

Acquittal of Gotovina and Markač: A Blow to the Serbian and Croatian Reconciliation Process

Prosecutor v Gotovina et al (Appeals Judgment) IT-06-90-A (16 November 2012)

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Keywords

ICTY, Appeals Judgement, Gotovina and Markač, dissenting opinions, 200 Metre Standard, reconciliation, Croatia, Serbia

Abstract

On 16 November 2012, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') issued its decision on *Prosecutor v Gotovina et al*. The *de novo* review found errors in the Trial Chamber's analysis and the appellants Gotovina and Markač were acquitted of all charges. This decision has made an impact on the Serbian-Croatian reconciliation process, creating a gap between the two States' historical narratives. Highlighting the arguments in the dissenting opinions, this case note discusses the '200 Metre Standard' and the treatment of modes of liability in the alternative. Furthermore, the reception of the Appeals Judgment by Serbia and Croatia is discussed to demonstrate the political and social consequences of the decision.

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I. Background

The Republic of Croatia opted for unilateral secession from the Federal Republic of Yugoslavia in 1991. Prior to secession, the Serbs in Croatia were denied cultural autonomy, and their constitutional position was changed from a constituent nation to a minority group in 1990. Major Croatian political figures made allusions to the pro-Nazi Croatian government of the Second World War,¹ and some symbols from that era were adopted,² rekindling fears among the Serb population. This fear was especially pronounced in Krajina, a region of Croatia where the majority of the population was Serb and where terrible memories from the Second World War lived on. When Croatia began pursuing secession, the Serbs refused to leave Yugoslavia. The people proclaimed autonomy, forming the Republic of Serbian Krajina and their campaign enjoyed the support of the Serbian regime of Slobodan Milošević. After a short war, Krajina became a UN protected zone in 1992.

In 1995 the Croatian government, with the support of the US, decided to recapture the Krajina region. With that aim, Croatian leaders and officials carried out Operation Storm, with the logistical support of a private American company L-3 MPRI.³ The operation resulted in 220,000 Serb refugees and more than 2,000 deaths, the majority of which were civilians.

With the creation of the International Criminal Tribunal for the former Yugoslavia ('ICTY' or 'the Court'), several persons were indicted for crimes carried out during Operation Storm, specifically, Colonel General of the Croatian Army Ante Gotovina, the Commander of Operation Storm Mladen Markač and General Ivan Čermak. The alleged crimes included crimes against humanity, violation of the laws or customs of war, and the participation from July to September 1995 in the Joint Criminal Enterprise ('JCE')⁴ to forcefully and permanently remove the Serb population from Krajina by unlawful attacks against civilians and civilian objects, persecution and deportation, murder and plunder of property.⁵ At the conclusion of the trial proceedings, the ICTY Trial Chamber found Ante Gotovina and Mladen Markač guilty, while Ivan Čermak was acquitted. In November 2011, the Court sentenced Gotovina to 24 years and Markač to 18 years imprisonment.⁶ These sentences caused uproar in Croatia, expressed in part through mass demonstrations. A year later, on 16 November 2012, the Appeals Chamber suspended the Trial Chamber's decision and issued a new judgement acquitting both appellants. This decision caused shock in Serbia and celebration in Croatia.

II. The Appeals Judgement

The Appeals Judgement was supported by three of the five judges. One of the three in the Majority, Presiding Judge Theodor Meron, wrote a separate opinion. Regarding those opposed to the judgement, Judge Carmel Agius and Judge Fausto Pocar dissented and expressed their disagreement in unusually harsh terms, stating that certain elements of the judgement were confusing, inconsistent, unclear, artificial and defective.⁷

The basic argument for overturning the decision of the Trial Chamber deals with the so-called '200 Metre Standard'. According to the Trial Chamber, artillery projectiles that impacted within a distance of 200 metres of an identified artillery target were to be considered deliberately fired. By extension, shelling was considered indiscriminate or unlawful if the projectiles fell more than 200 metres from a legitimate military target, perhaps in the vicinity of a hospital, factory, cemetery, or a UN headquarters.⁸ The Majority found, however, that the Trial Chamber erred in adopting a margin of error that was not substantiated by the existing evidence, and in failing to explain on what basis it adopted the standard (ie 'failing to provide a reasoned opinion'). Having established this error in the analysis, the Appeals Judgement concluded that all the evidence lost

1 At the first general meeting of the Croatian Democratic Union (HDZ) on February 24-25, 1990, Croatian political figure Franjo Tuđman stated that '[t]he independent state of Croatia was not a mere quisling creation or fascist crime, but also the expression of the historical aspiration of the Croatian people.' (Original: 'NDH nije bila samo kvislinška tvorevina i fašistički zločin nego je predstavljala i izraz povijesnih težnji hrvatskog naroda za samostalnošću'). S Kovačević and P Dajić, *Chronology of the Yugoslav Crisis 1942-1993* (Institute for European Studies, 1994) 24.

2 For example, the emblem of the flag, a chessboard, was used during the Second World War.

3 This company employs retired US generals, admirals, intelligence officers and maintains good connections with the Pentagon, Central Intelligence Agency, Defense Intelligence Agency and National Security Agency.

4 *Prosecutor v Gotovina et al* (Trial Judgement) IT-06-90-T (15 April 2011) vol II, paras 2314, 2269-2375 <<http://www.icty.org/case/gotovina/4#tjug>> accessed 30 January 2013.

5 *Prosecutor v Gotovina et al* (Amended Joinder Indictment) IT-06-90-PT (17 May 2007) paras 48-53; Trial Judgement (n 4) vol 1, para 3.

6 Trial Judgement (n 4) vol II, paras 2620, 2623.

7 *Prosecutor v Gotovina et al* (Appeals Judgement) IT-06-90-A (16 November 2012) Dissenting Opinion of Judge Carmel Aguis, para 27, 74 <http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf> accessed 30 January 2013; Dissenting Opinion of Judge Fausto Pocar, paras 4, 5.

8 Separate Opinion of Judge Theodor Meron, para 23.

9 Dissenting Opinion of Judge Carmel Aguis, para 5 referring to *ibid* para 61.

its probative value with the 200 Metre Standard discounted.¹⁰

Problems with the Appeals Judgement were pointed out in the dissenting opinions of Judge Carmel Agius and Judge Fausto Pocar. The general, and most fundamental, critique was that the Majority not only did not respect the unanimous evaluation of the facts by the Trial Chamber, but also did not take into consideration the totality of the evidence.¹¹ Rather, the Majority examined the evidence by compartmentalising the reasoning provided by the extensive, 1300-page Trial Chamber judgement.¹² Acting in such a manner, the Majority constructed the 200 Metre Standard as a fatal error and ignored the vast body of underlying evidence justifying the Trial Chamber's opinion.

Because the Majority interpreted that the 200 Metre Standard was the foundation of the Trial Chamber's finding,¹³ and since the 200 Metre Standard was, according to the Majority, not adequately explained nor could it be empirically substantiated, it was concluded that unlawful shelling did not occur and was not the cause of the mass exodus. Deportation was redefined as 'departure'.¹⁴ Thus, the 200 Metre Standard became the fatal blow to the case.¹⁵ Without the standard, the participation of the two Generals in the JCE could not be substantiated, because evidence of unlawful shelling was fundamental to the argument.¹⁶

Interpreting the Trial Chamber's findings in such a manner, the Majority ignored an entire body of mutually reinforcing evidence, including evidence pertaining to the orders to attack and to the accuracy of the weaponry used by the Croatian Army in shelling the towns of Krajina;¹⁷ evidence of 900 projectiles that fell over the town Kinin over 36 hours during which there was no sign of resistance from the town;¹⁸ the relevancy of the transcripts from the Brioni Meeting, which revealed that the Croatian political and military leadership agreed on a common plan to remove Serb civilians from Krajina by force; the testimony of (international) witnesses to the crimes committed by the Croatian army and police; the destruction and appropriation of Serb property; as well as the discriminatory laws that made the return of the refugees highly difficult.

Equally problematic, the two dissenting judges found that the Appeals Chamber overstepped its boundaries by deciding to review the Trial Chamber's findings *de novo*. According to the dissent, the Appeals Chamber's task was to examine whether there was an error of law or error of fact involved in adopting the 200 Metre Standard, rather than to give its own interpretation of facts. The analysis of the Majority violated the standards of review on appeal because it did not correct the legal error (the 200 Metre Standard) it was obliged to address (ie it did not identify and articulate the correct legal standard nor did it apply to the presented evidence).

Finally, the two dissenting judges demonstrated that the explanation for dismissing consideration of alternative modes of liability was not convincing; for the Chamber argued that they should not transcend the boundaries of the Appeals Chambers mandate to justify transcending the boundaries of their mandate. Presiding Judge Theodor Meron stated in his separate opinion:

'I do not believe the Appeals Chamber should enter convictions pursuant to alternate modes of liability. Such convictions would... necessarily involve unfairness to the Appellants, who would be found guilty of crimes very different from those they defended against at trial or on appeal.'¹⁹

Moreover, the Appeals Chamber's authority should not serve 'as a licence for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber.'²⁰ The statement is strongly against what the Appeals Chamber did, but such arguments should have been sharply articulated when the idea of a reviewing the Trial Chambers' findings *de novo* first came up.

10 Dissenting Opinion of Judge Carmel Aguis, para 13.

11 Dissenting Opinion of Judge Carmel, para 3.

12 *ibid.*

13 See *ibid* para 4; Dissenting Opinion of Judge Fausto Pocar, para 21. Both dissenting opinions characterise this as a misrepresentation. Dissenting Opinion of Judge Faust Pocar, para 2; Dissenting Opinion of Judge Carmel Aguis, para 15.

14 Appeals Judgement, para 92. It is interesting to note that a vital document, the so-called Artillery Diaries (Topnički dnevnici), which could give an account of the artillery attacks, attack plan, targets, etc were never provided to the Court because, according to Croatian officials, they were lost.

15 Appeals Judgement, paras 64, 83-84.

16 Appeals Judgement, para 59.

17 Trial Judgement, vol II para 1892.

18 Trial Judgement, vol II para 1892.

19 Separate Opinion of Judge Theodor Meron, para 6.

20 Separate Opinion of Judge Theodor Meron, para 5.

III. The Consequences of the Appeals Judgement

By erasing the unanimous decision of the Trial Chamber's findings (that the top Croatian leadership planned through JCE to permanently remove the Serbs from Krajina) one of the biggest ethnic cleansings since the Second World War was legitimised as a defensive military action, tainted by only a few isolated criminal incidences. The Croatian government was proclaimed innocent, and the systemic foundation of the crimes remained non-transparent.

Following the Appeals Judgement, the Croatian people were euphoric, released altogether from the need to confront its role in the Yugoslav drama. There was no publicly expressed empathy for the Serb victims by the officials,²¹ nor any apparent discomfort with the fact that in the process of building the independent Croatian State, the Serb population was reduced from 12% to 4.3% (according to the latest census) and rendered an insignificant minority.²²

On the other hand, the Judgement humiliated the Serb victims. No one is or has been prosecuted at the ICTY, or in the Croatian court system, for the crimes perpetrated during Operation Storm. This humiliation has been compounded by the fact that shortly after the Appeals Judgement, on 29 November 2012, the Trial Chamber dropped charges against the Albanian leader of the Kosovo Liberation Army Ramush Haradinaj for war crimes committed against Serbs in Kosovo, due to insufficient evidence.²³ 'Insufficient evidence' meant that Haradinaj, managed to dispose of 17 witnesses, by threats, finding ways to silence them or murder.²⁴ These events have convinced the Serbs – even those who were previously supportive of the ICTY as an institution of justice – that it is highly biased, ie treating victims unequally depending on their ethnic origin, reducing the rule of law by acting more as a political than a legal institution.

One can only speculate what the motivations were for the Appeals Judgement, for it is difficult to interpret them as of a strictly legal nature. Was it the fact that Croatian State is soon to become a member of the EU and, as such, should not be carrying any criminal responsibility? Was it perhaps the fear that the support of Washington for Operation Storm and the involvement of L-3 MPRI might have become, at some point, an embarrassing issue in the case for its implication of the American government? Or perhaps, the Court, having devoted itself to establishing 'the truth' concerning the roots, nature and main actors of the conflict, estimated that if JCE was to be linked to any actor or State other than Serbia, it would be disruptive for the version of truth it has been attempting to establish or promote.

Whatever the true motives may have been, the Appeals Judgement has dealt a heavy blow to the process of reconciliation between Croatia and Serbia, and in the region as a whole. The lines of irreconcilability have deepened, and the distance between each State's hostile historical narrative have increased. The void between the two 'truths' is best illustrated by the fact that the Operation Storm victory will continue to be celebrated with no discomfort, as one of the main national *holidays* in Croatia, while the Serb minority will be reliving it as one of the greatest, unacknowledged *national disasters*. ■

21 At that time, only a few representatives from NGOs were critical of the decision. By contrast, President Josipovic (who previously, together with the ex-Serbian President, made some steps toward reconciliation) to the surprise of many, in the midst of the celebration stated that he did not care about the reactions in Serbia. Statements like this depict the extent of the void dividing the perceptions of the two neighbouring nations.

22 According to the 2011 Census, 186,633 Serbs live in Croatia, which is 7.4% less than in 2001. Their share in the population in the last decade fell from 4.54% to 4.36%. See 'The change of the number of Serbs in Croatia between two Censuses 2002-2011' (*Makroekonomija*) <<http://www.makroekonomija.org>> accessed 7 January 2013. According to the 1991 Census of the Republican Bureau of Statistic, Republic of Croatia, there were 581,663 Serbs in Croatia, or 12.12%. According to 2001 Census of the State Bureau of Statistics, Serbs participated in the population with 4.54%. The data from the Bureau of Statistics cited in M Berber and others 'Promena udela stanovništva Hrvatske i Srpske nacionalne pripadnosti u Republici Hrvatskoj po gradovima i opštinama na osnovu rezultata iz 1991 i 2001 godine' (Translation: 'The change in the share of the population of Croatian and Serbian national affiliation in Republic of Croatia in cities and municipalities on the basis of the 1991 and 2001 results') (13 November 2008) 3, 5 <<http://www.doiserbia.nb.rs>> accessed 7 January 2013.

23 'The Hague Tribunal acquits former Kosovo Liberation Army Commander Ramush Haradinaj of all Charges' (*B92*) <<http://www.B92.net>>.

24 'Before summarising its findings, the Chamber highlighted the significant difficulties encountered in securing the testimony of a large number of witnesses. Presiding Judge Orić stated, "The Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe". This statement was made after the first acquittal. See 'Haradinaj and Balaj Acquitted' (*Hague Justice Portal*, 4 April 2008) <<http://www.haguejusticeportal.net/index.php?id=9096>> accessed 30 January 2013.