THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-06-90-A

BEFORE THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Patrick Robinson
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Date Filed: **17 May 2012**

THE PROSECUTOR

v.

ANTE GOTOVINA AND MLADEN MARKAC

ANTE GOTOVINA'S SUPPLEMENTAL BRIEF PURSUANT TO THE ORAL ORDER OF THE APPEALS CHAMBER OF 14 MAY 2012

[*PUBLIC*]

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I. Introduction

1. Parties were twice put on notice that they were not permitted to raise new arguments during the appeal hearing.[1] Pursuant to the oral order of the Appeals Chamber on 14 May 2012, Appellant Ante Gotovina ("Appellant") submits this Supplemental Brief regarding the inadmissibility of four new arguments advanced by the Prosecution for the first time at the Appeal Hearing, as follows:

    i. Lawful artillery attacks constituted the *actus reus* of deportation;

    ii. Use of artillery in the four towns during Operation Storm constituted a disproportionate attack;

    iii. The use of MRLs and T-130 artillery was "inherently indiscriminate" in an urban environment; [2] and

    iv. The Trial Chamber was able to infer a JCE to deport Serb civilians from the Brioni transcript itself.[3]

[1] Decision on Ante Gotovina's Motion *in Limine*, 9 May 2012, page 1; *Addendum* to the Scheduling Order for Appeal Hearing, 24 April 2012, p 1.
[2] This argument was advanced at trial, rejected by the Trial Chamber, and the Prosecutor did not appeal that adverse ruling. See further discussion Section III, paragraphs 19-21 *infra*.

2. As set forth below, the consideration of these new arguments would constitute a flagrant violation of the Appellant's fundamental right of detailed and timely notice of charges and the Appeals Chamber's repeated orders concerning the permitted scope of arguments at the appeal hearing. These new arguments should therefore be disregarded.

II. The Prosecution Did Not Give Notice That Its Case Alleged That Lawful Shelling, or Shelling of Military Targets, Could Constitute Deportation

3. The Prosecution responded to the Appeals Chamber's Fourth Question by advancing the new and extraordinary argument that even if the artillery attacks were lawful and targeted only military objectives, they would still constitute the *actus reus* of deportation because of the alleged presence of the requisite *mens rea*.[4]

A. At Trial The Prosecution Never Claimed that Lawful Shelling of Military Targets Caused the Alleged Deportation

4. The Prosecution's shelling theory at trial was as follows:

   i. "In accordance with Gotovina's order, Knin, Benkovac, Obrovac, Gracac, and many other towns, villages and hamlets, […] were struck repeatedly with artillery over two days despite having <u>few or, as in almost all cases, no identifiable military targets</u>";[5]

   ii. The JCE involved the unlawful attacks directed against "<u>civilian areas</u>"; the entire section of the Prosecution's Pre-Trial Brief describing the relationship of unlawful attacks to the JCE is titled, "Shelling of Civilian Areas"[6] and makes no reference to shelling of "military objectives" as a modality of deportation;

   iii. <u>Residential areas</u> of these towns, villages and hamlets were allegedly struck as part of an indiscriminate attack intended to achieve "complete demoralisation"[7]; and

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[3] T.170:17-23.
[4] T.82-83; 95-98.
[5] OTP Pre-Trial Brief, 23 March 2007, paragraph 31. Emphasis added.
[6] OTP Pre-Trial Brief, page 9; see also paragraphs 31, 32, 36, 52, 110, and 114, all of which refer exclusively to shelling of "civilian areas" (not military targets) as the underlying criminal act.
[7] OTP Pre-Trial Brief, paragraph 31.

iv. The means of attack included multiple rocket launchers (MRLs or MBRLs), "an indiscriminate artillery weapon designed for open field battle and inappropriate for use in populated civilian areas."[8]

5. The allegations in the Amended Joinder Indictment are limited strictly to the shelling of civilians and "civilian areas."[9] There is no allegation (and thus no notice) of shelling of legitimate military objectives as a factor relevant to the deportation charge.

6. The Prosecution's Pre-Trial Brief explicitly alleged that the "the population of Knin was expected to flee as a result of the shelling of civilian areas."[10]

7. In particular, the Prosecution alleged that Gotovina "discussed with Tudjman, his commander-in-chief, the nature and purpose of the shelling of civilian areas and ordered its execution."[11] Appellant was thus given notice that the Prosecution case against him was that he deliberately attacked "civilian areas." He had no notice that the Prosecution would now allege that any use of artillery (whether lawful or unlawful) would qualify as deportation merely because civilian flight was foreseeable.

8. Elsewhere, "[t]he Prosecution alleges that the accused unlawfully attacked civilians, civilian areas, and civilian convoys in order to drive the civilians from the RSK."[12] There was never any reference to a JCE to deport by attacking military objectives.

B. The Trial Chamber Also Concluded that the Prosecution's Allegations Were Limited to the Shelling of "Civilian Areas"

9. The Trial Judgment also concluded that the Prosecution case was unlawful attacks against "civilian areas."[13] It categorically excluded lawful attacks as a modality

[8] *Id.*
[9] Amended Joinder Indictment, 12 March 2008, at paragraphs 28, 34, and 48.
[10] OTP Pre-Trial Brief, paragraph 36.
[11] OTP Pre-Trial Brief, paragraph 52. Emphasis added.
[12] Trial Transcript, T.150:15-19. Emphasis added. See also, Trial Transcript, T.167:12-16; *Prosecution Response to Allegations of Concession Pursuant to Trial Chamber's Order of 23 February 2007*, 26 February 2007, at paragraph 14.
[13] TJ, paragraph 1510.

of deportation at paragraph 1755 which acquitted Appellant of deportation from numerous villages because, "the evidence allowed for the reasonable interpretation that the forces who fired artillery projectiles which impacted on or nearby these places were deliberately targeting military targets." It clearly held that "[u]nder these circumstances, the Trial Chamber cannot conclusively establish that those who left such towns or villages were forcibly displaced, nor that those firing artillery at such towns had the intent to forcibly displace those persons."

10. Accordingly, the Appellant's understanding that the Prosecution never argued that lawful attacks could constitute deportation is consistent with that of the Trial Chamber.

C. The Prosecution's Failure to Plead a Material Fact Requires that it be Precluded from Arguing "Lawful Targeting as Deportation"

11. The indictment is the "primary accusatory instrument,"[14] in which the Prosecution must plead *"the essential aspect of [its] case".*[15] Whilst the Prosecution may elaborate particulars of the material facts, "the practice of failing to allege known material facts in an indictment is unacceptable".[16]

12. International tribunals have often relied upon other pleadings to determine the nature of the Prosecution case including: (i) the Prosecution pre-trial brief;[17] (ii) the Prosecution opening statement;[18] and (iii) summaries of witness statements attached to the Prosecution pre-trial brief or otherwise provided at the pre-trial stage.[19]

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[14] See, generally, *Kupreskic* AJ, 114. See also *Halilovic*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, par 13, *in fine*.
[15] Kupreskic AJ, 114.
[16] See *Prosecutor v Bagosora et al*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 , footnote 45, referring to *Ntakirutimana* AJ, 125.
[17] See, e.g., *Kupreskic* AJ, 116-117; *Krnojelac* AJ, 138; *Martic* TJ, 17; *Simic* AJ, 24; *Naletilic* AJ, 27, 45; *Kordic* AJ, 140; *Ntagerura* AJ, 35, 40, 130, 140, 153-154, 156-157; *Nahimana* AJ, 325, 367; *Bagosora* TJ, 116; *Muhimana* AJ, 82; *Gacumbitsi* AJ, 57, 58; *Ntakirutimana* AJ, 48.
[18] See, e.g., *Kupreskic* AJ, 117-118; *Blaskic* AJ, 242; *Martic* TJ, 17; *Simic* AJ, 24; *Kordic* AJ, 169; *Naletilic* AJ 27; *Ntagerura* AJ, 35, 41-42, 130, 156; *Nahimana* AJ, 325, 367.
[19] See, e.g., *Martic* TJ, 17; *Naletilic* AJ, 27; *Ntagerura* AJ, 74, 81-82, 96, 101-102, 154, 156.

13. Although post-indictment notification may be relevant to notice of charges,[20] it must have been given clearly *and* in timely fashion.[21] All such notice must have been given *prior to* the commencement of trial proceedings.[22] Thus, for instance, new allegations introduced in the Prosecution final trial brief – let alone in appellate hearings – are legally incapable of serving as "notice" of the Prosecution case.[23]

14. Accordingly, at trial the Prosecution alleged only alleged unlawful attacks against civilians and "civilian areas" and provided no notice that it was alleging that lawful attacks against military objectives constituted the *actus reus* of deportation

15. There is no doubt that this argument was never raised at trial, and that it was mentioned for the first time at the Appeal Hearing. The Appeals Chamber should refuse to consider this new argument as this would violate the fundamental right of the accused to detailed and timely notice of the charges (Article 21(4)(a) of the Statute) and would constitute a grave injustice.[24]

III. The Prosecution Never Alleged Disproportionate Attack At Trial

16. At the Appeal Hearing, the Prosecution for the first time argued that the overall artillery attack was disproportionate.[25] The Prosecution provided no notice prior

[20] See e.g. *Prosecutor v Bagosora et al*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, pars 34-35. The *Kordic* Appeals Chamber referred to those generically as "post-Indictment communications" (paragraph 139)
[21] See e.g. *Gacumbitsi* AJ 175 and 177-178.
[22] See, e.g., *Ntagerura* AJ, 22 and 38; see also, ibid, par 86 referring to certain "pre-trial disclosures"; and *Prosecutor v Karemera et al*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, par 27-28, in particular, par 27, emphasis added ("Particularized notice *in advance of trial* of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case."); *Niyitegeka* AJ, 194, referring to the time "until the Prosecution files its pre-trial brief or until the trial itself" and par 219. See also, *inter alia*, *Kupreskic AJ,* 117; *Ntakirutimana* AJ 36; *Kordic AJ,* 169. In *Ntagerura*, the Prosecution sought to rely upon its Final Trial Brief in support of its argument that notice of particular charges had been given to the accused (see Ntagerura AC, par 41). The Appeals Chamber declined to rely upon that document, reiterating that if a material fact is not disclosed to the Defence "until the trial itself", the defence could not be expected to conduct an adequate investigation as is necessary for the purpose of preparation (ibid, par 44; see also, ibid, footnote 123 referring to *Niyitegeka* AJ, 194 and *Kvocka* AJ, 44-45).
[23] See, e.g., *Gacumbitsi* AJ 178; *Bagosora* TJ 122.
[24] *Kupreskic* AJ, 88 *et seq.*
[25] T.88:24-25; T.90:16-91:19. Although in Closing Argument the Prosecution made a conclusory statement that it had also proven "disproportionate attack," it provided no elaboration and instead invited the Trial

to trial that it alleged Appellant committed a disproportionate attack. Moreover, there is no such allegation in the Indictment, Prosecution Pre-Trial Brief,[26] or the Prosecution Opening Statement.[27] There is no question that the Accused was never given notice of such an allegation as forming a valid part of the charges. A full explanation of the failure to allege disproportionate attack has already been submitted to the Appeals Chamber.[28]

17. A "fundamental part of the Prosecution's case" included the theory of how and why the attack was unlawful.[29] To be valid, notice of an allegation of disproportionate attacks must be given unambiguously.[30] In the *Galic*,[31] *Dragomir Milosevic*[32] and *Strugar*[33] cases, where disproportionate attacks formed part of the Prosecution case, the Prosecution's Pre-Trial Brief explicitly referred to disproportionate attacks as unlawful attacks against civilians. In contrast, the Prosecution Pre-Trial Brief in this case does not contain any reference to disproportionate attack(s) forming part of the alleged unlawful attack.[34]

18. Finally, the Trial Judgment expressly declined to consider the proportionality of the overall attack, limiting itself to a single incident involving Martić.[35] In its Respondent's Brief, the Prosecution offered no arguments in support of an allegation of disproportionate attack. It should not be allowed to raise this new argument for the first time during the Appeal Hearing and to thereby deny fair notice to the Appellant.

Chamber not to consider the issue. Moreover, statements in closing argument do not constitute notice to the Accused. *Supra,* fn. 23.
[26] OTP Pre-Trial Brief, 23 March 2007.
[27] See Transcript of Proceedings of 11 March 2008, T.414 through T.511.
[28] *Ante Gotovina's Motion in Limine*, 4 May 2012.
[29] *Kordic* AJ, 144.
[30] See, generally, *Ntagerura* AJ, 22, 32; *Rutaganda* AJ, 303; *Rukundo* AJ, 29. *Karera* AJ, 293.
[31] See Prosecution Pre-Trial Brief, pars 12; Trial Judgment, pars 58-61; Appeal Judgment, pars 131-134, 187-189.
[32] See Prosecution Pre-Trial Brief, pars 11, 127-133, 140; Trial Judgment, pars 6, 877, 939, 949; Appeal Judgment, par 54.
[33] See Prosecution Pre-Trial Brief, pars 148-152; Trial Judgment, pars 278, 293-295 and footnote 902; Appeal Judgment, pars 179, 187.
[34] The word "disproportionate" or "disproportionately" does not figure in the part of the pre-trial brief related to the artillery shelling and alleged unlawful attack. The word "disproportionately" figures only once, irrelevantly, in paragraph 37 OTP PTB ("The few remaining Serbs, disproportionately comprised of the elderly or infirm….").
[35] TJ, fn. 932, 935.

IV. The Trial Chamber Rejected the Prosecution's Claim that the HV Weapons Systems Were "Inherently Indiscriminate"

19. At trial the Prosecution argued that the HV's use of MRLs was "indiscriminate" and "inappropriate for use in populated civilian areas."[36] The Trial Judgment specifically rejected this argument.[37] The Prosecution did not appeal on that point, and Respondent's Brief does not challenge this finding. The finding is therefore *res judicata* for the purpose of these proceedings and should not form part of the appeal.

20. At the Appeal Hearing, the Prosecution sought to reintroduce this argument without notice and in violation of the Appeals Chamber's requirement that the parties not raise new arguments.[38] Moreover, the Prosecution has no basis to challenge this finding, because the Trial Chamber had evidence from Leslie, Konings and Rajćić placing the margin of error at around 400m.[39] Despite this, the Trial Chamber ultimately made no finding on margin of error, but concluded that the weapons were **not** inherently indiscriminate.

21. The Prosecution should not be allowed to re-litigate this issue after failing to appeal the Trial Judgment and should form no part of this appeal.

V. The Prosecution Should Not Be Allowed to Contradict Its Respondent's Brief Regarding Brioni

22. At the Appeal Hearing the Prosecution argued in complete disregard of the Trial Judgment that the Trial Chamber found the Brioni transcript "in itself" to be "a conversation about forcing civilians out, rather than protecting civilians."[40] This is opposite to the Prosecution's position in its Respondent's Brief, in which it emphasizes that in considering the "totality of the evidence", the Trial Chamber

[36] OTP Pre-Trial Brief, paragraph 31.
[37] TJ, paragraph 1897.
[38] T.83:21-84:2; T.88:21-88:24; T.89-90.
[39] TJ, paragraph 1898. Leslie placed the margin of error at 400m. Konings placed it at 295m (55m internal error plus 240m of external error (60m per four external factors)) for a 155mm projectile at 14.5 km, which would have been closer to 400m at the actual distance of 26km. Rajcic estimated 75m of internal error, which combined with Konings' 240m of external error (at 14.5km distance) put Rajcic's margin of error at *at least* 315m.
[40] T.170:17-23.

did not find any "single statement" or "formal agreement" at Brioni to expel civilians but rather inferred this from "subsequent events."[41]

23. Pursuant to the Appeals Chamber's Scheduling Order,[42] the Prosecution should not be allowed to raise new arguments during the Appeal Hearing. Accordingly, this new interpretation of the Trial Chamber's conclusions about the Brioni transcript should also be rejected.

VI. Conclusion

24. For all of the reasons set forth above, the Appeals Chamber should uphold the Appellant's fundamental right to fair notice of the charges pursuant to Article 21(4)(a) of the Statute and summarily reject all four new arguments raised by the Prosecution for the first time during the Appeal Hearing.

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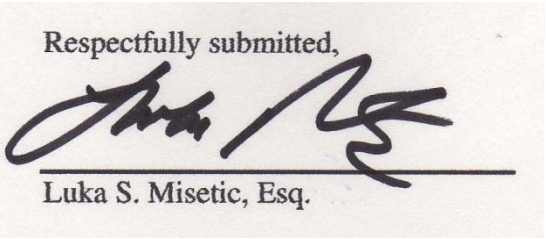
Respectfully submitted,



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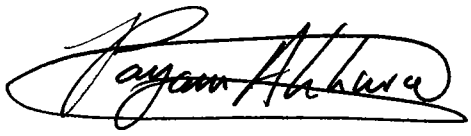

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[41] Prosecution Respondent's Brief, 234,239,268,271. See also *Gotovina* Reply Brief, 1,26,74,101.
[42] See footnote 1 above.