when it is *actually placed under the authority of the hostile army*. The occupation extends only to the territory where such authority has been established and can be exercised.”²⁴

¹⁹ See, e.g., ICRC Study, Rule 129, at pp. 457-458; referring to Article 49(1) of Geneva Convention IV, at footnote 3; cited with respect to Article 5(d) of the Statute in Stakic Appeals Judgment at paragraph 296. See also ICRC Commentary, Geneva Convention IV, at p. 599, stating that the “grave breach” of “unlawful deportation or transfer” under Article 147, corresponding to Article 2(g) of the ICTY Statute, refers to Article 49 of Geneva Convention IV.

²⁰ Emphasis added. *Id.*

²¹ Emphasis added. *Id.*

²² ICRC Study, at p. 457.

²³ See, e.g., Stakic Appeals Judgment, at paragraphs 290-299. It is noted here that “by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 [of the ICTY Statute] more narrowly than necessary under customary international law.” (Tadic Jurisdiction Decision, at paragraph 141). The definition of crimes against humanity under Article 7 of the Rome Statute does not require a nexus with armed conflict. Thus, it is conceivable that the crime of “deportation or forcible transfer of population” under Article 7(1)(d) of the Rome Statute may be committed where there is no military occupation, though actual authority over the relevant territory would still be required. However, to the extent that an armed conflict exists in a given situation, humanitarian law applies as the *lex specialis* and the relevant standard becomes the same as that under Article 5 of the ICTY Statute.

²⁴ Article 42 of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (“Hague Convention”); see e.g., **Prosecutor v. Dario Kordic & Mario Cerkez**, *Trial Chamber Judgment*, Case No. IT-95-14/2-T, at paragraph 339 (26 February 2001); See also **Prosecutor v. Mladen Naletilic and Vinko Martinovic**, *Trial Chamber Judgment*, Case No. IT-98-34-T, at paragraph 216 (31 March 2003) (hereinafter referred to as the “Naletilic Trial Judgment”); and *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, at paragraphs 78 and 89 (9 July 2004) as found on the Internet at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>; and *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, at paragraph 172 (19 December 2005) as found on the Internet at: <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

Since the Indictment pleads an internal armed conflict,²⁵ this standard only applies by analogy because a State cannot “occupy” its own territory. Thus, under Article 17(1) of Protocol II, the crime of “forced movement of civilians” applies only within “the territory...where a conflict, within the meaning of Article 1 [of Protocol II]²⁶ ...is taking place.”²⁷

15. Both the crime of “deportation and forcible transfer” in an international armed conflict, and the crime of “forced movement of civilians” in an internal armed conflict, apply only to persons in territories actually placed under the authority of a party to the conflict.²⁸ Thus, the Prosecutor can only invoke this crime with

²⁵ See *supra* at paragraph 7.

²⁶ Article 1(1) of Protocol II provides in relevant part that its narrow “material field of application” is restricted to “armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Article 1(2) provides furthermore, that Protocol II “shall not apply to situations of internal disturbances and tensions”.

²⁷ ICRC Commentary to Protocols II, at paragraph 4852; see *infra* at paragraphs 19-23 on the inapplicability of the law of occupation to internal armed conflict upon the close of military operations.

²⁸ At most, the crime applies to persons “in the hands of” or “in the power” of a party to the conflict; see e.g. Tadic Appeals Judgement, at paragraph 164: “Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines “protected persons” - hence possible victims of grave breaches - as those “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons.” There is no comparable provision with respect to internal armed conflict, but see: ICRC Commentary to Protocol II, at p. 1365, paragraph 4507: “As the Protocol does not provide for different categories of persons who enjoy a special status” the rules on humane treatment “apply equally to all persons affected by the armed conflict who are *in the power of the enemy*” (emphasis added).

The ICRC Commentary, Geneva Convention IV, at p. 60, states that: “In all cases of occupation, whether carried out by force or without meeting any resistance, the Convention becomes applicable to individuals, i.e. to the protected persons, as they fall into the hands of the Occupying Power.” It states furthermore, that the word “occupation” in Article 6 concerning “beginning and end of application” of the Convention “has a wider meaning than it has in Article 42 [of the 1907 Hague Convention]. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of Article 42... . . . There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation” (at p. 60). Based on this authority, the Naletilic Trial Judgment, at paragraph 221, states that for protected persons in an international armed conflict, “a state of occupation exists upon their falling into ‘the hands of the occupying power.’” It concludes that the crime of “forcible transfer” is “prohibited from the moment that they fell into the hands of the opposing power, regardless of the stage of the hostilities. There is no further need to establish that an actual state of occupation as defined under Article 42 of the Hague Regulations existed at the relevant time in the relevant place.” (at paragraph 222). This broad interpretation of the law of occupation within the ambit of Article 6 of Geneva Convention IV suggests that the crime of deportation may be committed against persons who are “in the hands of” the occupying power but not in “occupied territory.” Under Article 49 of Geneva Convention IV, however,

respect to persons situated in the “Krajina” *after* it was placed under Croatian authority and not prior to or during Operation Storm as alleged in the Joinder Indictment.

16. The Prosecutor is surely aware of the distinction between “Hague Law”, relating to the conduct of hostilities, and “Geneva Law”, relating to protected persons “in the hands of” a party to the conflict.²⁹ There is a considerable difference between the absolute standards applicable to humane treatment of those in the power of a party to the conflict and the ambiguities surrounding the conduct of hostilities. This distinction explains the Prosecutor’s decision not to initiate an investigation concerning alleged humanitarian law violations by NATO forces during the 1999 Kosovo aerial bombardment campaign despite the killing of 495 civilians and the wounding of 820.³⁰ If the Prosecutor is alleging that General Gotovina has engaged in unlawful attacks against civilians contrary to Hague Law,³¹ or that Operation Storm’s “primary purpose” was to “spread terror among the civilian population”,³² then she should so charge and satisfy the more exacting requirements of proof. However, the Prosecutor cannot simply allege violations of Hague Law under the guise of Geneva Law and thereby avoid proof that particular attacks were in fact unlawful.³³

“occupied territory” is a requisite element of the crime of deportation or forcible transfer; see e.g. ICC Elements of Crimes, Article 8(2)(b)(viii). In any event, persons in the hands or power of a party to the conflict are protected under the “Geneva Law”, and not under the “Hague Law” applicable to conduct of hostilities.

²⁹ See e.g. Tadic Jurisdiction Decision, at paragraph 87; See also **Prosecutor v. Dusko Tadic**, *Separate Opinion of Judge Abi-Saab on The Defence Motion For Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1, at Section II “The Law of the Hague and the Law of Geneva”, (2 October 1995); See also *Advisory Opinion on the Legality on the Threat or Use of Nuclear Weapons*, International Court of Justice, at paragraph 75 (8 July 1996) as found on the Internet at: <http://www.icj-cij.org/icjwww/icses/iunan/iunanframe.htm>.

³⁰ See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, at paragraphs 90-91, as found on the Internet at: <http://www.un.org/icty/pressreal/nato061300.htm>.

³¹ For a discussion of the crime of “attacks on civilians” as a violation of the laws or customs of war, see e.g. **Prosecutor v. Stanislav Galic**, *Trial Chamber Judgment*, Case No. IT-98-29-T, at paragraphs 13-62 (5 December 2003) (hereinafter referred to as the “Galic Trial Judgment”).

³² See Article 13(2) of Protocol II, corresponding to Article 51(2) of Protocol I; for a discussion of the requirements of this crime, see Galic Trial Judgment, at paragraphs 63-138.

³³ See e.g. ICRC Study comments on Rule 129, at pp. 461-462: “Ethnic cleansing aims to change the demographic composition of a territory. *In addition to displacement of the civilian population of a territory,*

17. Accordingly, by improperly expanding the scope of the crime of “deportation and forcible transfer” under customary law to cover alleged conduct of hostilities violations against persons in territories not under the authority of Croatian forces, Counts 1 to 3 violate the *nullem crimen sine lege* principle, fall outside the Tribunal’s jurisdiction *ratione materiae* within the ambit of Rule 72(D)(iv), and should thus be stricken from the Joinder Indictment.
18. Alternatively, the Trial Chamber should declare that General Gotovina has not been charged with violations of Hague Law concerning his conduct of Operation Storm, including alleged unlawful ruses of war and the unlawful shelling of Knin and other locations, and thus, that all conduct set forth in the Joinder Indictment relating to the conduct of hostilities is presumed to be in accordance with humanitarian law and may not form the basis for any criminal liability.

V. **THE CRIME OF “DEPORTATION AND FORCIBLE TRANSFER”(COUNTS 1 TO 3) DOES NOT APPLY TO INTERNAL ARMED CONFLICTS, ESPECIALLY TO THE RESETTLEMENT BY A STATE OF ITS OWN CIVILIAN POPULATION INTO TERRITORY FROM WHICH SUCH CIVILIAN POPULATION WAS PREVIOUSLY “ETHNICALLY CLEANSED”**

19. Paragraph 36 alleges that: “[a] demographic policy was...implemented whereby much of the Serb Krajina was to be *colonized* with Croats”.³⁴ These alleged acts are incorporated in Counts 1 to 3 by reference in paragraphs 49 and 50 respectively.
20. Article 49(6) of Geneva Convention IV provides that: “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” The ICRC Commentary explains that this provision: “is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for

[i.e. under Rule 129] this can be achieved through *other acts which are prohibited in and of themselves* such as *attacks against civilians...*” (Emphasis added).

³⁴ Emphasis added.

political and racial reasons or in order, as they claimed, to *colonize* those territories.”³⁵

21. Rule 130 of the ICRC Study establishes this as a customary law norm only “applicable in international armed conflicts”.³⁶ Article 17 of Protocol II does not contain a similar prohibition. It “*only* covers forced movement and does not, of course, restrict the right of civilians to move about freely within the country”.³⁷
22. It follows that in internal armed conflicts where a State does not occupy another State’s territory, there is no restriction on the movement of that State’s nationals within its own territory. Consequently, there is no legal basis for an allegation of “colonization” or unlawful settlement in an internal armed conflict, not least where persons previously “ethnically cleansed” are resettled. It is remarkable that the Joinder Indictment makes no mention whatsoever of the fact, asserted by the Prosecutor elsewhere, that by August 1995: “[v]irtually the whole Croat...population” of the “Krajina”, numbering at least 78,611, “was forcibly removed, deported, or killed” by the “Republika Srpska Krajina”.³⁸
23. Accordingly, by improperly expanding the scope of the crime of “deportation and forcible transfer” to cover Croatia’s alleged “colonization” of its own territory, Counts 1 to 3 violate the *nullem crimen sine lege* principle, fall outside the Tribunal’s jurisdiction *ratione materiae* within the ambit of Rule 72(D)(iv), and should thus be stricken from the Joinder Indictment.

VI. CRIMES ALLEGEDLY COMMITTED AFTER THE “GENERAL CLOSE OF MILITARY OPERATIONS” (COUNTS 1 TO 9) DO NOT CONSTITUTE VIOLATIONS OF HUMANITARIAN LAW

24. Paragraph 28 states that on 7 August 1995, Operation Storm “had been *successfully completed*” but that “[f]ollow-up actions continued until about 15

³⁵ ICRC Commentary, Geneva Convention IV, at p. 283. (Emphasis added).

³⁶ ICRC Study, at p. 462.

³⁷ ICRC Commentary, Protocol II, at paragraph 4851. (Emphasis added).

³⁸ **Prosecutor v. Milan Martić**, *Second Amended Indictment*, Case No. IT-95-11, at paragraphs 44-45 (9 December 2005). See also **Prosecutor v. Milan Babic**, *Judgment on Sentencing Appeal*, Case No. IT-03-72-A, at paragraph 2 (18 July 2005).

November 1995.”³⁹ Paragraph 33 further states that “[o]nce the *minimal* (and in many instances, *non-existent*) SVK resistance was overcome” Croatian forces “implemented a scorched earth, ethnic cleansing campaign”.⁴⁰ These factual assertions are manifestly inconsistent with the legal assertion in paragraph 56 that: “[a]t all relevant times, a state of armed conflict existed in the Krajina region of the Republic of Croatia”.

25. As set forth in the 28 April 2006 Rule 72 Motion, these factual assertions negate the existence of an armed conflict without which humanitarian law does not apply. As such, they fall outside the Tribunal’s jurisdiction *ratione materiae*.⁴¹ It is hereby further submitted that at the very least, the successful completion of Operation Storm by overcoming allegedly minimal or non-existent resistance leaves no doubt that the alleged “follow-up actions” did not occur in the context of an armed conflict.
26. An internal armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups”.⁴² Humanitarian law “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until...a peaceful settlement is achieved.”⁴³ Article 6 of Geneva Convention IV provides that application of humanitarian law to the territory of the parties to a conflict “shall cease on the general close of military operation”.⁴⁴ The ICRC Commentary states that: “the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation or simply on *debellatio*.”⁴⁵ *Debellatio* means “the end of an armed

³⁹ Emphasis added.

⁴⁰ Emphasis added.

⁴¹ See *Defendant Ante Gotovina’s Preliminary Motion to Dismiss the Proposed Joinder Indictment pursuant to Rule 72 of the Rules of Procedure and Evidence on the basis of (1) Defects in the Form of the Indictment (Vagueness/Lack of Adequate Notice of Charges) and (2) Lack of Subject Matter Jurisdiction (Ratione Materiae)*, at paragraphs 32-36 (28 April 2006).

⁴² Tadic Jurisdiction Decision, at paragraph 70.

⁴³ *Id.*

⁴⁴ With respect to internal armed conflict, Article 1(1) of Protocol II “does not contain any indication as regards the end of its applicability. Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities.” (ICRC Commentary to Protocol II, p. 1360, paragraph 4492.)

⁴⁵ ICRC Commentary, Geneva Convention IV, at p. 62.

conflict which results in the occupation of the whole of the enemy's territory and the cessation of all hostilities"⁴⁶ or "the destruction of a party to the conflict as an independent and organized entity."⁴⁷ In the context of internal armed conflict, "suppressed revolutions [i.e. insurgencies] provide equivalents to international *debellatio*."⁴⁸ The facts set forth in the Joinder Indictment clearly describe such a situation.

27. It is clear from Protocol II that a government that has prevailed in an internal armed conflict and which seeks to "maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State"⁴⁹ cannot be equated with an Occupying Power in an international armed conflict that post-*debellatio* "exercises the functions of government" in "occupied territory" within the meaning of Article 6 of Geneva Convention IV. The narrow application of humanitarian law in internal armed conflict expresses the "fundamentally unequal" legal status between "insurgents" and "the government in power acting in the exercise of the public authority vested in it".⁵⁰ Thus, Article 1(2) specifically provides that Protocol II "shall not apply to situations of internal disturbances and tensions..." The ICRC Commentary states that "internal tensions" include "the sequels of armed conflict or of internal disturbances."⁵¹ Thus, post-*debellatio* "follow-up actions" set forth in the Joinder Indictment fail to satisfy the required threshold for application of humanitarian law in an internal armed conflict.
28. Accordingly, crimes allegedly committed after the general close of military operations on 7 August 1995, do not constitute violations of humanitarian law, and by including conduct between that date and 15 November 1995, Counts 1 to 9 violate the *nullem crimen sine lege* principle, fall outside the Tribunal's

⁴⁶ ICRC Commentary, Geneva Convention IV, note 2.

⁴⁷ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II (London 1968), at p. 730.

⁴⁸ *Id.*

⁴⁹ See Article 3(1), Protocol II.

⁵⁰ ICRC Commentary, Protocol II, at paragraph 4458.

⁵¹ ICRC Commentary, Protocol II, at paragraph 4476.

jurisdiction *ratione materiae* within the ambit of Rule 72(D)(iv), and should thus be stricken from the Joinder Indictment.

VII. THE CRIME OF “INHUMANE ACTS AND CRUEL TREATMENT” (COUNTS 8 AND 9) CANNOT INCLUDE ALLEGED CONDUCT OF HOSTILITIES VIOLATIONS COMMITTED PRIOR TO RESTORATION OF CROATIAN AUTHORITY OVER “KRAJINA”

29. Paragraph 54 alleges that “by firing upon [Serb civilians] (including by aerial attack)”, Croatian armed forces violated the prohibition against “cruel treatment” under Article 3(1)(a) common to the Geneva Conventions of 1949.
30. Because it is part of Geneva Law, common Article 3 only applies to persons in power of a party to the conflict, but not to conduct of hostilities, which fall under Hague Law.⁵²
31. Accordingly, by improperly expanding the scope of the crime of “cruel treatment” under customary law to cover alleged conduct of hostilities violations in relation to persons in territories not actually placed under the authority of Croatian forces, Counts 8 and 9 violate the *nullem crimen sine lege* principle, fall outside the Tribunal’s jurisdiction *ratione materiae* within the ambit of Rule 72(D)(iv), and should thus be stricken from the Joinder Indictment.

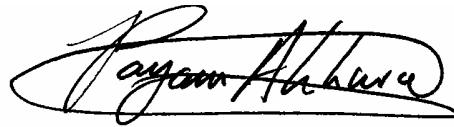
⁵² See *supra* paragraphs 15-16.

32. WHEREFORE, Defendant Ante Gotovina respectfully requests that the Pre-Trial Chamber enter an Order pursuant to Rule 72 dismissing the Joinder Indictment to the extent that it makes allegations falling outside the jurisdiction of the Tribunal.

Word count: 2,980

Dated: 18 January 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Payam Akhavan", enclosed within a large, stylized oval flourish.

Dr. Payam Akhavan

Defence Counsel for Ante Gotovina