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UNITED NATIONS

	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	Case No.	IT-06-90-AR72.1
		Date:	6 June 2007
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Date: **6 June 2007**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

Public

DECISION ON ANTE GOTOVINA'S INTERLOCUTORY APPEAL AGAINST DECISION ON SEVERAL MOTIONS CHALLENGING JURISDICTION

The Office of the Prosecutor:

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Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
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1. **THE APPEALS 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 ("Appeals Chamber" and "International Tribunal", respectively) is seized of an interlocutory appeal filed on 3 April 2007 by Ante Gotovina ("Interlocutory Appeal" and "Appellant", respectively) pursuant to Rule 72(B)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") against Trial Chamber I's "Decision on Several Motions Challenging Jurisdiction" rendered on 19 March 2007 ("Trial Chamber" and "Impugned Decision", respectively).[1] The Appeals Chamber is further seized of a motion filed by the Appellant requesting that he be allowed to bring oral arguments before the Chamber on his Interlocutory Appeal.[2]

I. BACKGROUND

2. On 17 July 2006, the Trial Chamber granted, in part, the Prosecution's motion to amend the indictment against the Appellant and the indictment against Ivan Čermak ("Čermak") and Mladen Markač ("Markač") and granted the Prosecution's request to join the Appellant's case[3] with that of Čermak and Markač[4] pursuant to Rule 48 of the Rules.[5] A joint indictment was subsequently filed by the Prosecution on 24 July 2006.[6] On 25 October 2006, the Appeals Chamber affirmed the Trial Chamber's Decision on Joinder.[7] On 6 March 2007, pursuant to Trial Chamber order,[8] the Prosecution filed a reduced version of the joint indictment pursuant to Rule 73*bis*(D) of the Rules ("Joint Indictment").[9]

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[1] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007.
[2] Defendant Ante Gotovina's Motion Requesting Oral Argument on the Interlocutory Appeal Challenging Jurisdiction, 20 April 2007 ("Motion for Oral Argument").
[3] Case No. IT-01-45-PT.
[4] Case No. IT-03-73-PT.
[5] *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, and *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 ("Decision on Joinder").
[6] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Joinder Indictment, 24 July 2006 ("First Joint Indictment").
[7] *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-AR73.1, and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006.
[8] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Order Pursuant to Rule 73*bis*(D) to Reduce the Indictment, 21 February 2007, pp. 3-4.
[9] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Joinder Indictment, 6 March 2007. Although the Impugned Decision was made with respect to challenges to the First Joint Indictment, the Appeals Chamber will consider the most recent modified Joint Indictment when disposing of this Interlocutory Appeal in light of the fact that the provisions at issue are identical in both versions of the Indictment, unless otherwise noted. The Appeals Chamber notes that the Prosecution has filed a further proposed Amended Joinder Indictment before the Trial Chamber on 17 May 2007; however, as of the date of this decision, the proposed indictment is still pending before that Chamber.

3. In the Joint Indictment, the Appellant is charged with persecutions on political, racial and religious grounds, deportation and forcible transfer, murder and inhumane acts as crimes against humanity under Article 5 of the Statute of the International Tribunal ("Statute") (Counts 1, 2, 3, 6, 8),[10] and plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity, murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute (Counts 4, 5, 7, 9).[11] The crimes enumerated were allegedly committed in or on the territory of the former Yugoslavia and in particular in the Krajina region of the Republic of Croatia, from at least July 1995 to on or about 30 September 1995.[12]

4. The Appellant challenged the jurisdiction of the International Tribunal by way of two preliminary motions filed on 28 April 2006[13] and 18 January 2007[14] ("Preliminary Motions") against the First Joint Indictment, which were dismissed by the Trial Chamber in the Impugned Decision.

5. In this Interlocutory Appeal, the Appellant raises four grounds of appeal pursuant to Rule 72(D) of the Rules to demonstrate that the Trial Chamber erred in law and in fact in the Impugned Decision. The Appellant submits that it would occasion a miscarriage of justice if the Appeals Chamber failed to reverse the Impugned Decision on these grounds[15] and requests the Appeals Chamber to strike portions of the Joint Indictment as appropriate.[16] The Prosecution responded on 13 April 2007, claiming that the appeal does not raise proper jurisdictional challenges and should therefore be dismissed.[17] The Prosecution further contests each of the four grounds raised by the Appellant.[18] The Appellant replied on 17 April 2007.[19]

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[10] The Appellant is charged with Article 7(1) and 7(3) responsibility for these crimes.
[11] *Id.*
[12] Joint Indictment, paras. 37, 55. The First Joint Indictment alleged from at least July 1995 to on or about 15 November 1995. *See* First Joint Indictment, para. 37.
[13] *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, 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*), 28 April 2006.
[14] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007.
[15] Interlocutory Appeal, paras. 2-5.
[16] *Id.*, para. 91.
[17] Prosecution Response to Interlocutory Appeal Challenging Jurisdiction, 13 April 2007 ("Response"), paras. 2, 9-16.
[18] *Id.*, paras. 3-8, 17-74.
[19] Defendant Ante Gotovina's Reply to Prosecution Response to Interlocutory Appeal Challenging Jurisdiction, 17 April 2007 ("Reply").

6. On 20 April 2007, the Appellant filed his Motion for Oral Argument with respect to this Interlocutory Appeal and on 24 April 2007, the Prosecution filed a response opposing the Motion.[20]

II. STANDARD OF REVIEW

7. When reviewing a Trial Chamber's decision on jurisdiction under Rule 72(B)(i) of the Rules, the Appeals Chamber will only reverse the decision "if the Trial Chamber committed a specific error of law or fact invalidating the decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner."[21] In reaching its decision, it is incumbent upon a Trial Chamber "to provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision."[22]

III. DISCUSSION

A. Motion for Oral Hearing

8. As a preliminary matter, the Appeals Chamber is not persuaded by the Appellant's submission in his Motion for Oral Hearing that oral argument on this Interlocutory Appeal "is exceptionally justified because of the far-reaching significance of the questions raised both for General Gotovina's defence as well as the jurisprudence of the Tribunal."[23] The Appeals Chamber has considered the parties' extensive submissions in the written pleadings and finds that they sufficiently appraise the Chamber of the issues to be disposed of in this Interlocutory Appeal such that oral argument is unnecessary for reaching its decision.

B. Interlocutory Appeal

9. Turning to the Interlocutory Appeal, the Appeals Chamber must first consider whether the Appellant raises proper jurisdictional challenges pursuant to Rule 72 of the Rules. The Appeals Chamber recalls that interlocutory appeals on jurisdiction lie as of right

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[20] Prosecution Response to Gotovina's Motion for Oral Hearing on Interlocutory Appeal Challenging Jurisdiction, 24 April 2007.
[21] *Prosecutor v. Jadranko Prlić et. al*, Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005 ("*Prlić et al.* Interlocutory Appeal on Jurisdiction"), para. 11 quoting *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10.
[22] *Prlić et al.* Interlocutory Appeal on Jurisdiction, para. 11, with reference to *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 22.
[23] Motion for Oral Argument, para. 4.

under Rule 72(B)(i) only where they challenge 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 ("personal jurisdiction"); (ii) the territories indicated in Articles 1, 8 and 9 of the Statute ("territorial jurisdiction"); (iii) the period indicated in Articles 1, 8 and 9 of the Statute ("temporal jurisdiction"); or (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute ("subject-matter jurisdiction").[24]

10. The Appellant claims that his four grounds of appeal appropriately challenge the jurisdiction of the International Tribunal because they demonstrate that the Joint Indictment "violates *nullem* [*sic*] *crimen sine lege* by expanding definitions of crimes beyond customary law, which is the basis for the Tribunal's jurisdiction *ratione materiae*."[25] The Prosecution responds by arguing that none of these grounds bring questions of jurisdiction as defined under Rule 72(D) of the International Tribunal's Rules. Rather, "while accepting that the Tribunal has jurisdiction over the violations charged in the Indictment, Gotovina seeks to modify the accepted legal definitions of these crimes, to challenge the sufficiency of the pleading in the Indictment and to attack the sufficiency of the evidence to be adduced at trial."[26] The Appeals Chamber turns to consider each of the Appellant's four grounds to determine whether they in fact qualify as jurisdictional challenges within the meaning of Rule 72(D) of the Rules.

C. First Ground of Appeal: Alleged Error of Law in Relation to Charges of Deportation and Forcible Transfer under Article 5(d) and (i) of the Statute

11. First, the Appellant submits that with respect to Counts 1-3 of the Joint Indictment, the Trial Chamber erred in law by expanding the *actus reus* of deportation and forcible transfer as crimes against humanity under Article 5 of the Statute when it failed to find that there is an "occupied territory" requirement pursuant to Article 49(1) of Geneva Convention IV and Article 17(1) of Protocol II to the Geneva Conventions for these crimes.[27] In his view, the Trial Chamber erred in failing to strike the Prosecution's definition of deportation and forcible transfer in the Joint Indictment to the extent that the charges "encompass alleged conduct of hostilities violations prior to actual control of the 'Krajina' by Croatian forces". He argues such a definition is contrary to customary law, violates the principle of *nullum*

[24] *See* Rule 72(D) of the Rules.
[25] Reply, paras. 1, 4.
[26] Response, para. 11.
[27] Interlocutory Appeal, paras. 2, 21-30, 52-72.

crimen sine lege and falls outside of the International Tribunal's subject-matter jurisdiction within the meaning of Rule 72(D)(iv) of the Rules.[28]

12. In support of this ground, the Appellant states that the Trial Chamber erred by holding that in armed conflict, the *actus reus* for these crimes "differs when charged as war crimes rather than crimes against humanity"[29] and in concluding that "the laws of war do not generally form a *lex specialis* to the *actus reus* of crimes against humanity."[30] He argues that the Trial Chamber "disregards the close relationship between the laws of war and crimes against humanity in ICTY jurisprudence, as well as the fundamental customary law distinction between Geneva and Hague Law" and, in so doing, leaves open "the possibility that General Gotovina may prove his innocence under the laws of war but still be found guilty by reclassification of the same conduct as crimes against humanity."[31]

13. The Appellant further notes that under paragraphs 29 and 35 of the Joint Indictment, the allegations therein relate solely to ruses of war or to the conduct of hostilities prior to or during Operation Storm and not to deportation or forcible transfer of persons from territory under the authority of Croatian forces.[32] He argues that because of the "occupied territory requirement" under customary law for these crimes enumerated under Article 5 of the Statute, the Joint Indictment can only charge them "with respect to displacement of persons in 'Krajina' *after* it was placed under Croatian authority and not prior to or during Operation Storm as alleged."[33] The Appellant contends that, as a consequence of the Trial Chamber's "unprecedented view", he must now defend against deportation and forcible transfer charged in Counts 1-3 of the Joint Indictment "based on a novel legal standard that is wholly inconsistent with well-established customary law, conflates Geneva and Hague Law, and leaves open the possibility of his conviction for crimes against humanity even if he can establish his compliance with the laws of war."[34] In addition, he claims that in the absence of a reasoned opinion by the Trial Chamber as to why the "occupied territory" requirement under Article 49(1) of Geneva Convention IV and Article 17(1) of Protocol II to the Geneva Conventions is inapplicable, the Trial Chamber has committed an error of law invalidating its decision."[35]

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[28] *Id.*, para. 64.
[29] *Id.*, para. 21.
[30] *Id.*, para. 37.
[31] *Id.*, paras. 21-22,
[32] *Id.*, para. 25.
[33] *Id.*, para. 28.
[34] *Id.*, para. 29.
[35] *Id.*, para. 22.

14. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber considered that the Appellant failed to cite any authority in support of his arguments with respect to the definitions of deportation and forcible transfer as crimes against humanity under Article 5 of the Statute.[36] Furthermore, the Trial Chamber noted, with reference to the definitions of the *actus reus* for the crimes of deportation and forcible transfer set out in the *Stakić* Appeals Judgement,[37] that there is nothing in the jurisprudence of the International Tribunal that supports the Appellant's contention that "occupation" is an element for these crimes.[38] On these bases, the Trial Chamber rejected this argument.

15. The Appeals Chamber finds that the Appellant fails to raise a proper jurisdictional challenge pursuant to Rule 72(D)(iv) of the Rules under his first ground of appeal or to demonstrate that the Trial Chamber erred in dismissing his argument as to "occupied territory" being a necessary requirement for the crimes of deportation and forcible transfer as crimes against humanity. Here, the Appellant is not contesting that the International Tribunal has jurisdiction over these crimes under Article 5 of the Statute, which are charged in the Joint Indictment according to their definitions and elements under customary international law as set out in the jurisprudence of the International Tribunal.[39] Rather, he argues that the interpretation of the definition for the *actus reus* of these crimes should be narrow and limited to displacement from occupied territory. As such, the Appellant may bring these arguments before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the Tribunal's lack of subject-matter jurisdiction.[40]

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[36] Impugned Decision, para. 54.
[37] *Prosecutor v. Milomir Stakić*, Case No. IT-97-A, Judgement, 22 March 2006 ("*Stakić* Appeals Judgement").
[38] Impugned Decision, para. 55 citing the *Stakić* Appeals Judgement, paras. 278, 317.
[39] *See Stakić* Appeals Judgement, paras. 278-303, 317.
[40] *See Prlić et al.* Decision on Jurisdiction, para. 13, which states:

> In his Appeal, the Appellant says that he accepts that the crimes charged and the modes of liability alleged in the Indictment do fall within the jurisdiction of the Tribunal but questions whether they 'nevertheless could be misdefined and misapplied in the particular Indictment and thus transform into some other crimes and/or forms of liability falling outside the Tribunal's jurisdiction'. The Appellant's complaint therefore is not whether the Tribunal has jurisdiction over the crimes and modes of liability alleged [. . .].

See also Prosecutor v. Delalić et al., Case No. IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), 6 December 1996 at para. 27 ("*Delalić et al.* Decision") (holding that "Articles 2, 3, 4 and 5 of the Statute are shorthand for the corresponding norms of international humanitarian law, and if there is any dispute as to those norms, that is a matter for trial not for pre-trial objections to the form of the Indictment.").

D. Second Ground of Appeal: Alleged Error of Law in Relation to Charges of Cruel Treatment and Inhumane Acts under Articles 3 and 5 of the Statute

16. Under his second ground of appeal, with reference to Counts 8 and 9 of the Joint Indictment, which allege inhumane acts as a crime against humanity under Article 5 of the Statute and cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute respectively, the Appellant contends that the Trial Chamber erred in law in failing to find that for crimes based on Common Article 3 of the Geneva Conventions, there is a requirement that such acts be perpetrated against "persons in the power of a party to the conflict".[41] The Appellant notes that one of the fundamental requirements for grave breaches provisions under Article 2 of the Statute is that "protected persons" be "in the hands of" a party to the conflict.[42] He relies upon the Appeals Judgement in the *Čelebići* case[43] to claim that the element of "persons taking no active part in the hostilities" found in Common Article 3 "may be assimilated to persons in the hands of a party to the conflict who are not protected persons *stricto sensu*" under Article 4 of Geneva Convention IV because the "broader rules of international conflict in the Convention clearly exclude conduct of hostilities violations [and] it follows that the narrower scope of Common Article 3 cannot encompass Hague Law Violations."[44] In his view, the Appeals Chamber in *Čelebići* clearly indicated that "persons taking no active part in the hostilities under Common Article 3 are the substantial equivalent of protected persons under Article 2."[45] Therefore, according to the Appellant, the Trial Chamber erroneously held that "Article 3 common to the 1949 Geneva Conventions in Counts 8-9 may encompass conduct of hostilities violations under Hague Law, in violation of customary law and the *nullum crimen sine lege* principle, and thus falling outside the Tribunal's jurisdiction *ratione materiae* under Rule 72(D)(iv)."[46]

17. In the Impugned Decision, the Trial Chamber noted that under established jurisprudence, for alleged cruel treatment based on Common Article 3 to the Geneva Conventions, "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."[47] The Trial Chamber also noted that in the International Tribunal's jurisprudence on cumulative convictions found in the *Čelebići* Appeals Judgement, it was held that cruel treatment under

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[41] Interlocutory Appeal, paras. 73, 77.
[42] *Id.*, para. 75.
[43] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement").
[44] Interlocutory Appeal, para. 75.
[45] *Id.*, para. 76 (internal quote marks omitted).
[46] *Id.*, para. 78.
[47] Impugned Decision, para. 80.

Article 3 of the Statute does not contain an element found in the Article 2 crimes of "wilfully causing great suffering or serious injury to body or health" and "inhuman treatment"—the protected persons status of the victim.[48] Finally, the Trial Chamber considered that in the jurisprudence of the International Tribunal, Article 3 violations have been applied to persons not in the hands of the perpetrators and, on these bases, rejected the Appellant's claim that violations charged under Common Article 3 of the Geneva Conventions apply only with respect to victims shown to have been in the power of a party to the conflict.[49]

18. The Appeals Chamber considers that the Appellant's second ground of appeal fails to raise a proper jurisdictional challenge under Rule 72(D)(iv) of the Rules. The Appellant does not dispute that the International Tribunal has jurisdiction over crimes charged under Articles 3 and 5 of the Statute as violations of Common Article 3 of the Geneva Conventions. Furthermore, he does not dispute that "committed against persons taking no active part in the hostilities" is a proper element of such crimes under customary international law. Rather, he contests the definition of that element and argues that the jurisprudence of the International Tribunal demonstrates that it should be interpreted narrowly to require that such persons be shown to be in the hands of a party to the conflict akin to the "protected person" element for crimes alleged to be grave breaches of the Geneva Conventions under Article 2 of the Statute. Such arguments are properly raised on the merits at trial[50] and do not demonstrate that the International Tribunal lacks subject-matter jurisdiction over the crimes and the elements of those crimes under Counts 8 and 9 of the Joint Indictment. Therefore, the Appellant's second ground of appeal is dismissed.

E. Third Ground of Appeal: Alleged Error of Fact in Failing to Hold that the Joint Indictment Pleads *Debellatio* on 7 August 1995

19. The Appellant's third ground of appeal alleges that the Trial Chamber erred by failing to weigh considerations in a reasonable manner when it declined to find that the facts as pleaded in the Indictment constitute *debellatio* or "the end of an armed conflict which results

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[48] *Id.*, para. 81.
[49] *Id.*, paras. 82, 83.
[50] *Cf. Delalić et al.* Decision at para. 27 (holding that "Articles 2, 3, 4 and 5 of the Statute are shorthand for the corresponding norms of international humanitarian law, and if there is any dispute as to those norms, that is a matter for trial not for pre-trial objections to the form of the Indictment."). *See e.g., Prosecutor v. Anto Furundžija,* Case No. IT-05-17/1-T, Judgement, 10 December 1998 at paras. 172-186 ("*Furundžija* Trial Judgement") (wherein the Trial Chamber further defines the elements of rape as a crime against humanity under Article 5(g) of the Statute as found in customary international law and broadens its definition); *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 at paras. 436-460 (expanding upon the definition of the element "by coercion or force or threat of force against the victim or a third person" for rape as a crime against humanity under Article 5(g) of the Statute as established in the *Furundžija* Trial Judgement).

in the occupation of the whole of the enemy's territory and the cessation of all hostilities" on 7 August 1995.[51] The Appellant submits that, as a consequence, the Trial Chamber erred in failing to hold that "all alleged conduct after that date falls outside the Tribunal's jurisdiction *ratione materiae*" within the meaning of Rule 72(D)(iv) of the Rules.[52]

20. In the Impugned Decision, the Trial Chamber noted that paragraph 28 of the Joint Indictment alleges that Operation Storm was "successfully completed" on 7 August 1995 with follow-up actions continuing until 15 November 1995. It further noted that paragraph 33 of the Joint Indictment states that after "minimal" SVK resistance had been "overcome" an ethnic cleansing campaign was implemented.[53] The Trial Chamber declined to address the Appellant's contentions that these provisions are inconsistent with paragraph 56 of the Joint Indictment, which alleges that a state of armed conflict existed at all times with respect to the crimes alleged therein, and that the International Tribunal lacks jurisdiction over the acts allegedly committed after the end of Operation Storm.[54] Rather, the Trial Chamber rejected the Appellant's arguments on grounds that they go to the question of when the armed conflict ceased to exist, which is a factual issue to be determined at trial.[55]

21. The Appeals Chamber finds that the Appellant's third ground of appeal fails to raise a proper jurisdictional objection within the meaning of Rule 72(D)(iv) of the Rules and to demonstrate that the Trial Chamber erred in rejecting it. Clearly, the Joint Indictment provides that a state of armed conflict existed at all times with respect to the violations of international humanitarian law alleged therein. Whether an armed conflict actually existed post-Operation Storm is a factual determination to be made at trial. It was well within the discretion of the Trial Chamber to consider that determining this issue pre-trial is premature and can only be decided upon hearing and weighing all of the evidence.[56] To the extent that the Appellant claims that the provisions of the Joint Indictment on this issue are inconsistent or do "not plead any facts supporting the existence of an armed conflict after Operation

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[51] Interlocutory Appeal, paras. 79, 81, 84.
[52] *Id.*, para. 84.
[53] Impugned Decision, para. 67.
[54] *Id.*
[55] *Id.*, para. 75 and fn. 117. *See also* paras. 29, 42.
[56] *See Prosecutor v. Ljube Boškoski and Johan Tarčulovski,* Case No. IT-04-82-AR72.1, Decision on Interlocutory Appeal on Jurisdiction, 22 July 2005, paras. 11-13. *Cf. Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 8 December 2005, para. 11(holding that "[t]o the extent that the Appellant's argument concerns not the sufficiency of the indictment, but the sufficiency of the supporting evidence, the Appeals Chamber agrees with the Trial Chamber that this is an issue to be resolved at trial."); *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para. 14 (holding that whether the Prosecution can establish a connection between alleged Article 5 crimes in Vojvodina and an armed conflict in Croatia and/or Bosnia and Herzegovina is a question of fact to be determined at trial).

Storm",[57] these arguments may constitute allegations of defects in the form of the indictment, which may be challenged under Rule 72(A)(ii) of the Rules.[58] Therefore, on these bases, the Appellant's third ground of appeal is dismissed.

F. Fourth Ground of Appeal: Alleged Error of Law in Relation to the *Mens Rea* of Third Category Joint Criminal Enterprise

22. Finally, under his fourth ground of appeal, the Appellant claims that the Trial Chamber erred in law when it confirmed that the applicable *mens rea* for third category or the extended form of joint criminal enterprise ("JCE") liability is *dolus eventualis* but failed to strike references to "possible consequence" in paragraphs 12 and 43 of the Joint Indictment.[59] The Appellant contends that "[t]he Trial Chamber did not base its decision on a reasonable interpretation of *Tadić*" which does not incorporate the "possible consequence" threshold but rather requires that for crimes committed that were not within the purpose of the JCE, they must have been a "predictable consequence" of the JCE.[60] According to the Appellant, this "lower threshold substantively expands the scope of JCE in violation of the *nullem* [*sic*] *crimen sine lege* and *nullem* [*sic*] *crimen sine culpa* principles and thus falls outside the Tribunal's jurisdiction within the ambit of Rule 72(D)(i)."[61]

23. The Trial Chamber noted in the Impugned Decision that it is clearly established in the jurisprudence of the International Tribunal that JCE is a mode of liability over which the International Tribunal has jurisdiction.[62] It then considered that the phrase "this possible consequence" in paragraph 43 of the Joint Indictment, when read in the context of the paragraph as a whole, clearly referred to the "natural and foreseeable consequences" part of JCE liability and falls squarely within the definition of JCE as set out in *Tadić* and subsequent judgements.[63] It therefore concluded that, contrary to the Appellant's claim, the elements of JCE as set out in the Joint Indictment, including the subjective element for third category JCE, fall within the accepted ambit of Article 7(1) of the Statute as set out in the settled jurisprudence of the Tribunal.[64] Furthermore, the Trial Chamber held that the

[57] Reply, para. 11.
[58] *Cf. Prlić et al.* Decision on Jurisdiction, para. 13.
[59] Interlocutory Appeal, para. 85.
[60] *Id.*, para. 88.
[61] *Id.*, para. 90.
[62] Impugned Decision, para. 20 & fn. 19.
[63] *Id.*, para. 22.
[64] *Id.*

Appellant's arguments with respect "to the contours of this mode of liability belong to the sphere of arguments on the merits and should be raised at that stage."[65]

24. The Appeals Chamber considers that the Appellant fails to demonstrate that his fourth ground of appeal raises a proper jurisdictional objection pursuant to Rule 72(D)(i) of the Rules. Here, the Appellant does not contest the International Tribunal's jurisdiction over JCE as a mode of liability under Article 7(1) of the Statute, which, as the Trial Chamber noted, is clearly established in the jurisprudence of the International Tribunal.[66] In the Joint Indictment, the Prosecution alleges JCE and its elements, as they are set out in the Tribunal's jurisprudence, and the Appellant merely challenges the definition and interpretation of a particular element as established in cases subsequent to the *Tadić* Appeals Judgement.[67] The Appeals Chamber agrees with the Trial Chamber that such a challenge is to be considered on the merits at trial.[68] To the extent that the Appellant submits that the Prosecution has failed to plead an element of this mode of liability properly, such an argument goes to pleading practice and the form of the indictment and is not a challenge to jurisdiction.[69] Accordingly, the Appellant's fourth ground of appeal is dismissed.

IV. DISPOSITION

25. On the basis of the foregoing, this Interlocutory Appeal and the Motion for Oral Hearing are **DISMISSED**.

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[65] *Id.*

[66] *See* Impugned Decision, fn. 19.

[67] *See Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 at para. 204 (using the phrase "predictable consequence"). *But see Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 at para. 101 (using the phrases "might be" and "possible consequence"); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 at para. 33 ("*Blaškić* Appeals Judgement") (referring to "possible consequence"); and *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 at paras. 65, 87 (referring to "might be perpetrated" and "possible consequence").

[68] *See* Impugned Decision, para. 22 & fn. 25 citing to *Prosecutor v. Milan Milutinović et al.,* Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 23 ("[l]ike challenges concerning the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial."). The Trial Chamber also cited to the *Blaškić* Appeals Judgement at paras. 34-42 wherein the Appeals Chamber considered whether the Trial Chamber's articulations of the definition for the mental element of "ordering" pursuant to Article 7(1) of the Statute were in error.

[69] *See Prlić et al.* Decision on Jurisdiction, para. 13, which states:

> In his Appeal, the Appellant says that he accepts that the crimes charged and the modes of liability alleged in the Indictment do fall within the jurisdiction of the Tribunal but questions whether they 'nevertheless could be misdefined and misapplied in the particular Indictment and thus transform into some other crimes and/or forms of liability falling outside the Tribunal's jurisdiction'. The Appellant's complaint therefore is not whether the Tribunal has jurisdiction over the crimes and modes of liability alleged, but whether the Prosecution has pleaded those crimes and modes of liability properly. The Trial Chamber did not err in determining that this argument was addressed in its Decision on Defence

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

Dated this 6th day of June 2007,

At The Hague,

The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

Motions on the Form of the Indictment. Accordingly, the Trial Chamber was not required to address this argument in the Impugned Decision. (Footnotes omitted).