UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-06-90-PT

Date: 19 March 2007

Original: English

IN TRIAL CHAMBER I

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

Registrar: **Mr. Hans Holthuis**

Decision of: **19 March 2007**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

DECISION ON SEVERAL MOTIONS CHALLENGING JURISDICTION

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Laurie Sartorio

Counsel for the Accused:

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

TRIAL CHAMBER I ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of "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*)" filed on 28 April 2006, ("First Gotovina Preliminary Motion"). The Trial Chamber is further seised of "Accused Mladen Markač's and Ivan Čermak's Joint Preliminary Motion Re Jurisdiction" ("Joint Preliminary Motion"), and "Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence" ("Second Gotovina Preliminary Motion"), both filed on 18 January 2007.

A. Procedural History

1. On 28 April 2006, Defence Counsel for Ante Gotovina filed its First Gotovina Preliminary Motion, and on 12 May 2006, the Prosecution filed "Prosecution's Response to Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment" ("Prosecution Response to First Preliminary Motion").

2. On 19 May 2006, the Gotovina Defence filed "Defendant Ante Gotovina's Reply Brief in Support of his Preliminary Motion to Dismiss the Proposed Joinder Indictment Pursuant to Rule 72" ("Reply to Prosecution Response to First Gotovina Preliminary Motion"), together with "Defendant Ante Gotovina's Motion for Leave to File Reply to Prosecution's Response to Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment, and for Leave to Exceed the Page Limitation". On 23 May 2006, the Prosecution filed "Prosecution's Response to Ante Gotovina's Motion for Leave to File Reply to Prosecution's Response to his Motion to Dismiss, and to Exceed Page Limitation" and on 26 May 2006, the Defence filed "Defendant Ante Gotovina's Reply in Support of his Motion Filed on 19 May 2006" as well as a motion for leave to file that reply.[1] The Trial Chamber notes that the Reply to Prosecution Response to First Gotovina Preliminary Motion exceeds the permitted word limit by more than 1500 words and in that regard recalls that the provisions of the Practice Direction on the Length of Briefs and Motions requires that a party must seek authorisation in advance to exceed the word-limit.[2] However, in the interests of fairness to the Accused, the Trial Chamber will exceptionally allow the filing of the Reply to Prosecution Response to First Gotovina Preliminary Motion.

[1] Defendant Ante Gotovina's Motion for Leave to File Reply in Support of his Motion of 19 May 2006, filed on 26 May 2006.
[2] Practice Direction on the Length of Briefs and Motions, IT-184/Rev.2, 16 September 2005, points 5 and 7.

3. On 14 July 2006, the Trial Chamber granted, in part, the Prosecution's motion to amend the Indictment against Ante Gotovina and the Indictment against Ivan Čermak and Mladen Markač pursuant to Rule 50(A) of the Rules of Procedure and Evidence ("Rules") and granted the Prosecution's request to join the Gotovina case with that of Čermak and Markač pursuant to Rule 48 of the Rules ("Decision on Joinder"). The Joinder Indictment was filed by the Prosecution on 24 July 2006, and on 25 October 2006 the Appeals Chamber in its "Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder" ("Appeals Chamber Decision on Joinder") dismissed the Accused's appeals against the Decision on Joinder.

4. On 5 December 2006, the Accused appeared before the Trial Chamber in order to enter a plea on the new charges in the Joinder Indictment in accordance with Rule 50(B) of the Rules. At the hearing, in accordance with Rule 50(C), the Trial Chamber ordered the Accused to file any preliminary motions pursuant to Rule 72.[3]

5. On 18 January 2007, Defence Counsel for Ivan Čermak and Mladen Markač filed their Joint Preliminary Motion, and Defence Counsel for Ante Gotovina filed its Second Gotovina Preliminary Motion.

6. On 1 February 2007, the Prosecution filed "Prosecution's Response to Čermak and Markač's Joint Preliminary Motion" ("Response to Joint Preliminary Motion") and "Prosecution's Response to Gotovina's Second Motion Challenging Jurisdiction" ("Response to Gotovina Second Preliminary Motion").

7. On 8 February 2007, Defence Counsel for Ante Gotovina filed "Defendant Ante Gotovina's Motion for Leave to File a Reply to Prosecution's Responses to Preliminary Motions Challenging Jurisdiction and the Form of the Joinder Indictment" ("Motion for Leave to Reply") and "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" ("Gotovina Reply"). On 9 February 2007, Defence Counsel for Ante Gotovina filed a Supplementary Motion ("Gotovina Supplementary Motion") which requested the Trial Chamber to grant an extension of the word-limit, and to add a supplemental Seventh Ground to the Second Gotovina Preliminary Motion.[4]

8. On 12 February 2007, Defence Counsel for Ante Gotovina filed "Defendant Ante Gotovina's Motion Requesting Oral Argument on the Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72 (A)(i) of the Rules of Procedure and Evidence" ("Gotovina Motion Requesting

[3] Status Conference, 5 December 2006, T. 23-26.
[4] Defendant Ante Gotovina's Supplementary Motion on the Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 8 February 2007.

Oral Argument"), whereby the Defence for Ante Gotovina requested oral arguments on the above-mentioned submissions. On 13 February 2007, Defence Counsel for Mladen Markač filed a Joinder to Gotovina's Motion Requesting Oral Argument ("Markač Joinder Oral Request").[5]

9. On 14 February 2007, the Prosecution filed "Prosecution Consolidated Response to Gotovina's Motion Seeking Leave to Reply, to Exceed Word Count, to File Additional Submissions, and for Oral Argument" ("Prosecution Consolidated Response"), in which the Prosecution, *inter alia,* argued that it would request a response to the contentions in the Gotovina Reply that the Prosecution had conceded several challenges to jurisdiction.

10. On 23 February 2007, the Trial Chamber issued its "Order on Several Defence Motions, Incorporating Scheduling Order for Oral Arguments", in which the Trial Chamber:

i. Granted the Motion for Leave to Reply;

ii. Granted the Prosecution the opportunity to reply to the Defence contentions of concession;

iii. Granted the Defence request for an extension of the word-limit;

iv. Denied the Defence request to supplement an additional Seventh Ground; and

v. Ordered Oral Arguments for Wednesday 28 February 2007.

11. On 26 February 2007, the Prosecution filed "Prosecution Response to Allegations of Concession Pursuant to Trial Chamber Order of 23 February 2007" ("Prosecution Response to Allegations of Concession").

12. On 28 February 2007, the Trial Chamber heard the oral arguments of the Prosecution and of Defence Counsel for Ante Gotovina and Defence Counsel for Mladen Markač ("Hearing").[6]

13. The Trial Chamber notes that Rule 50(C), which governs the proceedings for Rule 72 preliminary motions in cases where an indictment is amended, allows the filing of preliminary motions "in respect of the new charges". However, in view of the considerable changes in the wording made to the entire Gotovina Amended Indictment as a result of the joinder of the two cases, the Trial Chamber is of the view that, in fairness to the Accused, it should consider all the

[5] Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 13 February 2007.
[6] The Trial Chamber notes that Counsel for Mladen Markač informed the Trial Chamber at the Hearing that it fully supports the arguments set forth by Counsel for Ante Gotovina, Hearing, T. 146.

arguments advanced by the Defence, even if some of them may not pertain to the new charges introduced in the Joinder Indictment.

B. Law on Challenges to Jurisdiction

14. The present Preliminary Motions are filed pursuant to Rule 72(A)(i) Rules. Rule 72(D) of the Rules provides that:

> (D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
>
> (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
>
> (ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
>
> (iii) the period indicated in Articles 1, 8 and 9 of the Statute;
>
> (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.[7]

C. Discussion

15. The Joinder Indictment charges the Accused under Articles 7(1) and 7(3) of the Statute with Persecutions (Count 1), Deportation and Forcible Transfer (Counts 2 and 3), Plunder of Public or Private Property (Count 4), Wanton Destruction (Count 5), Murder (Counts 6 and 7), and Inhumane Acts and Cruel Treatment (Counts 8 and 9).

1. Gotovina Defence first ground: joint criminal enterprise

(a) Arguments of the Parties

16. In alleging that the Accused participated in a joint criminal enterprise, paragraph 12 of the Joinder Indictment provides that "it was foreseeable that the crimes of murder, inhumane acts and cruel treatment were a possible consequence in the execution of the enterprise".[8] In paragraph 43 the Joinder Indictment provides that:

> In addition or in the alternative, as to any crime charged in this Joinder Indictment which was not within the purpose of the joint criminal enterprise, such crime was the natural and foreseeable consequence of the joint criminal enterprise and of implementing or attempting to implement the enterprise and each accused was aware of this possible consequence and, despite this awareness, joined and continued in the enterprise and willingly took the risk that the crimes would be committed and is responsible for the crimes charged.[9]

---

[7] The Trial Chamber concurs with the Trial Chamber finding in *Šešelj* that the list provided in Rule 72(D) is exhaustive. *Prosecutor v. Vojislav Šešelj* Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004, para. 10.

[8] Joinder Indictment, para. 12.

[9] Joinder Indictment, para. 43.

17. The Gotovina Defence challenges the use of the phrase "possible consequence". Based upon the Appeals Chamber Judgement in *Tadić*, the Defence argues that the correct *mens rea* requirement is that of a "predictable" consequence.[10] It argues that the *mens rea* of "possible" consequence is one which is not in accordance with the jurisprudence of the Tribunal and "dilutes" the *mens rea* requirement, replacing *dolus eventualis* with strict liability.[11] Therefore, it argues, that by applying this standard of *mens rea,* Counts 1 to 9 "substantively expand the scope of joint criminal enterprise" violating the principle of *nullum crimen sine culpa* and falling outside the scope of the Tribunal's jurisdiction *ratione personae*.[12]

18. The Prosecution responds that the use of "possible consequences" properly mirrors the elements of joint criminal enterprise as articulated by the Appeals Chamber in the *Stakić* and the *Blaskić* Judgements.[13] Moreover, it contends that the Joinder Indictment does not charge Ante Gotovina with *all* possible consequences, but only those which were a natural and foreseeable consequence of the joint criminal enterprise.[14]

19. The Gotovina Defence, in its Reply, argues that the Prosecution Response makes no reference to the *Tadić* Appeals Judgement which has been cited with approval in all subsequent cases, and which set forth a *dolus eventualis* standard.[15] Furthermore, it argues that as the two authorities cited by the Prosecution both "purport to follow *Tadić*", they do not justify a deviation from the *Tadić* standard.[16] The Defence argues, on the basis of the Appeal Judgement in *Kvočka*, that "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'."[17] The Defence therefore argues that knowledge of a mere "possible consequence" is insufficient for joint criminal enterprise extended liability.[18]

---

[10] Second Gotovina Preliminary Motion, para. 5.
[11] Second Gotovina Preliminary Motion, para. 5, *citing Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 41.
[12] Second Gotovina Preliminary Motion, para. 6.
[13] Response to Gotovina Second Preliminary Motion, paras 2-4.
[14] Response to Gotovina Second Preliminary Motion, para. 5.
[15] Gotovina Reply, para. 6.
[16] Gotovina Reply, para. 6.
[17] Gotovina Reply para. 9, emphasis in original, *citing Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać,* Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 86.
[18] Gotovina Reply para. 6.

(b) Discussion

20. It has been clearly established since the earliest pronouncements of this Tribunal on joint criminal enterprise, that it is a mode of liability over which the Tribunal has jurisdiction.[19] With regard to the formulation of the subjective element of joint criminal enterprise the Appeals Chamber in *Tadić* held that:

> Criminal responsibility may be imputed to all participants within the common enterprise where the *risk* of death occurring was both a *predictable consequence* of the execution of the common design and the accused was either reckless or indifferent to that risk. [20]

21. Subsequent judgements, relying upon the Appeals Chamber in *Tadić*, have provided some other formulations of the subjective element. For example, the Appeals Chamber in *Kvočka* held:

> the accused must also know that such a crime might be perpetrated by a member of the group, and *willingly take the risk that the crime might occur* by joining or continuing to participate in the enterprise.[21]
>
> [...]
>
> participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[22]

The Appeals Chamber in *Stakić*, citing *Kvočka*, above, held that:

> Liability attaches 'if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly *took that risk*'. The crime must be shown to have been foreseeable to the accused in particular.[23]

Later in the same discussion it held:

---

[19] *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement") para. 190; *Prosecutor v. Mitar Vasiljević,* Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 95; *Prosecutor v. Milomir Stakić,* Case No. IT-97-24-T, Judgement, 29 October 2003 ("*Stakić* Appeal Judgement"), para. 62 and references cited therein. In order to come within the Tribunal's Jurisdiction *ratione personae*, the Appeals Chamber has held that any form of liability must satisfy the following 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. *Prosecutor v. Milutinović et. al,* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ("*Milutinović* Decision") para. 21. The Trial Chamber notes that in its Decision the *Milutinović* Appeals Chamber upheld the inclusion of joint criminal enterprise in that indictment, thus finding that joint criminal enterprise fulfilled the above-listed pre-conditions.

[20] *Tadić* Appeal Judgement, para. 204, (emphasis added).

[21] *Kvočka* Appeal Judgement, para. 83, (emphasis added), *citing, inter alia, Tadić* Appeal Judgement paras 228, 204, 220.

[22] *Kvočka* Appeal Judgement, para. 86, (emphasis in original).

[23] *Stakić* Appeal Judgement, para. 65, (emphasis in original) *citing Tadić* Appeal Judgement, paras 220, 228 and *Kvočka* Appeal Judgement, para. 83.

> As noted above, for the application of third category joint criminal enterprise liability, it is necessary that [...] the participant in the joint criminal enterprise was aware that the crimes *were a possible consequence* of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.[24]

22. The phrase used in the Joinder Indictment in the present case, that of "this possible consequence", when read in the context of paragraph 43 as a whole clearly refers to the "natural and foreseeable" consequences of the crime. Furthermore, it can clearly be said to fall squarely within the accepted definition of joint criminal enterprise as set out in the *Tadić* Judgement and subsequent judgements.[25] Therefore, having regard to the settled jurisprudence that joint criminal enterprise is a mode of liability over which the Tribunal has jurisdiction, and finding that the elements of the joint criminal enterprise as set out in the Joinder Indictment fall within the ambit of Article 7(1) of the Statute, the Trial Chamber rejects this argument of the Gotovina Defence. Furthermore, the Trial Chamber is of the view that the Gotovina Defence arguments in relation to the contours of this mode of liability belong to the sphere of arguments on the merits and should be raised at that stage.

2. Initial matters for consideration in relation to Gotovina Defence Grounds 2 to 6 and Čermak and Markač Joint Preliminary Motion

23. In examining the arguments of the Gotovina Defence and the Čermak and Markač Defence, the Trial Chamber has noted that there are several points of legal reasoning which pervade their arguments. Therefore, prior to its consideration of the specifics of the Defence arguments challenging jurisdiction, the Trial Chamber finds it useful to set out its reasoning in relation to three elements which seem, in particular, to inform the Gotovina Defence reasoning in its argumentation on grounds two to six.

(i) The relationship between Article 3 and Article 5

24. Throughout the reasoning of the Gotovina Defence, there appears to be some confusion as to the relationship between violations of the laws and customs of war under Article 3 of the Statute and crimes against humanity under Article 5 of the Statute within the jurisdiction of this Tribunal. The Gotovina Defence argumentation consistently and repeatedly attempts to apply constructs of the laws and customs of war ("war crimes") to charges of crimes against humanity.[26] One of the points of confusion for the Defence appears to arise from its contention that war crimes law acts as

[24] *Stakić* Appeal Judgement, para. 87, emphasis added.
[25] *See Milutinović* Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006 para. 23, *citing Blaškić* Appeal Judgement, paras 34-42.
[26] *See, e.g.* Second Gotovina Preliminary Motion, paras 8-9, 13-17; Gotovina Reply, paras 11-14, 17-18, 20-22.

the *lex specialis* to crimes against humanity.[27] In this regard, the Trial Chamber notes that it is well established in public international law that rules of international humanitarian law serve, in times of armed conflict, as a *lex specialis* in respect of the interpretation of the limits of prohibitions contained in instruments safeguarding the respect for human rights.[28] However, any reference to the *lex specialis* principle with regard to war crimes and crimes against humanity in the context of the jurisdiction of the Tribunal, necessarily differs from this situation.

25. Article 1 of the Statute provides that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law [...] in accordance with the provisions of the present Statute". As stated by the Secretary General, the jurisdiction of the Tribunal covers international humanitarian law which is part of customary international law, that is:

> [t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.[29]

26. Thus, it is evident that the jurisdiction of the Tribunal covers both crimes against humanity, which are set out in Article 5 of the Statute *and* violations of the laws and customs of war under Article 3. The inclusion of separate Articles covering crimes against humanity and war crimes is clearly not a matter of coincidence, but indicates that these two regimes exist separately and independently. Furthermore, while crimes against humanity under Article 5 of the Statute must be linked to the existence of an armed conflict,[30] these crimes are not dependant upon the application

---

[27] *See, e.g.*, Second Gotovina Preliminary Motion, para. 8; Gotovina Reply, paras 11 and 13.

[28] This doctrine was confirmed by the ICJ in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: "The Court observes that the protection of the International Covenant of Civil and Political Rights (ICCPR) does not cease in times of war [...] In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, para. 25, 1996 ICJ 226. See also International Court of Justice Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, para. 106, 2004 I.C.J. 136 where the ICJ held that: "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".

[29] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para. 35. *See also*, para. 47 "Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany".

[30] *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("*Tadić* Jurisdiction Decision") paras 139-142. In particular the Trial Chamber notes the statement of the *Tadić* Jurisdiction Decision at para

of the "laws or customs of war" enumerated separately under Article 3. Finally, a single act may be charged as a war crime or as a crime against humanity, and in certain cases, as both.[31]

27. In its arguments, the Gotovina Defence referred to certain parts of the ICRC Study on Customary International Law ("ICRC Study") in support of its contentions that war crimes form a *lex specialis* to crimes against humanity. In this regard, the Trial Chamber notes that the Gotovina Defence appears to confuse the use of the term "international humanitarian law" in Article 1 of the Statute which within the jurisdiction of this Tribunal encompasses war crimes and crimes against humanity, and the narrower construct of the ICRC Study.[32] Furthermore, the Trial Chamber notes that the ICRC Study does not refer to crimes against humanity.[33]

28. In light of the foregoing, the Trial Chamber finds that the Gotovina Defence contention regarding war crimes as the *lex specialis* in relation to the elements of crimes against humanity is entirely unsupported and is based upon a misunderstanding of the co-existence of and relationship between war crimes and crimes against humanity in the jurisprudence of this Tribunal.

(ii) Nature of the armed conflict pleaded in the Joinder Indictment

29. In several of the arguments of the Gotovina Defence and the Čermak and Markač Defence, argumentation is adduced which relates to the nature of the armed conflict charged in the present

141 that: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all."

[31] *Prosecutor v. Zejnil Delalić, Zdravko Mucić (a.k.a. "Pavo"), Hazim Delić and Esad Landzo (a.k.a. "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgment"), paras 412-413. *See also Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgment"), paras 1032-1033 and *Stakić* Appeal Judgment, paras 355-356. *See also Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgment"), para. 386. *See also Jelisić* Appeal Judgment, para. 82.

[32] The Trial Chamber notes in this regard that the title of the ICRC Study is "ICRC Study on Customary International Humanitarian Law", and that Rule 156 of the Study states: "Serious violations of international humanitarian law constitute war crimes".

[33] The Trial Chamber further notes that in its Reply, the Gotovina Defence argues that "[m]ost revealing is the repeated [Prosecution] contention – in relation to the core allegation of 'ethnic cleansing' – that 'the laws and customs of war ... do not apply to crimes against humanity'." The Defence argues that "this is tantamount to arguing that the basis for criminal liability under humanitarian law can be wholly disregarded simply by charging conduct as crimes against humanity rather than war crimes". In support of its argument, the Reply cites Article 1 of the Statute. Gotovina Reply, para. 3, *citing* Response to Gotovina Second Preliminary Motion, para. 11, and footnote 3. The Trial Chamber further notes that the core of the Gotovina Defence argument here appears to be based upon a misquotation of the Prosecution. The Prosecution Response stated that "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". Response to Gotovina Second Preliminary Motion, para. 11, emphasis added. When read in full, the Prosecution argument is that the Defence are applying requirements of the laws and customs of war to crimes against humanity. As the Trial Chamber has already set out the applicable law in relation to war crimes and crimes against humanity under the Statute, and as this Defence argument appears to be based upon a misquotation of the Prosecution, the Trial Chamber will not enter into any further discussion on this point.

Joinder Indictment.[34] The Gotovina Defence in particular appears to base many of its arguments upon an assumption that the Joinder Indictment pleads a non-international armed conflict.[35] In this regard, the Trial Chamber finds that it is well established that the question as to the nature of the conflict pleaded in the indictment is one of the facts to be determined on the basis of the evidence presented at trial. For example, the Appeals Chamber in *Boškovski and Tarčulovski* held that:

> the characterization of the conflict [...] is an issue whose resolution depends on factual determinations and may not be addressed at this stage of the proceedings. Such factual determinations are to be made by the Trial Chamber upon hearing and reviewing evidence at trial.[36]

30. Furthermore, it is well established that the nature of the armed conflict is irrelevant to charges of crimes against humanity, which may be committed in an international or non-international armed conflict.[37] The Trial Chamber recalls that in drafting Article 5 of the Statute, the "armed conflict" requirement was added by the drafters in order to limit the jurisdiction of the Tribunal to those crimes which were connected with the armed conflict in the former Yugoslavia. As stated by the Appeals Chamber:

> At the meeting of the Security Council at which the Tribunal's Statute was adopted, those members that addressed the scope of Article 5 of the Statute made clear their view that it encompassed widespread or systematic criminal acts committed against the civilian population on the territory of the former Yugoslavia during an armed conflict.[38]

31. Moreover, the "in armed conflict" requirement has been interpreted broadly in the jurisprudence of the Tribunal. While requiring, for the purposes of Article 5, the existence of an armed conflict at the time and place relevant to the indictment, the jurisprudence does not require a "material nexus" between the armed conflict and the acts of the accused.[39] The "in armed conflict" requirement should therefore not be confused with the requirements under Articles 2 or 3 relating to grave breaches of the Geneva Conventions or violations of the laws or customs of war.

---

[34] *See e.g.* First Gotovina Preliminary Motion, paras 32-33; Joint Preliminary Motion, paras 20-22; Second Gotovina Preliminary Motion, para. 25.
[35] *See e.g.* Second Gotovina Preliminary Motion, paras 7-9, 14-15, 21-23 and 26-27; Gotovina Reply, paras 11-14, 18, and 25.
[36] *Boškovski and Tarčulovski*, Decision on Interlocutory Appeal on Jurisdiction, 22 July 2005, para. 13.
[37] *Tadić* Jurisdiction Decision, paras 138-142. *See also Kupreškić* Trial Judgement, para. 545. The Trial Chamber notes that the Appeals Chamber in the *Tadić* Jurisdiction Decision in fact noted that "customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, 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 more narrowly than necessary under customary international law." para. 141, *see also Tadić* Appeal Judgement, para. 627.
[38] *Prosecutor v. Vojislav Šešelj* Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 12, *citing* Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, Security Council S/PV. 3217, 25 May 1993.
[39] Thus, for example, there is no requirement that an attack directed against a civilian population be related to the armed conflict, *Prosecutor v. Vojislav Šešelj* Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 13 *citing Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-22&23-/1-A, Judgement, 12 June 2002 ("*Kunarac et. al.* Appeal Judgement"), para. 83; *Tadić* Appeal Judgement, paras 249 and 251.

(iii) Arguments pertaining to a so-called "Gotovina exception"

32. The Trial Chamber notes that in its Gotovina Motion Requesting Oral Argument,[40] as well as during the Hearing, Defence Counsel argued that Ante Gotovina was being treated differently from other accused before the Tribunal:

> We submit respectfully that the Gotovina exception is an attempt by the Prosecution to criminalise Operation Storm without proof that it constituted unlawful combat, if alleged that the purpose of Operation Storm was terrorisation and mass expulsion of civilians because there was no legitimate military objective.[41]

33. The Defence contends that Ante Gotovina has been improperly charged with deportation, submitting that the appropriate charges should have been unlawful attacks or spreading terror.[42] Although the Defence does not contend that unlawful attacks cannot be charged as crimes against humanity,[43] it argues that had Ante Gotovina been charged with unlawful attacks or spreading terror he would have been in a position to raise defences which he cannot now raise when faced with the present charges:

> one of the issues is if the Prosecution had charged Hague law violations, you can be sure that we would be bringing both sides many expert witnesses, many direct witnesses, who are going to speak about what was the military intention on the ground, were Serbian forces using civilian buildings in order to launch attacks against Croatia, these type of questions, what was the technology available to General Gotovina.[44]

34. It is unclear to the Trial Chamber how bringing charges under Article 5 of the Statute would deprive the Accused of the opportunity of raising a defence in relation to the same conduct if that conduct had been charged under Article 3, particularly insofar as it concerns a defence which pleads that adherence to international humanitarian law relieves the accused of criminal responsibility for that conduct. An accused may well argue that his conduct was in accordance with international humanitarian law, irrespective of the Article under which the charges are brought, and that therefore he has to be acquitted. The Defence is not prohibited from raising conformity with international humanitarian law as a defence although the Trial Chamber at this stage of the proceedings refrains from any comment on the potential merits of such a defence.

[40] Gotovina Motion Requesting Oral Argument, para. 2.
[41] Hearing, T. 142.
[42] Hearing, T. 142-143.
[43] Hearing, T. 159.
[44] Hearing, T. 164.

3. Second Ground: that the crimes of deportation or forcible transfer do not apply to internal armed conflicts

(a) Arguments of the Parties

35. Relying upon the Trial Chamber in *Hadžihasanović*, the Second Gotovina Preliminary Motion argues that the Joinder Indictment does not allege that an international armed conflict existed at the time and therefore that the Trial Chamber must conclude that the Prosecution is alleging the existence of a non-international armed conflict only.[45]

36. On this basis, the Gotovina Defence, citing Rule 129(b) of the ICRC Study, which relates to non-international armed conflicts and refers to "displacement of the civilian population", argues that the crimes of deportation and forcible transfer do not apply to non-international armed conflicts.[46] Therefore, the Defence contends that the Prosecution has improperly charged the Accused with deportation and forcible transfer in a non-international armed conflict, violating the principle of *nullum crimen sine lege* and, thus, that Counts 1 to 3 should be stricken from the Joinder Indictment as falling outside of the jurisdiction of the Tribunal *ratione materiae*.[47]

37. In relation to the first element of the Defence argument, the Prosecution contends that this issue had been already addressed in its previous filings, in which it referred to the fact that the Joinder Indictment alleges the existence of an armed conflict,[48] and that the particular type of armed conflict is irrelevant to crimes against humanity.[49]

38. In relation to the second element, the Prosecution responds that the ICTY has jurisdiction over crimes against humanity whether committed in an international or non-international armed conflict.[50] It argues that the Defence purports to apply war crimes law to crimes against humanity, and furthermore that the ICRC Study does not purport to interpret crimes against humanity and is therefore inapplicable.[51]

39. In its Reply, citing Rule 129(b) of the ICRC Study, the Gotovina Defence argues that:

> 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

[45] Second Gotovina Preliminary Motion, para. 7, *citing* Joinder Indictment para. 56.
[46] Second Gotovina Preliminary Motion, para. 8, *citing* Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law, Vol. 1: Rules,* p. 457.
[47] Second Gotovina Preliminary Motion, para. 6.
[48] Response to Gotovina Second Preliminary Motion, para. 23 referring to Prosecution Response to First Preliminary Motion, para. 18.
[49] Response to Gotovina Second Preliminary Motion para. 10.
[50] Response to Gotovina Second Preliminary Motion para. 7.
[51] Response to Gotovina Second Preliminary Motion para. 8.

> basis for ICTY jurisdiction under Article 1 of the Statute – is the *lex specialis* that defines the material elements of crimes against humanity.[52]

Based on this argument, the Gotovina Defence submits that the *lex specialis* applicable to non-international armed conflicts defines the *actus reus* as that of "forced movement of civilians" rather than "deportation" or "forcible transfer".[53] The Defence concludes 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 submission on this ground".[54]

40. In the Prosecution Response to Allegations of Concession, the Prosecution responds that it has explained the inapplicability of Rule 129(b) of the ICRC Study to the *actus reus* of crimes against humanity, it argues that the established elements for deportation and forcible transfer under Article 5 differ from the approach taken by Rule 129 of the ICRC Study; in particular, proof of an international armed conflict is not required as an element of the crimes of deportation or forcible transfer as crimes against humanity.[55] The Prosecution further lists six cases of the Tribunal wherein convictions were entered for deportation and forcible transfer in internal armed conflicts.[56]

41. The Prosecution notes that "the ICRC Study is useful as a source of customary IHL not for the black letter of the rules it sets out, but for the sources of state practice that it collects."[57] The Prosecution further argues that the ICRC Study reflects the Prosecution position in that it recognises a "fundamental distinction between international humanitarian law and crimes against humanity, noting that, under the Statutes of the ICTY, ICTR and ICC, deportation or transfer of the civilian population also constitute crimes against humanity".[58] It also contends that the Appeals Chamber methodology in reviewing a wide range of sources in determining the elements of crimes against humanity in the ICTY statute further supports the Prosecution's contention that international humanitarian law sources are not determinative in defining crimes against humanity.[59]

---

[52] Gotovina Reply, para. 13.
[53] Gotovina Reply, para. 11.
[54] Gotovina Reply, para. 16.
[55] Prosecution Response to Allegations of Concession, para. 2.
[56] Prosecution Response to Allegations of Concession, para. 5, *citing Stakić* Appeal Judgement, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, Case No. IT-95-9-A, Judgement, 28 November 2006 and *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003, *Krnojelac* Appeal Judgement, and *Prosecution v. Radislav Krstić*, Case No. IT -98-33-T, Judgement, 2 August 2001, *Prosecution v. Radislav Krstić*, Case No. IT -98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").
[57] Prosecution Response to Allegations of Concession, para. 8, *citing Prosecutor v. Hadžihasanović*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, 11 March 2005, para. 30.
[58] Prosecution Response to Allegations of Concession, para. 9, *citing* ICRC Study, p. 459.
[59] Prosecution Response to Allegations of Concession, paras 10-11.

(b) Discussion

42. As noted in the initial matters which the Trial Chamber dealt with above, the nature of the armed conflict alleged in the Joinder Indictment is a factual issue which must be dealt with in the course of the evidence presented at trial. However, in relation to the specific Defence argument that the Trial Chamber must consider the present Joinder Indictment as pleading a non-international armed conflict in the absence of any specification to the contrary, the Trial Chamber notes that the authority cited by the Gotovina Defence arises from the Trial Chamber Judgement in *Hadžihasanović*, which made its finding on the nature of the armed conflict after a consideration of the evidence.[60] This ruling of the Trial Chamber in *Hadžihasanović* is therefore in keeping with the practice of this Tribunal that the determination of the nature of the conflict is one to be established in the course of the trial.

43. Furthermore, as noted above, crimes against humanity may be charged in either an international or non-international armed conflict, therefore the finding made in *Hadžihasanović* is not one which is required for the application of Article 5. The Trial Chamber therefore rejects this argument of the Defence, and notes that any arguments pertaining to the nature of the armed conflict are to be raised during the course of the presentation of evidence at trial.

44. With regard to the Gotovina Defence's reliance on the ICRC Study, the Trial Chamber has already set out its reasoning above in relation to the Defence arguments on the application of the ICRC Study and any *lex specialis* between war crimes and crimes against humanity.[61]

45. Furthermore, the Trial Chamber notes that it is well established in the jurisprudence of the Tribunal that deportation and forcible transfer under Article 5 may be applied to non-international armed conflicts.[62]

---

[60] *Prosecutor v. Enver Hadžihasanović and Amir Kubura,* Case No. IT-01-47-T, Judgement, 15 March 2006, para. 28. The Trial Chamber stated: "the Chamber noted in its decision that the Prosecution did not present evidence during its case-in-chief which would establish that the armed conflict in Central Bosnia in 1993 was international in nature. Ruling on the evidence produced by the Prosecution in cross-examination and finding that it would be admissible only insofar as it provides further details about the general context of this case and that it cannot serve to establish the international nature of the conflict in respect of the applicable law, the Chamber recognises that it is in fact dealing with an internal armed conflict."

[61] The Trial Chamber notes that Rule 129(b) refers to "ordering", based upon Article 17 of Additional Protocol II. In this regard the Trial Chamber notes that it has, above, dealt with the matters raised by the Gotovina Defence in relation to the ICRC Study, and furthermore, that the jurisprudence of the Tribunal does not include any additional requirement of "ordering" in relation to the application of the crimes of deportation and forcible transfer under Article 5.

[62] *See, e.g. Krnojelac* Appeal Judgement, para 217-225; *Stakić* Appeal Judgement, paras 300-303; *see also, Krstić* Appeal Judgement, *Brdjanin* Trial Judgement, paras 540-544.

46. The Trial Chamber therefore finds that the arguments of the Defence are misinformed and dismisses this ground on the basis that it is not a jurisdictional challenge but is based upon the Defence's misunderstanding of the jurisprudence of this Tribunal.

4. Third Ground: "deportation and forcible transfer" cannot include alleged conduct of hostilities violations committed prior to restoration of Croatian authority over 'Krajina'

(a) Arguments of the Parties

47. The Joinder Indictment alleges that:

> 29. The orchestrated campaign to drive the Serbs from the Krajina region began before the major military operation commenced on 4 August 1995, largely by the use of propaganda, disinformation and psychological warfare. Information was spread that the attack by Croatian forces was imminent, in circumstances where the Serb population, having experienced or become aware of crimes and misconduct in similar Croatian operations, was filled with panic and fear [...] As the operation went forward, Croatian forces shelled civilian areas, entered civilian Serb settlements at night, and threatened those civilians who had not already fled, with gunfire and other intimidation.
>
> [...]
>
> 35. In the course of Operation Storm and the continuing related operations and/or actions, participants in the joint criminal enterprise and their subordinates inflicted inhumane acts on Serb civilians and persons taking no part in hostilities, including persons placed hors de combat, causing not only mental abuse, humiliation and anguish (including by threats to kill such persons or their families), but also severe physical injury, by shooting, beating, kicking and burning people, including extensive shelling of civilian areas and an aerial attack on fleeing civilians.

48. The Gotovina Defence argues that the allegations that an expulsion campaign began before the commencement of Operation Storm with "propaganda, disinformation and psychological warfare" followed by Croatian shelling of civilian areas,[63] refer to alleged acts which 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 the territory under the authority of Croatian forces."[64]

49. The Defence contends that "there is no legal basis to apply deportation to situations other than occupied territory", it therefore contends that "occupation" is a constitutive element of the crimes of deportation and forcible transfer.[65] Furthermore, it argues that as the Joinder Indictment pleads an internal armed conflict, the standard applies only by analogy as "a State cannot 'occupy' its own territory".[66] It also argues that the crime of "deportation and forcible transfer" in an international armed conflict, and "forced movement of civilians" in a non-international armed

[63] Second Gotovina Preliminary Motion para. 11, *citing* Joinder Indictment paras 29, 35.
[64] Second Gotovina Preliminary Motion para. 12.
[65] Second Gotovina Preliminary Motion para. 13. The Defence argues that the "customary law definition" of forcible transfer under Articles 5(d) and (i) of the Statute is contained in Article 49(1) of the Geneva Conventions IV, that is, individual or mass forcible transfers "of protected persons *from occupied territory*", para. 13. The Gotovina Defence also cite Article 85(4)(a) of Protocol I and *Stakić* Appeal Judgement paras 290 -299.

conflict, apply only to persons in territories actually placed under the authority of a party to the conflict.[67] Therefore, it argues, the Prosecutor cannot charge deportation and forcible transfer with respect to persons in the Krajina prior to or during Operation Storm, when it was not under Croatian authority.[68] It concludes that "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".[69]

50. The Prosecution responds that Counts 1 to 3 of the Joinder Indictment charge crimes against humanity, not war crimes, and that the arguments raised by the Defence "are directed at particular requirements of the laws and customs of war which do not apply to crimes against humanity".[70] It argues that the rules relied upon by the Defence are drawn from the laws and customs of war and are not applicable to crimes against humanity, and that reliance on war crimes rules to interpret aspects unique to crimes against humanity "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".[71] It also responds 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.[72] Furthermore, it argues that crimes against humanity can be committed against any civilian population, including one within a state's own borders,[73] they do not require military occupation and do not depend on whether the victims are in territories under the authority of a party to the conflict.[74]

51. In relation to the question of a requirement of occupation, the Gotovina Reply argues that the Prosecution "does not offer one relevant authority in support of this far-reaching assertion [that the requirement of occupation is directed at particular requirements of the laws and customs of war which do not apply to crimes against humanity]".[75] It further argues that the Prosecution is "alleging that 'ethnic cleansing' of Serbs was 'largely' achieved by ruses and attacks prior to Croatian control of 'Krajina', but seeks to avoid proof that such conduct violated the laws of war", which amounts to "criminalising lawful combat".[76] The Reply further argues that the "Appeals Chamber [...] recognizes that '[d]eportation is clearly prohibited as a crime where the conflict

[66] Second Gotovina Preliminary Motion, para. 14.
[67] Second Gotovina Preliminary Motion, para. 15.
[68] Second Gotovina Preliminary Motion, para. 15.
[69] Second Gotovina Preliminary Motion, para. 16.
[70] Response to Gotovina Second Preliminary Motion, para. 11.
[71] Response to Gotovina Second Preliminary Motion, para. 13.
[72] Response to Gotovina Second Preliminary Motion, para. 14.
[73] Response to Gotovina Second Preliminary Motion, para. 15.
[74] Response to Gotovina Second Preliminary Motion, para. 15.
[75] Gotovina Reply, para. 17.
[76] Gotovina Reply, para. 17.

encompasses an occupied territory'",[77] and that the requirement of "occupation" does not become irrelevant simply because the Prosecution pleads crimes against humanity instead of war crimes.[78]

52. The Prosecution Response to Allegations of Concession rejects this contention, recalling its arguments set out in its Response to Gotovina Second Preliminary Motion.[79]

53. At the Hearing, the Gotovina Defence informed the Trial Chamber that the substance of its arguments was that "the Prosecution cannot accuse General Gotovina of crimes against humanity while disregarding the laws of war", "[that] the Prosecution unilaterally eliminates an essential element of deportation as defined by Article 49 of the Fourth Geneva Convention" and that the Joinder Indictment does not state anywhere that the alleged victims of deportation were in the hands of Croatian forces in territory under Croatian control.[80] Relying on the Appeals Chamber Judgement in *Stakić* wherein it stated that Article 49 is "the underlying instrument prohibiting deportation"[81] and citing the *Naletelić* Appeals Chamber Judgement, the Defence concluded that "if the alleged victims of deportation were never in the hands of Croatian forces, the crime of deportation was simply never committed."[82]

(b) Discussion

54. The Trial Chamber has already dealt with the arguments of the Gotovina Defence relating to the nature of the armed conflict above, and will not repeat them here. In relation to the specific contention that deportation as a crime against humanity has a requirement of "occupied territory", the Defence has not provided any authority supporting this assertion. Furthermore, at the Hearing the Gotovina Defence relied upon a Separate and Partly Dissenting Opinion in support of its arguments.[83] In addition, the discussion in the *Stakić* Appeal Judgement relied upon by the Gotovina Defence in its Reply, related in particular to the question of borders, and does not support the Gotovina Defence contention that "occupied territory" is a requirement:

---

[77] Gotovina Reply, para. 18, *citing Stakić* Appeal Judgement, para. 296.
[78] Gotovina Reply, para. 18.
[79] Prosecution Response to Allegations of Concession, paras 12-14.
[80] Hearing, T. 138-139.
[81] Hearing, T. 141, *citing Stakić* Appeal Judgement, para. 306.
[82] Hearing, T. 141, *citing Naletelić* Appeal Judgement, Separate and Partly Dissenting Opinion of Judge Schomburg, para. 22.
[83] *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Judgemenet, 3 May 2006 ("*Naletelić* Appeal Judgement"), Separate and Partly Dissenting Opinion of Judge Schomburg, para. 22. The Trial Chamber notes that: (i) the Gotovina Defence cited Judge Schomburg's dissenting opinion as to Appeals Chamber majority as it then stood, furthermore, the Trial Chamber notes that the Appeals Chamber in *Naletelić* did not in fact examine the elements of deportation as a crime against humanity under Article 5(d) of the Statute, relying instead on *Stakić* Appeal Judgement, *Naletelić* Appeal Judgement, para. 152; and (ii) that the proposal of Judge Schomburg cited by the Defence concerned the border requirement for the crime of deportation and was not part of any discussion as to any requirement of "occupied territory".

> In the view of the Appeals Chamber, the crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above. Customary international law *also recognises that displacement from 'occupied territory'*, as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous Security Council Resolutions, is also sufficient to amount to deportation. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular de facto border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.[84]

55. The Appeals Chamber in *Stakić* held that the *actus reus* of the crime of deportation is "the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* border or, in certain circumstances, a *de facto* border, without grounds permitted under international law."[85] The *actus reus* of forcible transfer is the forced displacement of persons within national boundaries.[86] The Trial Chamber notes that nothing in the jurisprudence of the Tribunal supports the Defence contention that "occupation" is an element of the crime of deportation.

56. Finally, as to the argument that the victims of deportation must be in the hands of a party to the conflict, the Trial Chamber recalls that crimes against humanity must be "directed against any civilian population".[87] Article 5 of the Statute therefore applies to "any" civilian population including one within the borders of the state of the perpetrator.[88] There is no additional requirement in the jurisprudence that the civilian be in the power of the party to the conflict.

57. In light of the foregoing, the Trial Chamber rejects the arguments of the Defence on the third ground.

5. Fourth Ground: "deportation and forcible transfer" does not apply to the resettlement by a state of its own civilian population

(a) Arguments of the Parties

58. Paragraph 36 of the Joinder Indictment provides that "[a] demographic policy was also implemented whereby much of the Serb Krajina was to be colonized with Croats" and these alleged acts are included in the charges under Counts 1 to 3.

---

[84] *Stakić* Appeal Judgement para. 300, footnotes omitted (emphasis added). The Trial Chamber further notes that the Appeals Chamber in *Stakić* discussed Article 49 in relation to the question of whether there is a requirement of intent that deportees should not return, *Stakić* Appeal Judgement, paras 306-307.
[85] *Stakić* Appeal Judgement, para. 278. *See also Naletelić* Appeal Judgement, paras 152-154.
[86] *Stakić* Appeal Judgement, para. 317.
[87] ICTY Statute, Article 5.
[88] *See e.g. Vasiljević* Trial Judgement, para. 33.

59. The Gotovina Defence alleges that there is no legal basis for an allegation of 'colonisation', as the Joinder Indictment concerns a non-international armed conflict and there is no prohibition on the movement of persons within a State's own territory.[89] Therefore, it argues that the Prosecution has improperly expanded the concept of deportation and forcible transfer to cover 'colonisation' of Croatia's own territory and Counts 1 to 3 should be dismissed as exceeding jurisdiction *ratione materiae.*[90]

60. The Prosecution argues that the Defence erroneously suggest that the Prosecution have alleged that the Croats in the Serbian Krajina were deported or forcibly transferred,[91] that the Defence takes "one portion of the statement of facts out of context and conflates it with the charges", and that neither the modalities nor motive for deportation are relevant to a challenge of jurisdiction.[92] It argues that the Defence suggestion of justification is a *tu quoque* defence.[93] It further argues that the Defence contention that "there is no restriction on the movement of that State's nationals within its own territory" is incorrect.[94] Finally, it contends that the focus of the charge is not the movement of the Croat population to "colonise" but the deportation and forcible transfer of the Krajina Serbs.[95]

61. The Defence argues in its Reply that as recognised by Rule 130 of the ICRC Study, the crime of transferring a civilian population into the occupied territory of another state, that is, "colonization", does not apply to a non-international armed conflict.[96] It argues that there is no *actus reus* for "colonization" in a non-international armed conflict, that the non-return of Serb civilians because of the resettlement of Croats cannot be the basis for criminal liability, that the discouragement of Serbs from returning is not the same as *mens rea* and that the Prosecution cannot retroactively support the crime of deportation or forcible transfer because of the lawful resettlement of civilians.[97]

62. The Prosecution Response to Allegations of Concession argues that the Prosecution has not conceded this point, and repeats that the Prosecution does not allege a crime of "colonization".[98]

---

[89] Second Gotovina Preliminary Motion, para. 22.
[90] Second Gotovina Preliminary Motion, para. 23.
[91] Response to Gotovina Second Preliminary Motion para. 18.
[92] Response to Gotovina Second Preliminary Motion para. 19.
[93] Response to Gotovina Second Preliminary Motion para. 20.
[94] Response to Gotovina Second Preliminary Motion para. 21.
[95] Response to Gotovina Second Preliminary Motion para. 21.
[96] Gotovina Reply, para. 23.
[97] Gotovina Reply, para. 25.
[98] Prosecution Response to Allegations of Concession, paras 15-17.

(b) Discussion

63. At the Hearing, the Gotovina Defence argued that "the Prosecution cannot retroactively consummate the crime of deportation when Croatian forces never deported protected persons from occupied territory in the first place."[99] However, in response to questioning from the Bench, the Defence argued that:

> the crime under Article 49, paragraph 6 of the 4th Geneva Convention of transferring by a state of its own population into territory occupied by another state clearly does not apply to internal armed conflict. This is reflected in Rule 130 of the ICRC study on customary law. Now, the Prosecution's response concedes that they are not charging this crime. They are not charging the crime of colonisation; that is an admission by the Prosecution in its latest response. [100]

64. The Trial Chamber therefore understands the Defence position in relation to its arguments on 'colonisation' to be that it is satisfied that the Prosecution is not charging the accused with any crime of 'colonisation'. The Trial Chamber will therefore not enter into any further discussion on this issue, given that it is clear that the Accused are not charged with a crime of 'colonisation'.

65. The Trial Chamber notes, in addition, that motives are irrelevant to crimes against humanity.[101] As to the question of forcible displacement within State boundaries, the Appeals Chamber has held that "forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries".[102]

66. In light of the foregoing the Trial Chamber therefore rejects the arguments of the Defence on the Fourth ground.

6. Fifth Ground: crimes allegedly committed after the "general close of military operations" under Counts 1 to 9 do not constitute violations of humanitarian law

(a) Arguments of the Parties: Gotovina Defence

67. Paragraph 28 of the Joinder Indictment alleges that on 7 August 1995 Operation Storm had been "successfully completed" with follow-up actions continuing until 15 November 1995. Paragraph 33 states that after the "minimal" SVK resistance was "overcome" the "ethnic cleansing campaign" was implemented. The Defence in its Second Gotovina Preliminary Motion alleges that these allegations are inconsistent with the assertion in paragraph 56 of the Joinder Indictment that a state of armed conflict existed at all times,[103] without which, it argues, humanitarian law does not

[99] Hearing, T. 143.
[100] Hearing, T. 155.
[101] *Kunarac* Appeal Judgement, para. 103.
[102] *Stakić* Appeal Judgement, para. 317.
[103] Second Gotovina Preliminary Motion para. 24.

apply.[104] It argues that at the very least the completion of Operation Storm "leaves no doubt that the alleged 'follow-up actions' did not occur in the context of an armed conflict".[105] Therefore, it argues that these actions do not reach the threshold for the application of humanitarian law in a non-international armed conflict.[106]

68. The Prosecution responds, based on the Appeals Chamber Judgement in *Tadić*, that international humanitarian law continues to apply until a "general conclusion of peace" or a "peaceful settlement" is reached. Furthermore, it argues that the contention of the Defence that the armed conflict ended at the completion of Operation Storm is one for evidence at trial.[107]

69. In its Reply, the Gotovina Defence argues that the Prosecution has failed to explain how a state of armed conflict can exist or humanitarian law apply "post-*debellatio*" and therefore has conceded the Defence submissions.[108]

70. The Prosecution, in its Response to Allegations of Concession, argues that it has explained why the jurisdictional requirement of an armed conflict throughout the Indictment period has been pleaded, and refers to its citation of Tribunal case-law which provides that a state of armed conflict extends beyond the cessation of hostilities until the conclusion of a peaceful settlement. The Prosecution argues that it does not concede that the armed conflict ended with the conclusion of Operation Storm, and further argues that the duration of the conflict is a question of evidence for trial.[109]

71. At the Hearing, the Gotovina Defence argued that:

> The Prosecution's latest response now alleges for the first time ever that an armed conflict continued to exist post-*debellatio* simply because the Dayton and Erdut peace agreements were not yet concluded. But *debellatio* does not depend on formal agreements, whether an armistice or capitulation. The Prosecution's new argument is legally irrelevant and effectively concedes that there was no armed conflict in the Krajina. It is also an attempt to effectively amend the indictment by introducing a wholly new legal theory, again with just two months before the trial begins.[110]

---

[104] Second Gotovina Preliminary Motion, para. 25.
[105] Second Gotovina Preliminary Motion, para. 25.
[106] In its Reply, the Defence reiterates its arguments concerning armed conflict following 7 August 1995. The First Gotovina Preliminary Motion argued in similar terms that there was no armed conflict at the time of the crimes alleged in the indictment. In the First Gotovina Preliminary Motion the Gotovina Defence similarly argued that the Indictment failed to support the allegation that "at all relevant times, a state of armed conflict existed" in the relevant region, and in fact support the argument that a state of armed conflict did not exist. Gotovina First Preliminary Motion, para. 30. *See also,* , the Reply to Prosecution Response to First Gotovina Preliminary Motion paras. 26-32.
[107] Response to Gotovina Second Preliminary Motion, paras 23-28.
[108] Gotovina Reply, paras 28-31.
[109] Prosecution Response to Allegations of Concession, paras 18-20.
[110] Hearing, T. 144.

(b) Arguments of the Parties: Čermak and Markač Defence

72. The Čermak and Markač Defence submitted a similar argument to that of the Gotovina Defence in their Joint Preliminary Motion. They argue that during the period of the Joinder Indictment there was no armed conflict "at least not before 4 August 1995 and after completing Operation Storm"; even if these events could be defined as an armed conflict, that before the launch of and after the completion of Operation Storm the conflict could not be legally defined as an armed conflict; and that the incidents after the completion of Operation Storm should "be defined as internal disturbances and tensions".[111]

73. The Prosecution responds that the Defence do not raise any issue of jurisdiction, but factual issues to be determined at trial. It argues that the Joinder Indictment pleads the existence of an armed conflict and that the allegations have been reviewed and confirmed.[112] Furthermore, it argues that the legality or otherwise of an armed conflict is not relevant to the existence of an armed conflict.[113]

74. At the Hearing, Defence Counsel for Mladen Markač further[114] argued that "in the theatre of alleged crimes in the territory of the so-called Sector South of the self-proclaimed Republic of Krajina, there was no armed conflict",[115] and that the Prosecution have failed to support this allegation, therefore the Joinder Indictment should not have been confirmed, and should be dismissed.[116]

(c) Discussion

75. The arguments of both the Gotovina, and Čermak and Markač Defence concerning the conduct of hostilities at the time of the alleged crimes relate to the question of when the alleged armed conflict ceased to exist. As noted above, this is an issue to be dealt with at trial, as is the question of the intensity of the conflict.[117] The Trial Chamber therefore rejects this ground of the Gotovina, and Čermak and Markač Defence.

---

[111] Joint Preliminary Motion, para. 22.
[112] Response to Joint Preliminary Motion, p. 2, 3, *citing The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras 619-621, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2002, para. 99-101; *Čelebići* Trial Judgement, para. 182.
[113] Response to Joint Preliminary Motion, para. 7.
[114] As noted above, the Defence for Mladen Markač stated that it fully supported and accepted the arguments put forward by the Gotovina Defence, Hearing, T. 146. The Trial Chamber notes that the Defence for Ivan Čermak made no further arguments at this stage.
[115] Hearing, T. 146
[116] Hearing, T. 149.
[117] *See e.g. Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu,* Case No. IT-03-66-T, Judgement 30 November 2005 (*"Limaj et al,* Trial Judgement"), 30 November 2005, para. 90; "Consistently with decisions of other chambers of

7. Sixth Ground: the crime of inhumane acts and cruel treatment (Counts 8 to 9) cannot include alleged conduct of hostilities violations committed prior to the restoration of Croatian authority over 'Krajina'

(a) Arguments of the Parties

76. The Gotovina Defence argues that the Joinder Indictment alleges cruel treatment under Article 3(1)(a) common to the Geneva Conventions of 1949 which "applies only to persons in [the] power of a party to the conflict, but not to the conduct of hostilities, which fall under Hague Law".[118] Therefore, it argues, that the Prosecution has improperly expanded the scope of the crime of 'cruel treatment' to cover alleged conduct of hostilities violations in relation to persons in territories not actually placed under the authority of Croatian forces, thereby violating the principle *nullum crimen sine lege* and falling outside the jurisdiction of the Tribunal *rationae materiae.*[119]

77. The Prosecution responds that Common Article 3 is not limited to persons in the power of a party to the conflict, but that Common Article 3 is the "minimum yardstick" applicable to both international and non-international armed conflict.[120] It contends that the fact that hostilities are ongoing cannot protect an accused from criminal responsibilities for violations of Common Article 3.[121]

78. In its Reply, the Gotovina Defence argues that by failing to provide authority for its view that Common Article 3 of the Geneva Conventions applies to conduct of hostilities, and failing to explain "how Hague Law violations can be pleaded under Geneva Law" the Prosecution has conceded the Defence submissions.[122]

79. In its Response to Allegations of Concession, the Prosecution argues that it has validly pleaded that the shelling was part of the methodology for carrying out the Article 5 displacement crimes and has not conceded this point.[123] Furthermore, it argues that its Response "did not adopt Gotovina's terminology of 'Hague Law' versus 'Geneva Law' because the distinction is artificial, outdated and according to one highly qualified publicist 'never really existed'."[124] It argues that it is

---

the Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis".

[118] Second Gotovina Preliminary Motion para. 30.

[119] Second Gotovina Preliminary Motion paras 29-31.

[120] Response to Gotovina Second Preliminary Motion, para. 29-30, *citing Nicaragua v United States*, ICJ Reports 1986, § 218.

[121] Response to Gotovina Second Preliminary Motion, para. 30.

[122] Gotovina Reply, para. 33.

[123] Prosecution Response to Allegations of Concession, para. 21.

[124] Prosecution Response to Allegations of Concession, para. 22, *citing* Louise Doswald-Beck, "International humanitarian law and the Advisory Opinion on the ICJ of the legality of the threat or use of nuclear weapons," International Review of the Red Cross No. 316, p. 35.

settled in the jurisprudence that inhumane acts and cruel treatment, as well as other war crimes and crimes against humanity, can be committed using the modalities of war,[125] and that the case-law shows that the victims need not be in the hands or power of a party to the conflict.[126]

(b) Discussion

80. With regard to the Gotovina Defence challenge that "cruel treatment" charged under Article 3 of the Statute only applies to persons within the power of a party to the conflict, the Trial Chamber recalls that in relation to charges of murder, torture and cruel treatment based on Common Article 3, the only requirement concerning the status of the victims is that they were taking no active part in the hostilities at the time the crime was committed.[127] Cruel treatment as a violation of the laws or customs of war has been defined by the Appeals Chamber as "an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity[...] committed against a person taking no active part in the hostilities."[128]

81. The Appeals Chamber in *Čelebići* examined the question of "wilfully causing great suffering or serious injury to body or health" under Article 2 and "cruel treatment" under Articles 3 of the Statute, and held that:

> The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. [129]

Similarly, in relation to "inhuman treatment" under Article 2 and "cruel treatment" under Article 3, the Appeals Chamber held:

> Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its

[125] Prosecution Response to Allegations of Concession, para. 23, *citing* Prosecutor v. Pavle Strugar, Case No. IT- 01-42-T, Judgement, 31 January 2005 ("*Strugar* Trial Judgement"), paras 262-276; *Naletelić* Trial Judgement, paras 298-303; *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-T, Judgement, 14 December 2003 ("*Galić* Trial Judgement"), paras 598-599 and *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), paras 154-159.
[126] Prosecution Response to Allegations of Concession, para. 25.
[127] *Čelebići* Appeal Judgement, para. 420; *Tadić* Trial Judgement, para. 615.
[128] *Blaskić* Appeal Judgement, para. 595 quoting *Čelebići* Appeal Judgement, paras. 424, 426.
[129] *Čelebići* Appeal Judgement, para. 424. Cruel treatment as a violation of the laws or customs of war is defined as: an intentional act or omission [...]which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, committed against a person taking no active part in the hostilities. *Blaškić* Appeal Judgement, para. 595. See also e.g. *Strugar* Trial Judgment, 31 January 2005, paras 260-276, where the Trial Chamber following Čelebići, found that shelling of Dubrovnik by the JNA causing serious injuries to civilians amounted to cruel treatment under Article 3.

counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.[130]

82. Furthermore, the Trial Chamber notes that in the jurisprudence of the Tribunal Article 3 has been applied to persons who were not "in the hands" of the perpetrators.[131]

83. In light of the above, the Trial Chamber rejects the Defence arguments on this ground.

D. Disposition

84. For the foregoing reasons, after having heard and considered the written and oral arguments of the Parties, pursuant to Rule 72 of the Rules, the Trial Chamber:

i. **Dismisses** the First Gotovina Preliminary Motion and the Second Gotovina Preliminary Motion; and

ii. **Dismisses** the Joint Preliminary Motion of Ivan Čermak and Mladen Markač.

Done in English and French, the English text being authoritative.

Judge Alphons Orie
Presiding

Dated this nineteenth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

[130] *Čelebići* Appeal Judgement, para. 426.
[131] *See e.g. Strugar* Trial Judgement, paras 262-276; *Galić* Trial Judgement, paras 595-597. In relation to the Defence arguments regarding Hague Law and Geneva Law, the Trial Chamber notes the ICJ Advisory Opinion on the Use of Nuclear Weapons that "[t]hese two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law", para. 75.