PROSECUTOR v. ANTE GOTOVINA & MLADEN MARKAC, APPEALS CHAMBER JUDGMENT: HUMAN RIGHTS LAWYERS: LOOK AWAY NOW!

– Dr. Miroslav Baros[1]

I. Introduction

This article aims to provide a critical analysis of the recent judgment by the Appeals Chamber of the ICTY in Prosecutor v Ante Gotovina & Mladen Markac[2]. It will be argued that the judgment is flawed at almost every level. It contradicts the previous practice of the Tribunal in the sense that it completely discarded determination of facts by the Trial Chamber and it falls below the standard of review as required by Article 25 of the Tribunal's Statute because it neither corrected an error of law made by the Trial Chamber nor did it determine different factual situation that may merit the reversal. In terms of consequences for the parties involved what the judgment unfortunately managed to achieve was to reverse the processes of reconciliation among the parties to the Balkan conflicts that were taking place prior to the judgment. The vitriolic rhetoric that is following the judgment between to the most relevant parties, Croatia and Serbia is reminiscent of the situation in early 1990s that led to the bloody conflict. The judgment has in fact caused so much controversy that the UN General Assembly decided to dedicate a session in April 2013 on the role of ad hoc international criminal tribunals in effectuating reconciliation among former warring factions.

In most general terms the Appeals Chamber by this judgment instilled a high degree of inconsistency in its activism and scrutiny of Trial Chamber's legal and factual determinations. A brief comparative analysis will be provided to demonstrate the point. Whilst it rather laconically rejected the totality of evidence in the Gotovina and Markac case where it in essence turned a blind eye in relation to the appellants' proved responsibility by the Trial Chamber, the Appeals Chamber exhibited an admirable level of judicial activism in coming to an opposite conclusion in Prosecutor v. Mile Mrkšić and Veselin Šljivančanin[3] for example where it found additional legal reasons for increasing the sentence handed out by the Trial Chamber. The Appeals Chamber has therefore demonstrated a conspicuously different standard in its treatment of the Trial Chamber's legal and factual determination.

II. The Case Of The Appeals Chamber's Judgment In Gotovina And Markac: A Devastating Blow To Justice And Reconciliation

This case concerns events that occurred from at least July 1995 to about 30 September 1995 in the Krajina region of Croatia. During this period, Croatian leaders and officials initiated

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[2] Prosecutor v. Ante Gotovina, Ivan Cermak, and Mladen Markac, Case No. IT-06-90 - T, 2012 Appeals Chamber, http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgment.pdf ("Appeals Judgment").

[3] Prosecutor v Mile Mrksic and Veselin Sljivancanin, Case No. IT-95-13/1-A, Judgment, 2009.

"Operation Storm", a military action aiming to take control of territory in the Krajina region.

According to a unanimous Trial Chamber's decision Mr. Gotovina shared the objective of and significantly contributed to a Joint Criminal Enterprise (JCE), whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering unlawful artillery attacks on Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed by his subordinates against Serb civilians in the Krajina. The Trial Chamber found Mr. Gotovina guilty, pursuant to both the first and third forms of JCE, of crimes against humanity and of violations of the laws or customs of war. He was sentenced to 24 years of imprisonment. Mr. Markac was the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia. According to the Trial Chamber Mr. Markac shared the objective of and significantly contributed to a JCE, whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering an unlawful artillery attack on Gracac and by creating a climate of impunity through his failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians. The Trial Chamber found Mr. Markac guilty, pursuant to the first and third forms of JCE, of crimes against humanity and violations of the laws or customs of war. He was sentenced to 18 years of imprisonment.[4]

The appellants Mr Gotovina and Mr Markac submitted four and eight grounds of appeal respectively and requested that the Appeals Chamber overturns convictions in their entirety, which the Appeals Chamber has done indeed by three votes to two in November 2012.

III. The Appeals Chamber's Legal Reasoning: A Departure From Previous Practice And Rules

The Appeals Chamber's decision is problematic for a number of reasons.

First of all the Appeals Chamber misapplied the standard of appellate review pursuant to Article 25 of the Statute of the Tribunal; it found that a standard applied by the Trial Chamber was wrong but it did not offer any alternative although it was required to do so. The Appeals Chamber is under duty to formulate a correct legal standard if it finds an error of law in the trial judgment arising from the application of an incorrect legal standard.[5]

The common law procedures that the ICTY adopted in its jurisprudence require the Appeals Chamber to correct errors of law and show a high degree of deference to Trial Chamber's determination of facts especially in the present case where the Trial Judgment contains 1.300 pages and an assessment of a variety of evidence by expert witnesses. In other words, Trial Chamber's determination of facts could only be disturbed if no reasonable trier of fact could have made the relevant findings. Consequently, a review should not amount a new trial.

[4] Prosecutor v. Ante Gotovina, Ivan Cermak, and Mladen Markac, Case No. IT-06-90-T, 2011 ("Trial Judgment") at: http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgment_vol1.pdf and http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgment_vol2.pdf.

[5] Supra 1 at 12.

The Appeals Chamber too narrowly interpreted the overall evidence of the Trial Chamber and concentrated almost exclusively on the so-called 200 Metre Standard in its reasoning and reversing the Trial Chamber's judgment. The Trial Chamber, in assessing the shelling by the Croatian artillery of the four Serbian towns in the Krajina region (populated by Serbs for centuries), adopted a standard that any shell which landed further than 200 metres from a legitimate military target should be deemed an indiscriminate and unlawful attack. It should be said that the Appeals Chamber unanimously rejected this standard because it was not supported by the evidence in the trial record of the Tribunal and it was not given adequate reasons for by the Trial Chamber. In this respect the Appeals Chamber was arguably correct in reaching that conclusion.

However, what subsequently happened was quite astonishing: the Appeals Chamber failed to correct the apparent legal (of factual) error by the Trial Chamber because it did not provide or even suggest a correct legal standard for assessing whether shelling was indiscriminate or not. It could have said for example that it should be 400 or 800 or 0 metres, but it remained silent on the issue. This failure would not on its own be problematic had it not produced very significant consequences. The Appeals Chamber not only rejected the Trial Chamber's standard but it found the appellant not guilty on all accounts! It was essentially saying: "Your standard is not good; I do not have a better one and consequently the artillery attacks were not disproportionate". The main problem with this line of reasoning is that on the basis of rejecting the 200 Metres Standard the Appeals Chamber rejected all other evidence provided by the Trial Chamber, apparently treating the failure to provide reasonable explanation for the 200 Metres Standard as a fatal error which invalidated all other evidence, even those that were totally unrelated to shelling. Although unanimous, in the present author's view this rejection of the 200 Metre Standard may have catastrophic consequences; in essence it questions why should hitting targets by artillery attacks beyond any particular limit be deemed unlawful? Dare we imagine the implications of this reasoning in the context of the protracted conflict between Israel and Palestinian factions in the Middle East with the increased use of rocket exchanges between the parties?

It should not be forgotten that the Trial Chamber did not base its findings exclusively on the 200 Metre Standard. It also found that the forcible displacement by members of the Croatian military forces and Special Police of

[…] persons in August 1995 constituted deportation." These persons were victims of, or witnessed, crimes – including cruel treatment, inhumane acts, detention, plunder, destruction, and murder – committed by members of the Croatian military forces or Special Police after 5 August 1995." The Trial Chamber considered that "these crimes caused duress and fear of violence in their victims and those who witnessed them, such that the crimes created an environment in which these persons had no choice but to leave." The Trial Chamber found that these crimes were committed with the intention to discriminate on political, racial, or religious grounds and therefore that *"the deportation, which was brought about by the commission of the aforementioned crimes, was also committed on discriminatory grounds" and constituted one of the underlying acts of*

persecutions as a crime against humanity."[6]

The Appeals Chamber seemed to be unconvinced by the evidence provided by the Trial Chamber of racist policies and clear intentions to forcibly and permanently remove Serb population from the Krajina region by the late president of Croatia expressed in his speech:

"Up until […] when it has been captured by Turkish Ottoman conquerors and together with them the ones who stayed till yesterday in our Croatian Knin. But today it is Croatian Knin and never again it will go back to what was before, when they spread cancer which has been destroying Croatian national being in the middle of Croatia and didn't allow Croatian people to be truly alone on it's [sic] own, that Croatia becomes capable of being independent and sovereign state. […]They were gone in a few days as if they had never been here, as I said […] They did not even have time to collect their rotten money and dirty underwear."[7]

The judgment, by finding that the movement of people subsequent to Operation Storm in August 1995 does not constitute forced removal or deportation will also seriously impede if not bring to a halt the return of refugees to their homes by implicit conclusion that more than 200.000 people left the region voluntarily!

Secondly, according to the Appeals Chamber another crucial piece of evidence relied on by the Trial Chamber was insufficient to determine responsibility for unlawful targeting against the Four Towns (Knin, Benkovac, Obrovac and Gracac).[8] The so-called 2 August Order directed Croatian Army units to organize:

"along the main attack axes, focus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centres, artillery firing positions and by putting the towns of… Knin, Benkovac, Obrovac and Gračac under artillery fire" (emphasis added).

The Order therefore specifically required the Croatian Army to put specific towns under artillery fire, instructing them to carry out indiscriminate attacks, which clearly amounts to grave breaches under Article 50 of the Geneva Convention.[9] The Appeals Chamber's conclusion that the Order did not explicitly order the shelling of unlawful targets and that it could not on its own constitute evidence that such attacks took place is bizarre.[10]

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6 Trial Judgment, para. 1756; see also paras. 1742 to 1863. See also Dissenting Opinion of Judge Carmel Agius, Appeals Judgment, para 36.

7 Trial Judgment, para. 2306.

8 Appeals Judgment, para. 70.

9 Geneva Convention 1, Art. 50:Grave breaches... shall be those involving any of the following acts: wilful killing, torture or inhuman treatment, including wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

10 Appeals Judgment, para. 81

During the background discussion at the Brioni Meeting of Croatian Army capabilities and goals, Mr y Gotovina stated that: "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours."[11] In spite of this damning evidence of clear readiness to destroy the town in its entirety, the Appeals Chamber concluded that: "the Brioni Transcript includes no evidence that an explicit order was given to commence unlawful attacks, and Gotovina's statement regarding a strike on Knin could be interpreted as a description of HV [Croatian Army] capabilities rather than its aims".[12] This astonishing attitude reveals that the Appeals Chamber almost took over the defence's strategy by interpreting the evidence in favour of the accused rather than in favour of the victims, which is implicit in the law of armed conflict and the ICTY's own purposes. Finding in favour of the accused is in sharp contrast to the Appeals Chamber's judgment in Sljivancanin.[13] Consider for example the Appeals Chamber's construction of mens rea in Sljivancanin:

[...]"specific direction" is not an essential ingredient of the actus reus of aiding and abetting. It reiterates its finding that the required mens rea for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal. While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[14]

In *Sljivancanin* a specific direction was not required to establish responsibility and to increase the sentence according to the Appeals Chamber, while in the present case the existence of a specific order was not sufficient to establish any responsibility of the applicants. In *Sljivancanin* inaction (failure to stop the beatings or to prevent their continuation and the inclusion of the obligation not to allow the transfer of custody of the prisoners...) was deemed sufficient to establish mens rea; in the present case an action was not deemed sufficient to do the same in relation to the appellants.

IV. Joint Criminal Enterprise: an Ultimate Legalistic Impediment

All of the Appellants' convictions rested on Joint Criminal Enterprise (JCE) as a mode of liability.[15] The Appeals Chamber by discarding the 200 Metre Standard also found that there was no evidence of the existence of the JCE.[16] As it put it:

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11 The Brioni Transcript, p. 10.

12 Appeals Judgment, para. 81.

13 Supra 2.

14 Supra 2, para. 159.

15 Trial Judgment, paras. 2375, 2587.

16 Appeals Judgment, paras. 92-97.

"Absent the finding of unlawful artillery attacks on the Four Towns and resulting displacement, the Trial Chamber's conclusion that the common purpose crimes of deportation, forcible transfer, and related persecution took place cannot be sustained."[17]

Further, the Appeals Chamber's treatment of the Brioni Transcript was indeed an astonishing display of judicial activism in a defendant-favoured approach. According to the Appeals Chamber: [o]ther parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the town of Knin, could be reasonably construed as using shorthand to describe the military forces stationed in an area, or intending to demonstrate potential military power in the context of planning a military operation...Evidence of policy and legal attempts to prevent the return of Serb civilians who had left the Krajina is also insufficient to justify the Trial Chamber's view that a JCE to permanently remove Serb civilians by force or threat of force existed."[18]

In this rather legal vs commonsensical encounter the Appeals Chamber did not consider any additional evidence or even the context in which the operation took place in support of the finding that a JCE did not exist. Once the Appeals Chamber dealt with the 200 Metre Standard in the way it did, it did not have any difficulty in rejecting the evidence of the existence of the JCE; the Appeals Chamber linked the two in a clinical manner and in total isolation, which defies common sense in the present case. According to the Appeals Chamber [t]he fact that Croatia adopted discriminatory measures after the departures of Serb civilians from the Krajina does not demonstrate that these departures were forced.[19] Or its treatment and assessment of the Appellant's statement that "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours"[20] where the Appeals Chamber concluded that there was no "evidence that an explicit order was given to commence unlawful attacks, and Gotovina's statement regarding a strike on Knin could be interpreted as a description of HV capabilities rather than its aims[21] is more reminiscent of the defence's argument than what the Tribunal should be doing. But this was probably the only available strategy the Appeals Chamber could adopt in order to reject the Trial Chamber's classification of liability. For the sake of illustrating the fallacy of the approach imagine one tries to construe a JCE in relation to the medieval practices of the Inquisition. On the basis of the fact that the Inquisition would not itself pronounce sentence; rather it would hand over convicted heretics to secular authorities for a punishment one would probably conclude that there was no evidence of the existence of the JCE!

V. If all you have is a hammer, everything looks like a nail

It is however unrealistic to expect a more balanced approach from the ICTY. The attribute

17 Appeals Judgment, para. 96.

18 Appeals Judgment, para. 93, 95.

19 Appeals Judgment, para. 95.

20 Brioni Transcript. P. 10.

21 Appeals Judgment, para. 81.

criminal (given to a policy rather than an individual action) is apparently reserved for one of the parties to the conflict and therefore any finding of criminal in relation to other parties' policies would endanger this Tribunal's very foundation.

In Tadic the Appeals Chamber invented a tool for pursuing the whole military and political leadership of one of the parties to the conflict. It established the concept of joint criminal enterprise,[22] which contradicts its Statue because Article 7 of the statute states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime...shall be individually responsible for the crime."[23] In spite of legal uncertainties and tensions with the principle of culpability[24] the concept has been applied by the ICTY in its jurisprudence. According to Laughland, "it is quite unclear whether JCE is itself a new crime or just a form of liability. Of course the Tribunals deny that it is a new crime because they do not have the right to include new crimes without a new Statute. In reality, they do treat JCE as a new crime. This makes it only even worse that the conditions for adjudicating whether a defendant has "participated" in a JCE are totally vague."[25]

A number of international human rights instruments endow an individual with the right to have criminal charges against him determined by a tribunal established by law.[26] This means that the question of establishing a judicial body has to be regulated by law emanating from a legislative organ and not from an executive one. Judge Sidhwa in his Separate Opinion in the Tadic case[27] explains the essence of the requirement "emanating from law". In his view,

[w]hat is required is that the establishment of the court or tribunal should not be dependent on the discretion of the executive, but should be regulated by law emanating from a legislative body, preferably a superior one, that such legislative body can delegate matters concerning the judicial organisation to another body and that the superior legislative body is not required to regulate each and very detail itself, if the law establishes at best the organisational framework of the judicial organisation.[28]

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22 Tadic, Appeals Chamber, 15 July, 1999, para. 192. See also G. Guliyeva, 'The Concept of Joint Criminal Enterprise and ICC Jurisdiction', http://www.americanstudents.us/Pages%20from%20Guliyeva.pdf; J. Laughland, 'Conspiracy, joint criminal enterprise and command responsibility in international criminal law' The Hague, 2009, http://www.heritagetpirdefense.org/papers/John_laughland_Conspiracy_joint_criminal_enterprise_and_command_responsibility.pdf.

23 ICTY Statute, Article 7 (1).

24 See Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations',5 J. Int'l Crim. Just. 91, 91 (2007).

25 Laughland, supra 21. pp. 2-3.

26 Article 14 para. 1of the International Covenant on the Protection of Civil and Political Rights; Article 6 para.1 of the European Convention on Human Rights; Article 8 para. 1 of the American Convention on Human Rights.

27 Prosecutor v. Tadic Case No. IT-94-1-AR 72, (Appeals Chamber) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Sidhwa (1997) 105 I.L.R. p. 538.

28 Ibid. p. 564.

The European Commission on Human Rights in the Zand case[29] ruled:

[I]t is the object and purpose of the clause in Article 6 (1) [of the European Convention on Human Rights] requiring that the courts shall be "established by law" that the judicial organization in a democratic society must not depend on the discretion of the Executive, but that it should be regulated by law emanating from Parliament.[30]

But the ICTY was nothing like that. In a kind of reversed chronology the UN Security Council had already determined that "violations of international humanitarian law" represented a threat to international peace and security and established the ICTY to prosecute those responsible. Ideally, a court should determine violations of law, not an executive body. Consequently, the ICTY could not escape falling into a trap created by the UN Security Council's Resolution 827[31] by which it established the ICTY and during the early development of the conflict. The Tribunal all but equated Serbian nationalism with genocide and from that point on it had no difficulty in finding any prominent figure from the group responsible for crimes that they were accused of. The requirement was "being aware" of the policy; "failure to act"; "no need for a specific order to impute guilt"; "lack of de jure responsibility cannot exculpate" and similar generalised statements are highly indicative of the Tribunal's troubled independence and professionalism. How fragile and unstable constructions the ICTY had to make to determine responsibility in Tadic and Sljivancanin! In Tadic, the ICTY formulated a new crime (persecution within the crimes against humanity) in order to justify its conclusion about responsibility; in the present case the Appeals Chamber adopted an opposite strategy by examining evidence in a clinical isolation in order to discard the Trial Chamber's findings and legal reasoning; no wider picture; no context; no awareness of a policy; no doubtable constructions of responsibility; no formulation of new crimes.

This kind of irrefutable presumption of a party's guilt does not exist in relation to any other group it must be said and without entering into assessment of its correctness this particular feature of the ICRT has made one of its tasks, namely to bring about reconciliation among the former warring factions impossible. The ICTY departed from its implicit condemnation of ethnically pure states contained in the Tadic case by acquitting Gotovina and Markac. The Judgment is a reward for an ethnically cleansed state.

VI. Conclusion

What the Tadic Judgment started with assigning a guilt to the defendant attributable to the whole nation the Appeals Chamber in the present case compounded in a way and that is delivering a moral and political judgment on the war in the former Yugoslavia in early 1990s.

[29] Zand v. Austria, Report adopted by the Commission on 12 October 1978, App. No. 7360/76 (1979) 15 Eur. Comm'n H.R. Dec. & Rep. p. 70.

[30] Ibid. p. 80 para. 69.

[31] UN Doc. SC/Res/827, 1993.

Both judgments leave no illusion about which party was responsible for the war. What is unambiguously aiding this conclusion is the fact that in the former the International Criminal Tribunal for the former Yugoslavia (ICTY) pursued a victim centred approach while in the latter it preferred a defendant favoured treatment of evidence and guilt and such a huge discrepancy in its judicial activism so to speak is indicative only of how this Tribunal has perceived its tasks, not of its supposedly independent jurisdiction. In Tadic the Trial Chamber provided a careful and brilliantly executed historical narrative in order to convince the reader of how unmistakably the defendant had to be guilty because he belonged to the group that was most responsible for the war; the narrative that merely being an official the defendant was, as a matter of fact guilty. There was nothing in the Appeals Chamber in the present case that is remotely similar in that approach; it comprehensively discarded any suggestion to that effect by the Trial Chamber! With surgical precision the Appeals Chamber examined the evidence in a total insulation and concluded that there was no guilt; no suggestion that the defendants may be a part of the policy to indiscriminately attack civilian targets and to remove population from the region. The message is clear: one of the parties is innocent; the other is guilty and it is just impossible to resist this conclusion. According to the Trial Chamber in Tadic the history of the parties involved did not exist prior to the latest conflict; everything started in 1990s when evil Serbs started implementing the concept of Greater Serbia. There were no nuances in giving this, for the purpose of the trial unnecessary and erroneous account. The relevant groups in the defendant's region lived in harmony prior to the conflict. Any mention of the parties' positions and roles in the Second World War was carefully and deliberately omitted because that historical fact would have complicated the picture the Chamber was painting. To pre-empt any claim of bias the Chamber carefully avoided apportioning blame to the whole Serbian nation.

Finally, Gotovina and Markac Judgment will have grave consequences for achieving any form of reconciliation between the former warring factions. The judgment in fact, for the first time united all political parties and public opinion on both sides in a vitriolic rhetoric that is developing right now, which will certainly stall the processes of reconciliation that had started between Croatia and Serbia. As Harland recently perceived:

"This [judgment] will amplify the worst political instincts of the peoples of the former Yugoslavia: the persecution complex of the Serbs; the triumphalism of the Croats; the sense of victimization of the Bosnian Muslims; the vindication of the Kosovar Albanian quest for racial purity. Each of these traits has some basis in truth, and each has been exaggerated and manipulated by politicians on all sides."[32]

[32] D. Harland, 'Selective Justice for the Balkans' New York Times, 07/12/2012 at http://www.nytimes.com/2012/12/08/opinion/global/selective-justice-for-the-balkans.html.