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International
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CASE/AFFAIRE NO. IT-06-90-PT DATE 1 February 2007

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

Case No. IT-06-90-PT

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Date filed: 1 February 2007

THE PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**PROSECUTION'S RESPONSE TO GOTOVINA'S SECOND MOTION
CHALLENGING JURISDICTION**

The Office of the Prosecutor

Alan Tieger

Counsel for the Accused

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

Case No. IT-06-90-PT

1. The second Defence Motion challenging jurisdiction should be dismissed in its entirety.¹ The six objections raise issues that either have already been settled by the Appeals Chamber or are matters of fact to be determined at trial. In addition, many objections erroneously conflate crimes against humanity with war crimes. Finally, contrary to the repeated allegations of the Defence, none of the crimes charged violates the principle of *nullem crimen sine lege*.

I. The extended form of JCE is correctly pleaded

2. The third category of JCE is correctly pleaded in the Joinder Indictment. The reference to “possible consequences” mirrors the elements of the third category of JCE articulated by the Appeals Chamber. Accordingly, the Defence challenge to the Tribunal’s jurisdiction based on incorrect pleading of JCE should be dismissed.

3. The Joinder Indictment pleads the third category of JCE in paragraphs 12 and 43. The formulation used in these paragraphs is consistent with the Appeals Chamber’s jurisprudence. In *Stakić*, for example, the Appeals Chamber summarised the required elements of the third category of joint criminal enterprise as follows:

As noted above, for the application of third category joint criminal enterprise liability, it is necessary that: (a) crimes outside the Common Purpose have occurred; (b) these crimes were a natural and foreseeable consequence of effecting the Common Purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a *possible consequence* of the

¹ Defendant Ante Gotovina’s Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i), 18-01-2007.

execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.²

4. As the Appeals Chamber has explained in *Blaskić*, the mental element of foreseeability is appropriate in third category JCE because the accused already shares the common criminal purpose of the group.³

5. Moreover, the Joinder Indictment does not charge Gotovina with responsibility for *all* possible consequences, but only those which are a foreseeable consequence of the joint criminal enterprise. Both references to “possible consequences” are preceded by references to the foreseeability of the consequences, consistent with the case law of the Appeals Chamber.

6. The Defence argument on this issue has already been directly addressed—and rejected—by the Appeals Chamber and should be dismissed. Accordingly, the allegations in the Joinder Indictment do not violate the *nullem crimen sine lege* principle.

II. Crimes against humanity can be committed in international or non-international armed conflict

7. The ICTY has jurisdiction over crimes against humanity committed in an armed conflict, whether it is international or non-international. The Defence argument that crimes against humanity of deportation and forcible transfer can only be charged in international armed conflicts is therefore irrelevant and should be dismissed.

8. The Defence argument is flawed because it purports to apply war crimes law to crimes against humanity. Counts 1 to 3 of the Joinder Indictment, challenged in Gotovina’s second argument, charge crimes against humanity of persecution (Count 1), deportation (Count 2), and inhumane acts of forcible transfer (Count 3). Gotovina is not charged with violations of the laws or customs of war in these counts. Rule 129

² *Stakić Appeal Judgement*, 87(emphasis added).

³ *Blaskić Appeal Judgement*, 33(emphasis added).

of the ICRC Study on Customary International Humanitarian Law does not purport to interpret crimes against humanity and is therefore inapplicable.⁴

9. As the *Kupreškić* Appeals Chamber explained, crimes against humanity within the jurisdiction of the Tribunal may be committed in either international or non-international armed conflict:

By requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council, in establishing the International Tribunal, may have defined the crime in Article 5 more narrowly than is necessary under customary international law. It is nevertheless sufficient for the purposes of Article 5 that the act occurred in the course or duration of *any* armed conflict. *The type and nature of such conflict – whether international or internal – is therefore immaterial.*⁵

10. The particular type of armed conflict may be relevant to the definitions of war crimes involving the displacement of the civilian population, but is irrelevant to the crimes of deportation or forcible transfer as crimes against humanity. These charges are consistent with the jurisprudence of the Tribunal and do not violate the principle of *nullem crimen sine lege*. The Defence argument fails to raise any issue of jurisdiction relevant to crimes against humanity and should be dismissed accordingly.

III. Counts 1–3 of the Indictment charge crimes against humanity not conduct of hostilities violations

11. Counts 1 to 3 of the Joinder Indictment charge crimes against humanity, not war crimes.⁶ All of the arguments raised in the corresponding sections of the Defence motion are directed at particular requirements of the laws and customs of war which do not apply to crimes against humanity.

12. The Defence suggests that certain factual allegations in the Joinder Indictment “relate solely to the ruses of war or conduct of hostilities” and that therefore they are not relevant to the crime of deportation. According to the Defence, the inclusion of these allegations in the statement of facts illegitimately expands the customary law

⁴ See, e.g., Motion, §8.

⁵ *Kupreškić Appeal Judgement*, §545(emphasis added).

⁶ Counts 1 to 3 of the Joinder Indictment charge only crimes against humanity and not violations of either Hague law or Geneva law, *cf* Motion, §16.

definition of deportation and forcible transfer as a crime against humanity to cover “alleged conduct of hostilities violations against persons not under the control of Croatian forces”.

13. This argument is flawed for three reasons. First, the rules relied on by the Defence to demonstrate their theory are all drawn from the laws and customs of war and are not applicable to crimes against humanity. The Appeals Chamber has accepted that reference to war crimes sources may be instructive to the interpretation of certain elements the crime of deportation. However, the relationship between the two bodies of law is limited by the fact 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.”⁷ Reliance on war crimes rules to interpret aspects unique to the 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.

14. Second, 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. A crime against humanity may be committed using various modalities of the armed conflict. For example, the Joinder Indictment charges that shelling civilians was one of the methods used in the commission of the crimes charged in the Joinder Indictment. Whether or not the actions described in the statement of facts in the Joinder Indictment could also have been charged as other crimes is irrelevant to the Tribunal’s jurisdiction over the crimes that have been charged.

15. Third, the Defence argument that crimes against humanity cannot include violations committed prior to the restoration of Croatian Authority over the Krajina is unpersuasive. Crimes against humanity can be committed against “any” civilian population, including civilian populations within a state’s own borders.⁸ They do not require military occupation of territory and do not depend on whether the victims are

⁷ *Stakić Appeal Judgement*, §289.

⁸ ICTY Statute, Art.5; *Vasiljević Trial Judgement*, §33 (“The protection of Article 5 extends to “any” civilian population including, if a state takes part in the attack, that state’s own population. It is therefore unnecessary to demonstrate that the victims were linked to any particular side of the conflict.”(citations omitted)).

in territories under the authority of a party to the conflict. The Defence's entire discussion of occupation is irrelevant to the crimes against humanity charged in the Joinder Indictment.⁹ The Defence's argument that "there is no legal basis to apply deportation to situations other than occupied territory" is simply wrong in the context of crimes against humanity.¹⁰ The Defence has failed to show that the charges of persecution, deportation, and forcible transfer as crimes against humanity violate the principle of *nullem crimen sine lege* or are jurisdictionally unsound.

16. The Defence's request for alternative relief—in the form of a declaration that the conduct of Operation Storm cannot form the basis of criminal liability—should also be denied. The Joinder Indictment does allege crimes relating to the manner in which military operations were conducted.¹¹ It will be up to the Trial Chamber, after hearing all the relevant evidence, to determine whether particular conduct alleged in the Joinder Indictment meets the legal standards of the crimes charged. This is not a matter of jurisdiction.

IV. Forcible transfer within a state is a crime against humanity

17. The Defence asserts that the allegation in paragraph 36 concerning the colonization of Serb Krajina with Croats improperly expands the crime of deportation and forcible transfer, particularly because these persons were previously "ethnically cleansed" from the area. This argument is misplaced for a number of reasons.

18. First, to the extent it suggests an allegation by the Prosecution that the Croats in question were deported or forcibly transferred, it misapprehends the charges in the Joinder Indictment, which addresses crimes against the Krajina Serb population.

19. Second, the Defence argument takes one portion of the statement of facts out of context and conflates it with the charges. Neither the motive for deportation of Krajina Serbs nor the modalities by which it was implemented are relevant to

⁹ Motion, §§13–15.

¹⁰ Motion, §13. *See e.g., Stakic Appeal Judgement.*

¹¹ *See, e.g.* Joinder Indictment, §52 (Count 5 Wanton Destruction), §51 (Count 4 Plunder), §53 (Counts 6&7 murder), §29 (shelling as part of the campaign to deport or forcibly transfer civilians and persecution), §35 (shelling of civilian areas and aerial attacks on fleeing civilians as means of inflicting inhumane acts and persecutions).

jurisdiction.¹² The Defence explanation that Croatia was merely resettling its own civilian population into an area from which they had been ethnically cleansed is not a challenge to jurisdiction.

20. Third, to the extent that the Defence argument suggests that actions directed toward the Krajina Serbs were justified by previous crimes against Croats, the argument is untenable. As the Appeals Chamber has explained, the defence of *tu quoque* has no application to crimes within the Tribunal's jurisdiction:

[...]when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.¹³

21. The Defence assertion that "there is no restriction on the movement of that State's nationals within its own territory" is incorrect. Forcible transfer as an inhumane act, which constitutes a crime against humanity, is defined by the Appeals Chamber as "forcible displacement of persons which may take place within national boundaries."¹⁴ This crime against humanity places an obvious restriction on the movement of a state's nationals within its own territory. The Defence citation to Article 49(6) of the Geneva Convention is inapposite. The 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. The focus of the Prosecution's case is rather the deportation and forcible transfer of Krajina Serbs.

22. Counts 1 to 3 of the Joinder Indictment follow the established jurisprudence of the Appeals Chamber and there is no basis for the Defence assertion that these charges violate the principle of *nullem crimen sine lege* or are otherwise jurisdictionally flawed.

¹² *Kunarac Appeal Judgement*, §103("the motives of the accused for taking part in the attack are irrelevant.").

¹³ *Kunarac Appeal Judgement*, §87(citations omitted).

¹⁴ *Stakić Appeal Judgement*, §317.

V. A state of armed conflict existed at all times relevant to the indictment

23. The Prosecution has already responded to Gotovina's denial of the existence of the armed conflict.¹⁵ The Defence now raises a supplemental argument that the Tribunal lacks subject matter jurisdiction because crimes committed after the "completion" of Operation Storm are not violations of international law. This is inaccurate in both law and fact.

24. International humanitarian law does not cease to operate immediately upon the conclusion of a part of a particular offensive. A state of armed conflict continues until a "general conclusion of peace" or a "peaceful settlement" is reached. The Appeals Chamber has explained that International Humanitarian Law extends *beyond* the cessation of hostilities:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place there*.¹⁶

25. The Joinder Indictment pleads that "At all relevant times, a state of armed conflict existed in the Krajina region of the Republic of Croatia in or on the territory of the former Yugoslavia." The Defence argues that the armed conflict ended at the completion of Operation Storm and that the allegation that there was only minimal resistance is inconsistent with the existence of an armed conflict. These arguments do not raise questions of jurisdiction. They are matters of evidence for trial.

26. The Defence attempt to limit the Joinder Indictment to certain portions of Operation Storm is unconvincing. The Joinder Indictment consistently pleads events from July 1995 leading up to Operation Storm, the major aspect of the Operation itself, and the related or follow-up operations lasting until 15 November 1995. In particular, paragraphs 12, 14, 15, 19, 28–30, and 31–37 make clear that the charges extend from July 1995 until 15 November 1995.

¹⁵ Prosecution's Response to the Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment, 12-05-2006, §§15–18.

¹⁶ *Tadić (Appeal on Jurisdiction)*, §70 (emphasis added).

27. The allegation of armed conflict was contained in both the original indictment and amended indictment, which were reviewed and confirmed in light of supporting materials.¹⁷ The time frame of the charges was broadened in the Joinder Indictment to include “earlier aspects and phases of the campaign charged” dating back to “at least July 1995.” This modification was confirmed by the Pre-Trial Chamber, which reviewed additional supporting materials.¹⁸

28. The Defence argues that the armed conflict ended on 7 August 1995 to suggest that any allegations of violations of international humanitarian law after that date violate the principle of *nullem crimen sine lege*. This argument is flawed because it rests on an inaccurate assumption. The Prosecution has alleged an armed conflict which includes Operation Storm, but which began before the limited period on which the Defence focuses and continued beyond the conclusion of the period described by the Defence. At this stage, the armed conflict is properly pleaded and the Prosecution has adduced a prima facie case proving the existence of the armed conflict during the relevant times. If the Defence wishes to dispute the Joinder Indictment’s allegation that an armed conflict existed at the relevant times, then the appropriate forum is the trial.

VI. The Tribunal has jurisdiction over Counts 8 and 9

29. Count 9 charges violations of Common Article 3 of the Geneva Conventions pursuant to ICTY Statute Article 3. The Defence contention that the underlying conduct involves the conduct of hostilities and that therefore the Tribunal does not have jurisdiction is untenable.

30. Common Article 3 is the “minimum yardstick” applicable in both international and non-international armed conflict.¹⁹ It protects “persons taking no active part in the hostilities,” and is not limited to persons in the power of a party to conflict. The

¹⁷ Indictment, 31-05-2001; Order on review of the indictment pursuant to article 19 of the Statute, 8-06-2001; Amended indictment, 19-02-2004; Decision on Leave to amend indictment and on confirmation of amended incitement and order for non-disclosure, 24-02-2004.

¹⁸ Decision on Prosecution’s consolidated motion to amend the indictment and for joinder, 14-07-2006, §§41–42.

¹⁹ *Nicaragua v. United States*, ICJ Reports 1986, §218.

Defence appears to argue the contrary—that the existence of armed conflict means that only the laws regulating the conduct of hostilities can apply. This position is unsustainable. The fact that hostilities are ongoing cannot protect an accused from criminal responsibility for violations of Common Article 3.

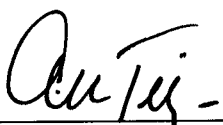
31. Count 8 of the Joinder Indictment charges crimes against humanity of inhumane acts pursuant to Article 5(i) of the ICTY Statute. As stated above, at paragraphs 11 to 17, the Defence argument that crimes against humanity cannot include alleged conduct of hostilities violations committed prior to the restoration of Croatian Authority over the Krajina is irrelevant to jurisdiction. The Defence attempt to resurrect this issue in relation to Count 8 should also be dismissed.

32. Charging violations of Common Article 3 and crimes against humanity which took place during an armed conflict does not violate the principle of *nullem crimen sine lege*. These charges fall within the jurisdiction of the Tribunal.

VII. Conclusion

33. None of the objections raised by the Defence challenge the jurisdiction of the Tribunal. The Defence motion should be dismissed in its entirety.

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Senior Trial Attorney

Dated this 1st day of February 2007
In The Hague
The Netherlands