

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

Case No. IT-06-90-PT

BEFORE TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Date Filed: 8 February 2007

THE PROSECUTOR

v.

ANTE GOTOVINA, IVAN CERMAK AND MLADEN MARKAC

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

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I. INTRODUCTION

1. The Prosecution's Response fails to properly address *any* of General Gotovina's six substantial grounds for challenging jurisdiction. His arguments are either mischaracterized, ignored, or attacked by unsupported assertions.
2. The Prosecution has in effect conceded General Gotovina's arguments on jurisdiction. Some of the responses are so deeply flawed that they further expose and confirm the serious legal inadequacy of the Joinder Indictment.
3. Most revealing is the repeated contention – in relation to the core allegation of “ethnic cleansing” – that “the laws and customs of war...do not apply to crimes against humanity.”¹ This is tantamount to arguing that the basis for criminal liability under humanitarian law² can be wholly disregarded simply

¹ See *Prosecution's Response to Gotovina's Second Motion Challenging Jurisdiction*, at paragraph 11 and also please refer to paragraphs 1, 8, 10, and 13 (1 February 2007) (hereinafter referred to as the “Prosecution Response”).

² The term “humanitarian law” is equivalent to the “laws and customs of war”; See **Prosecutor v. Dusko Tadic**, *Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1, at paragraph 87 (2 October 1995) (hereinafter referred to as the “Tadic Jurisdiction Decision”): “[t]he expression “violations of the laws or customs of war” is a traditional term of art used in the past...before they were largely replaced by...the more recent and comprehensive notion of “international humanitarian law”...”

by charging conduct as crimes against humanity rather than war crimes. This assertion is manifestly absurd.³

4. As set forth below, this astonishing argument is contrary not only to elementary principles of humanitarian law and ICTY jurisprudence, but also to the Prosecution's own consistent legal theory in all other indictments. By seeking a "Gotovina exception" to this fundamental rule, the Tribunal is being asked to disregard the laws of war to compensate for the factual inadequacy of the Joinder Indictment. This underscores the importance of dismissing *in limine litis* all counts falling outside the Tribunal's jurisdiction. Subjecting General Gotovina to a trial based on a Joinder Indictment that so blatantly disregards humanitarian law would be a miscarriage of justice.
5. In view of the Prosecution's unprecedented and deeply flawed legal position, General Gotovina hereby respectfully repeats his request for oral argument on this Motion.

II. THE JCE EXTENDED LIABILITY PLEADED BY THE PROSECUTOR AMOUNTS TO STRICT LIABILITY

6. The Prosecution's Response maintains that the "possible consequence" standard is "consistent with Appeals Chamber jurisprudence".⁴ It makes no mention whatsoever of the seminal Tadic Appeals Judgment where JCE extended liability was first formulated and thereafter cited with approval in all ICTY and ICTR cases.⁵ Tadic set forth an advertent recklessness or *dolus*

³ Under Article 1 of the ICTY Statute, the Tribunal's sole jurisdiction is "to prosecute persons responsible for serious violations of international humanitarian law".

⁴ Prosecution Response, at paragraph 3.

⁵ **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"); 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"); **Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic, and Dragoljub Prcać**, *Appeals Chamber Judgment*, Case No. IT-98-30/1-A, at paragraph 83 and footnote 194 (28 February 2005) (hereinafter referred to as the "Kvočka Appeal Judgment"); **Prosecutor v. Mitar Vasiljevic**, *Appeals Chamber Judgment*, Case No. IT-98-32-A, at paragraph 99 and footnote 173 (25 February 2004); **Prosecutor v. Milorad Krnojelac**, *Appeals Chamber Judgment*, Case No. IT-06-90-PT

eventualis standard, equated with subjective foresight that additional crimes were “a *predictable consequence* of the execution of the common design.”⁶ This Judgment confirms that knowledge of a mere “possible consequence” is insufficient for JCE extended liability.⁷

7. The two authorities cited by the Prosecution in support of the “possible consequence” standard both purport to follow Tadic.⁸ As such, they don’t justify a deviation from the standard set forth therein.⁹
8. The advertent recklessness¹⁰ or *dolus eventualis*¹¹ standard requires foresight of a “predictable consequence” or substantial likelihood that conduct will lead

Judgment, Case No. IT-97-25-A, at paragraph 30 (17 September 2003); **Prosecutor v. Radislav Krstic**, *Appeals Chamber Judgment*, Case No. IT-98-33-A, at paragraph 150: “[f]or an accused to incur criminal responsibility for acts that are natural and foreseeable consequences of a joint criminal enterprise ... [i]t is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise *aware of the probability* that other crimes may result” (emphasis added) (19 April 2004); See also **Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana**, *Appeals Chamber Judgment*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, at paragraph 465 and footnote 788, (13 December 2004); **Prosecutor v André Rwamakuba**, Case No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide*, at paragraph 14 (citing Tadic Appeals Judgment at paras. 195–220) (22 October 2004).

⁶ Tadic Appeals Judgment at paragraphs 204 and 220 (emphasis added).

⁷ Tadic Appeals Judgment, at paragraph 220 (emphasis in original):

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).

⁸ The Prosecution Response (at paragraph 3) relies on the Stakic Appeals Judgment, which cited the Tadic Appeals Judgment with approval (at paragraphs 65 and footnotes 159 to 161) but then in one instance used the term “possible consequence” instead of “predictable consequence” (at paragraph 87). Furthermore, the Blaskic Appeals Judgment invoked in the Response (at paragraph 4) discusses the *mens rea* of “ordering” under Article 7(1) of the Statute (at paragraphs 27-42) and mentions JCE only by way of *obiter dicta*, again citing the Tadic Case in support (paragraph 33, footnote 62).

⁹ **Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo**, *Appeals Chamber Judgment*, Case No. IT-96-21-A, at paragraph 8 (citing Aleksovski Appeals Judgment at paragraph 109): “It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts” (20 February 2001).

¹⁰ See e.g. **Prosecutor v. Tihomir Blaskic**, *Appeals Chamber Judgment*, Case No. IT-95-14-A, at paragraph 38 (29 July 2004) (hereinafter referred to as the Blaskic Appeals Judgment) stating that under the recklessness standard in common law systems, “[t]he mere possibility of a risk that a crime or crimes will occur as a result of the actor’s conduct generally does not suffice to ground criminal responsibility.”

to a particular result. This is a much higher standard than foresight of a mere “possible” consequence.¹²

9. The Prosecutor also contends that the extended form of JCE as pleaded in the Joinder Indictment does not violate *nullem crimen sine lege* because references to “possible consequences” are preceded by references to foreseeability of the consequences.¹³ This fails to respond to General Gotovina’s objection and further demonstrates the Prosecution’s conflation of the objective and subjective elements of JCE extended liability. The Prosecution must establish not only that the crimes were *objectively* natural and foreseeable (i.e. predictable), but that *subjectively* “the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.”¹⁴
10. The JCE extended liability standard in ICTY jurisprudence has been variously criticized by distinguished commentators as the “nuclear bomb” in the Prosecution’s arsenal,¹⁵ or “so broad a notion that it requires enormous self-restraint by prosecutors in order ever to be defensible in practice”,¹⁶ and as “result[ing] in discounted convictions that inevitably diminish the didactic significance of the Tribunal’s judgments and that compromise its historical legacy.”¹⁷ There can be no doubt that the Prosecution’s attempt to further expand the Tadic JCE standard is inconsistent with the Tribunal’s jurisdiction under Article 7(1) of the Statute.

¹¹ See *id.*, at paragraph 39 stating that in civil law systems, “[t]he volitional element denotes the borderline between *dolus eventualis* and advertent or conscious negligence.”

¹² *Id.*, at paragraph 33.

¹³ Prosecutor’s Response, paragraph 5.

¹⁴ Kvočka Appeal Judgement, at paragraph 86.

¹⁵ Allison Marston Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law”, (2005) 93 *Calif. L. Rev.* 75 at 137.

¹⁶ Mark Osiel, “The Banality of Good: Aligning Incentives Against Mass Atrocity”, (2005) 105 *Colum. L. Rev.* 1751 at 1800 et seq.

¹⁷ William A. Schabas, “Mens Rea and the International Criminal Tribunal for the Former Yugoslavia”, (2003) 37 *New Eng.L. Rev.* 1015 at 1033-1034.

III. THE APPLICABLE ACTUS REUS OF CRIMES AGAINST HUMANITY IN INTERNAL ARMED CONFLICT IS “FORCED MOVEMENT OF CIVILIANS”

11. The Prosecution’s Response to this jurisdiction challenge is wholly inadequate. First, the title “Crimes against humanity can be committed in international or non-international armed conflict” is irrelevant and mischaracterizes the argument. The Motion does not challenge the settled rule that crimes against humanity may be committed in both international and internal armed conflicts.¹⁸ The Defendant’s simple assertion is that in the present case, the *lex specialis* applicable to internal armed conflicts defines the relevant *actus reus* of crimes against humanity as “forced movement of civilians” – as set forth in Rule 129(b) of the ICRC Study – rather than “deportation” or “forcible transfer”.
12. Second, the Prosecution makes the remarkable assertion that: “[t]he Defence Argument is flawed because it purports to apply war crimes law to crimes against humanity.”¹⁹ The *sole* authority in support of this far-reaching argument – dismissing the highly authoritative ICRC Study on International Humanitarian Law as “inapplicable”²⁰ – is an inapposite quote from the Kupreskic Trial Chamber Judgment – which the Prosecution Response erroneously attributes to the Appeals Chamber²¹ – stating that Article 5 applies irrespective of the international or internal character of a conflict. Kupreskic merely refers to the Tadic Appeals Decision on Jurisdiction stating that “Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts.”²² This authority is wholly unresponsive to General Gotovina’s argument on the applicability of Rule 129(B).

¹⁸ Tadic Jurisdiction Decision, at paragraphs 138-142..

¹⁹ Prosecution Response, at Paragraph 8.

²⁰ Id.

²¹ See Prosecution Response at footnote 5, page 4; this passage appears at paragraph 545 of the Kupreskic Trial Chamber Judgment, and not the Appeals Chamber Judgment.

²² Tadic Jurisdiction Decision, at paragraph 142.

13. Since there is a nexus with armed conflict requirement under Article 5, and since the Joinder Indictment in fact pleads the existence of an armed conflict, humanitarian law – which is the sole basis for ICTY jurisdiction under Article 1 of the Statute – is the *lex specialis* that defines the material elements of crimes against humanity. As the Stakic Appeals Judgment recognized, Article 49 of Geneva Convention IV is “the underlying instrument prohibiting deportation” within the meaning of Article 5 of the Statute.²³ The mere fact that General Gotovina “is not charged with violations of the laws or customs of war in these counts”²⁴ does not render the laws of war irrelevant.
14. The standard applicable to internal armed conflict differs substantively from that applicable to international armed conflict.²⁵ In interpreting Articles 5(d) and (i) of the Statute, the Stakic Appeals Judgment recognized that “Article 17 of Additional Protocol II dealing with non-international armed conflicts...does not expressly address deportation or forcible transfer [i.e. corresponding to Article 49 of Geneva Convention IV]”²⁶ and further referred to Rule 129 of the ICRC Study, which sets forth two substantively different standards for international and internal armed conflicts.²⁷ Thus, the Prosecution’s unsupported assertion that “[t]he particular type of armed conflict may be relevant to the definitions of war crimes...but is irrelevant to...crimes against humanity”²⁸ does not withstand scrutiny.
15. It merits emphasizing that application of Rule 129(B) of the ICRC Study is entirely consistent with the Tribunal’s “primary purpose” which is “not to leave unpunished any person guilty of any such serious violation, whatever

²³ Stakic Appeals Judgment, at paragraph 306.

²⁴ Prosecution Response, at paragraph 8.

²⁵ See *Defendant Ante Gotovina’s Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence*, at paragraphs 7-9 (18 January 2007) (hereinafter referred to as the “Gotovina Jurisdiction Motion”).

²⁶ Stakic Appeals Judgment, at paragraph 294.

²⁷ *Id.*, at paragraph 296.

²⁸ Prosecution Response, at paragraph 10.

the context within which it may have been committed.”²⁹ This rule merely recognizes that different rules apply to different contexts but does not create any *lacunae*.

16. It is respectfully submitted that by failing to explain why Rule 129(B) of the ICRC Study is “inapplicable” in the present case, the Prosecution has conceded the Defendant’s submissions on this ground.

IV. THE ACTUS REUS OF “DEPORTATION” OR “FORCIBLE TRANSFER” UNDER CRIMES AGAINST HUMANITY IS DEFINED BY HUMANITARIAN LAW AND IS INAPPLICABLE TO THE CONDUCT OF HOSTILITIES PRIOR TO RESTORATION OF CROATIAN AUTHORITY OVER “KRAJINA”

17. The Prosecution’s Response to this ground is wholly inadequate. It contends that Hague Law violations can be charged as deportation and forcible transfer because the corresponding requirement of occupation in humanitarian law is “directed at particular requirements of the laws and customs of war which do not apply to crimes against humanity.”³⁰ It does not offer one relevant authority in support of this far-reaching assertion, and none of its other arguments respond to the Defendant’s objections.³¹ The Prosecution is

²⁹ Tadic Jurisdiction Decision, at paragraph 92.

³⁰ Prosecution Response, at paragraph 11.

³¹ The Prosecution’s three arguments on this ground are wholly inapposite to the Defendant’s submissions. The *First* argument is that: “Reliance on war crimes rules to interpret aspects unique to the [sic] crime against humanity – such as the nature of the armed conflict or the nationality of the victims – is wholly inappropriate, would eviscerate the distinction between the two bodies of law, and would negate the protection offered to all civilians by the prohibition of crimes against humanity” (paragraph 13). The quote from the Stakic Appeals Judgment in support of this argument, namely that “deportation as a crime against humanity developed out of deportation as a war crime – as a way of extending the scope of the crime’s protection to civilians of the same nationality as the perpetrator” is irrelevant to the issue at hand. It simply recognizes that under the 1945 Charter of the International Military Tribunal, prior to the adoption of Article 3 common to the 1949 Geneva Conventions, the laws of war did not protect victims of war that had the same nationality as the perpetrator. The *Second* argument that “the factual basis for charging a crime against humanity may be overlapping or identical to the factual basis for a violation of the laws or customs of war” is also irrelevant (paragraph 14). The Defendant’s contention is not that the Prosecution cannot characterize and charge the same facts as different crimes. The point simply is that in order to fall within the Tribunal’s jurisdiction, the Prosecution must properly plead crimes, consistent with customary law rather than expanding definitions at will. The *Third* argument is that because crimes against humanity may be committed against “any” civilian population, “They do not require military occupation of territory and do not depend on whether the victims are in territories under the authority of a party to the conflict”

alleging that “ethnic cleansing” of Serbs was “largely”³² achieved by ruses and attacks prior to Croatian control of “Krajina”, but seeks to avoid proof that such conduct violated the laws of war. This amounts to criminalizing lawful combat.

18. The Appeals Chamber considers Article 49 of Geneva Convention IV as “the underlying instrument prohibiting deportation” within the meaning of Article 5 of the Statute³³ and recognizes that “[d]eportation is clearly prohibited as a crime where the conflict encompasses an *occupied territory*.”³⁴ ICTY jurisprudence expressly recognizes that: “[t]he content of the underlying offence [of deportation] does not differ whether perpetrated as a war crime or as a crime against humanity.”³⁵ The requirement of “occupation” – or its equivalent in internal armed conflict – does not become irrelevant simply because the Prosecution pleads crimes against humanity instead of war crimes.
19. The most persuasive authority is the Prosecution’s own consistent legal theory and charging practice – affirmed by ICTY jurisprudence – in cases involving Hague Law violations as an element of crimes against humanity. The Galic Trial Judgment leaves no doubt as to the relevance of the laws of war to defining the *actus reus* of Article 5:

The Prosecution submits that, in the context of an armed conflict, the determination that an attack is unlawful in light of treaty and customary

(paragraph 15). This mischaracterizes the Defendant’s argument. Crimes against humanity may be committed against any civilian population, including for instance, the spreading of terror and unlawful attacks against civilians not “in the hands” or “in the power” of a party to the conflict. However, such Hague Law violations cannot be charged as “deportation and forcible transfer” because those specific acts require occupation as an element of the crime.

³² Joinder Indictment, at paragraph 29.

³³ Stakic Appeals Judgment, at paragraph 306. See also, e.g., **Prosecutor v. Radislav Krstic**, *Trial Chamber Judgment*, Case No. IT-98-33-T, at paragraph 522 (2 August 2001); and **Prosecutor v. Milorad Krnojelac**, *Trial Chamber Judgment*, Case No. IT-97-25-T, at footnote 1429, accompanying para. 474 (15 March 2002) (hereinafter referred to as the “Krnojelac Trial Judgment”).

³⁴ *Id.*, paragraph 296 (emphasis added).

³⁵ Krnojelac Trial Judgment, at paragraph 473.

international law with respect to the principles of distinction and proportionality is *critical* in determining whether the general requirements of Article 5 have been met. Otherwise, according to the Prosecution, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and *lawful combat would, in effect, become impossible*. It therefore submits that an accused may be found guilty of a crime against humanity if he launches an unlawful attack against persons taking no active part in the hostilities when the general requirements of Article 5 have been established. The Trial Chamber accepts that when considering the general requirements of Article 5, *the body of laws of war plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict* and whether the population may be said to have been targeted as such.³⁶

20. This position is consistently reflected in the Prosecution's Indictments, including those against Dorde Dukic, Milan Martic, and Dragomir Milosevic, where Hague Law violations under Article 3 of the Statute are the basis for the *actus reus* of "murder" and "inhumane acts" under Articles 5(a) and (i) respectively.³⁷ This begs the question why the Prosecution seeks a "Gotovina exception" in the present case. This abrupt *volte face* can only suggest that the Prosecution does not have adequate proof of the alleged Hague Law

³⁶ **Prosecutor v. Stanislav Galic**, *Trial Chamber Judgment*, Case No. IT-98-29-T, at paragraph 144 (5 December 2003) (emphasis added) (hereinafter referred to as the "Galic Trial Judgment"). See also **Prosecutor v. Milorad Krnojelac**, *Trial Chamber Judgment*, Case No. IT-97-25, at paragraph 54 (15 March 2002); **Prosecutor v. Dragomir Milosevic**, *Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter (E)*, Case No. IT-98-29/1-PT, at paragraph 149 (31 January 2006) where the Prosecution admits: "Civilians killed during a lawful attack may fall into the category of legitimate collateral casualties. The determination of the unlawful character of an attack is thus critical, as making the legitimate collateral casualties of a lawful attack the victims of crimes against humanity amounts to making lawful combat impossible" (emphasis added).

³⁷ **Prosecutor v. Dorde Dukic**, *Indictment*, Case No. IT-96-20-I, at paragraph 7; **Prosecutor v. Milan Martic**, *Amended Indictment*, Case No. IT-95-11, at paragraphs 49-55; **Prosecutor v. Dragomir Milosevic**, *Amended Indictment*, Case No. IT-98-29/1-PT, at paragraphs 24-25.

violations – such as spreading terror or deliberate attacks against civilians as an element of “ethnic cleansing” – and therefore seeks to transform crimes against humanity into a humanitarian law black-hole in which the laws of war can be disregarded at will.

21. If the Joinder Indictment is accepted in its present form, “lawful combat would become impossible” to quote the Prosecution’s own words.³⁸ As stated by the former Senior Legal Advisor to the Prosecutor’s Office: “[w]e do not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective as lawful can be regarded as unlawful because we changed the label [i.e. from war crimes to crimes against humanity].”³⁹ By dismissing the improperly pleaded allegations of Hague Law violations, and restricting the scope of the “deportation and forcible transfer” allegations under Article 5 to post-occupation Geneva Law

³⁸ Galic Trial Judgment, at paragraph 144.

³⁹ William J. Fenrick, “Crimes in Combat: The relationship between crimes against humanity and war crimes” (2004), as found on the Internet at: <http://www.icc-cpi.int/library/organs/otp/Fenrick.pdf>.

See also Guenaël Mettraux, “Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda”, (2002) 43 *Harv. Int’l L.J.* 237 at 246: “The concept of attack is based in both regimes on a similar assumption: that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target. However, an attack against a civilian population pursuant to the law of crimes against humanity does not necessarily imply a breach of the laws of war, especially if the crime takes place in peacetime. The converse is also true. A military operation is not necessarily an “attack against a civilian population” simply because breaches of the rules of warfare occur or because it leads to civilian casualties, even heavy ones. To the extent, however, that the military operation can be shown to be aimed at or directed against a civilian population, the pre-requisite is established for the commission of crimes against humanity. In that respect, the laws of war become a reliable legal yardstick to measure the nature of the military enterprise that led to, or was accompanied by, an attack upon the civilian population. To the extent that the crimes against humanity are committed in the course of hostilities, the laws of war will thus set the framework as to the attackability of a target and thereby help determine the circumstances under which an attack can be said to have been directed against a civilian population”; and

William J. Fenrick, “Should Crimes Against Humanity Replace War Crimes?” (1999) 37 *Colum. J. Transn’l L.* 767 at 785: “We have used crimes against humanity charges whenever it has been practicable to do so, including in connection with combat incidents. When we use crimes against humanity charges in relation to attacks, particularly in relation to killing at a distance, however, we also require proof that the casualties were caused as a result of an unlawful attack by law of the Hague criteria. Attacks which are directed against legitimate military objectives and which do not cause excessive incidental civilian casualties cannot be crimes against humanity because they do not meet the requirement that they be directed against the civilian population. Lawful, but regrettable, incidental, but not disproportionate, civilian casualties caused in the course of an attack directed against a legitimate military objective should not be converted into the victim group of a crime against humanity charge by creative recategorization.”

violations, the Pre-Trial Chamber would uphold not only the elements of these crimes under customary law, but also the viability of humanitarian law. The foundation of the laws of war is the “reasonable military commander” and not a legal utopia that criminalizes all combat.⁴⁰

22. It is respectfully submitted that by failing to explain how the requirement of “occupation” for Geneva Law crimes of “deportation” and “forcible transfer” can simply be disregarded to include Hague Law violations, the Prosecution has conceded the Defendant’s submissions on this ground.

V. **THE CRIME OF “DEPORTATION AND FORCIBLE TRANSFER” DOES NOT APPLY TO ALLEGED CROATIAN “COLONIZATION” OF ITS OWN TERRITORY**

23. The Prosecution fails to understand or properly respond to this ground. The International Court of Justice has held that Article 49(6) of Geneva Convention IV – which the Prosecution claims is “inapposite”⁴¹ – “prohibits not only deportations or forced transfers of population...but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”⁴² General Gotovina’s contention is simply that, as recognized by Rule 130 of the ICRC Study, the crime of transferring a civilian population into the occupied territory of another State – i.e. “colonization” – does not apply to an internal armed conflict.

⁴⁰ See e.g. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, at paragraph 50, as found on the Internet at: <http://www.un.org/icty/pressreal/nato061300.htm>: “It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the “reasonable military commander”. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.”

⁴¹ Prosecution Response, at paragraph 21.

⁴² See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, at paragraph 120 (9 July 2004) as found on the Internet at: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

24. The Prosecution responds that: “[t]he focus of the charges of deportation and forcible transfer is not the movement of Croats to colonize the territories, *except to the extent this movement prevented the Serbs from returning or was a motivating factor for the crimes alleged.*”⁴³ This argument is inapposite and further demonstrates the profound legal flaws underlying the Prosecution’s theory of deportation.
25. First, because there is no *actus reus* of “colonization” in internal armed conflict, such conduct cannot be the basis for criminal liability irrespective of impact or motive. Second, absent *mens rea* the mere impact of conduct – in this case Serb civilians allegedly not returning because previously “ethnically cleansed” Croats resettled in the “Krajina” – cannot be the basis for criminal liability. Third, the motivation for conduct – allegedly discouraging Serbs from returning to the “Krajina” – is not the same as *mens rea* and cannot render unlawful an otherwise lawful act – i.e. resettlement of displaced persons – because “motives are irrelevant in criminal law.”⁴⁴ Fourth, if the Prosecution has failed to prove that the Krajina Serbs were deported or forcibly transferred from territory under the authority of Croatian forces as required by humanitarian law, it cannot retroactively consummate the crime by arguing that Krajina Serbs were prevented from returning because of the lawful resettlement of civilians previously “ethnically cleansed”. Having failed to establish the “occupation” element of the *actus reus* of deportation, the Prosecution cannot alternatively invoke a non-existent *actus reus* of “colonization” to criminalize lawful conduct.
26. The Defence also takes strong exception to the suggestion that it is somehow raising the defence of *tu quoque*.⁴⁵ There is no basis whatsoever for imputing such an argument to General Gotovina.

⁴³ Prosecution Response, at paragraph 21 (emphasis added).

⁴⁴ Tadic Appeals Judgment, at paragraphs 268-269.

⁴⁵ Prosecution Response, at paragraph 20.

27. It is respectfully submitted that by failing to explain how “colonization” can be the basis for criminal liability under humanitarian law, the Prosecution has conceded the Defendant’s submissions on this ground.

VI. THERE CAN BE NO STATE OF ARMED CONFLICT AFTER DEBELLATIO

28. The Prosecution has completely failed to explain how a state of armed conflict can exist or how humanitarian law can otherwise apply post-*debellatio*. The Response does not deny that on 7 August 2005 Operation Storm “had been successfully completed”⁴⁶ but persists in the view that an armed conflict continued until 15 November 2005.⁴⁷ How can the Prosecution assert that “minimal or non-existent SVK resistance was overcome”⁴⁸ by that date and then argue that a state of armed conflict continued for at least three months afterwards without pleading further particulars? It is a settled rule of pleading that specific facts control general pleadings.⁴⁹
29. The Prosecution’s Response has simply ignored the Defendant’s discussion of Article 6 of Geneva Convention IV. Nowhere does it address *debellatio* which under the laws of war signifies “the end of an armed conflict” as noted by the ICRC Commentary.⁵⁰

⁴⁶ Joinder Indictment, at paragraph 28.

⁴⁷ Prosecution Response, at paragraphs 23-28.

⁴⁸ Joinder indictment, at paragraph 33.

⁴⁹ See e.g. *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371 at 1389-1390 where the court stated: “But this rule does not permit us to ignore long-established rules of pleading. Accordingly, we apply the rule that specific allegations control general pleadings”; *Stowe v. Fritzie Hotels, Inc.* (1955) 44 Cal.2d 416 at 422: “where there is any inconsistency between the specific allegations upon which a conclusion must be based and the conclusion, the specific allegations control”; *Clack v. State of California ex rel. Dept. Pub. Wks.* (1969) 275 Cal.App.2d 743 at 748: “where a fact is pleaded in general or conclusionary terms, followed by an inconsistent specific allegation, the latter controls”; *Whitaker v. Crowder State Bank*, 1910 OK 257, 110 P. 776: “[i]t is a well- settled rule of pleading that a specific statement of facts will always control a general statement, whether that general statement be or be not regarded as a mere conclusion of law”.

⁵⁰ See ICRC Commentary, Geneva Convention IV, note 2; cited in Gotovina Jurisdiction Motion, at paragraph 26.

30. The Prosecution's primary argument appears to be simply that: "[t]he allegation of armed conflict was contained in both the original indictment and amended indictment, which were reviewed and confirmed in light of supporting materials."⁵¹ This is tantamount to arguing that because the Pre-Trial Chamber has confirmed the Joinder Indictment, General Gotovina is precluded from challenging jurisdiction.
31. It is respectfully submitted that having failed to explain how humanitarian law continues to apply post-*debellatio*, the Prosecution has conceded the Defendant's submissions on this ground.

VII. THE CRIME OF "INHUMANE ACTS AND CRUEL TREATMENT" CANNOT INCLUDE ALLEGED CONDUCT OF HOSTILITIES VIOLATIONS

32. The Prosecution has failed to invoke authority in support of its view that Common Article 3 of the 1949 Geneva Conventions applies to conduct of hostilities.⁵² It is undisputable that "protected persons" under Geneva Law are only those who are "in the hands of" or "in the power of" a party to the conflict.⁵³ This further indicates that the Prosecution has chosen to disregard elementary principles of humanitarian law in the Joinder Indictment.
33. It is respectfully submitted that by failing to explain how Hague Law violations can be pleaded under Geneva Law, the Prosecution has conceded the Defendant's submissions on this ground.

⁵¹ Prosecution Response, at paragraph 27.

⁵² See Prosecution Response, at paragraphs 29-32.

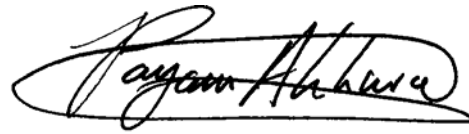
⁵³ See discussion of protected persons in Gotovina Jurisdiction Motion, footnote 28, accompanying paragraph 15.

34. 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: 2,993

Dated: 8 February 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Payam Akhavan", written over a horizontal line. To the right of the signature is a vertical red line.

Dr. Payam Akhavan
Defence Counsel for Ante Gotovina