THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-06-90-A

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

Date Filed: **27 January 2012**

THE PROSECUTOR

v.

ANTE GOTOVINA AND MLADEN MARKAC

ANTE GOTOVINA'S RESPONSE TO "APPLICATION AND PROPOSED AMICUS CURIAE BRIEF" FILED ON 13 JANUARY 2012 [*PUBLIC REDACTED VERSION*]

For the Prosecution:

Ms. Helen Brady
Mr. Douglas Stringer

For Ante Gotovina:
Mr. Gregory W Kehoe
Mr. Luka S. Misetic
Mr. Payam Akhavan
Mr. Guénaël Mettraux

For Mladen Markac:

Mr. Goran Mikulicic
Mr. Tomislav Kuzmanovic
Mr. John Jones
Mr. Kai Ambos

Application:

Mr. William Fenrick
Ms. Laurie Blank
Mr. Charles Garraway CBE
Mr. Geoffrey Corn
Mr. Bill Boothby
Mr. Donald Guter
Mr. Walter Huffman
Mr. Eric Talbot Jensen
Mr. Mark Newcombe
Mr. Thomas Romig
Mr. Raymond Ruppert
Mr. Gary Solis

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-06-90-A

THE PROSECUTOR
v.
ANTE GOTOVINA and
MLADEN MARKAC

ANTE GOTOVINA'S RESPONSE TO "APPLICATION AND PROPOSED AMICUS CURIAE BRIEF" FILED ON 13 JANUARY 2012

I. Introduction

1. The Appeals Chamber should accept the proposed Amicus Curiae Brief filed on 13 January 2012 because it satisfies the criteria for admission established by the jurisprudence of the Appeals Chamber.[1] The twelve Applicants are experts in the practical application of the laws of war in military operations, whose views will assist the Appeals Chamber in understanding matters at the intersection between the laws of war and technical aspects of conducting military operations. They offer an analysis of the Judgement through the lens of 290 years of practical military experience. There is little doubt that their observations are of assistance to the Appeals Chamber and relevant to the issues on appeal, and thus satisfy the criteria for admissibility.[2]

2. The proposed Amicus Brief offers the Appeals Chamber an independent and objective assessment from leading experts in the field. The fact that one of

[1] [REDACTED]
[2] Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, *Decision on the Admissibility of the Amicus Curiae Brief Filed By The" Open Society Justice Initiative" and On Its Request To Be Heard At the Appeals Hearing* ("Nahimana Decision"), 12 January 2007, at p. 3.

the Applicants (Professor Corn) was called by the Defence as an expert at trial is of no consequence, given that the Prosecution has never suggested either at trial or on appeal that Professor Corn was biased or lacked objectivity.[3] The Appeals Chamber has ruled that witnesses are the property of neither the Prosecution nor the Defence.[4] It is of no substantive significance that a witness was called by one party or the other.

3. Moreover, the Amicus Brief has been endorsed by eleven other prominent individuals, including the former Senior Legal Advisor of the Office of the Prosecutor, which removes any doubt about the objectivity of the proposed Amicus Brief. The reputations of all twelve of these individuals should not be tarnished as biased or lacking in objectivity where no evidence has been offered to support such accusations.

4. Finally, the Amicus Brief properly rests on the Trial Chamber's own finding that at least 95% of all shells fired in Knin *were intended by the HV to strike military objectives;*[5] a fact the Prosecution does not dispute.[6] Nothing in the Judgement suggests that any of these 95% of shells impacted on anything other than on or near the intended military objectives. Applicants' observation that "approximately 96% of artillery effects impacted lawful military objectives" is merely repeating the findings of the Trial Chamber in the Judgement.

5. For all of the reasons set forth below, the Application should be granted.

---

[3] Applicant Eric Talbot Jensen has never been a consultant to the Gotovina Defence. He has provided no advice to the Gotovina Defence during the trial or appeal phases. Appellant recently contacted Mr. Jensen to inquire about the reference on his curriculum vitae to serving as a "Defence consultant" on the appeal in this case, and he responded by stating that this was a reference to his consultation with the remaining Applicants about the Amicus Brief.

[4] Prosecutor v Mrksic *et al*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party* (30 July 2003) at para. 15.

[5] *Reply Brief of Appellant Ante Gotovina,* 4 October 2011, at paragraph 32 and Annex A.

[6] *Ante Gotovina's Response to Prosecution Motion to Strike Appellant's Reply Brief,* 7 October 2011, at paragraphs 6-9 and Annex 1.

II. Applicable Law

6. Pursuant to Rule 74 of the Rules, the Appeals Chamber "may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization, or person to appear before it and make submissions on *any issue* specified by the [Appeals] Chamber."[7]

7. The Appeals Chamber may admit a proposed amicus application where the proposed brief "would assist the Appeals Chamber in its consideration of the questions at issue on appeal," and where the arguments raised in the brief are "relevant to the issues on appeal."[8] Per *Nahimana,* the Appeals Chamber may, in the interests of justice, invite the parties to submit their own responses to the Amicus Brief after it has been admitted.

III. The Amicus Brief would assist the Appeals Chamber in its consideration of the questions at issue on appeal, and is relevant to the appeal

8. The Applicants are distinguished jurists in the Laws of War field, and include Judge Advocates General, Deans, a former Legal Advisor to the Office of the Prosecutor, and several law professors. These Applicants are particularly helpful because they are "experts in the practical application of the laws of war in military operations."[9]

9. The Applicants address several legal issues relevant to the appeal, and provide assistance to the Appeals Chamber "in understanding matters at the intersection between the laws of war and technical aspects of conducting military operations."[10] These legal issues include:

   (1) *Whether the Trial Chamber applied an improper burden of proof standard on a military commander.* One of the Applicants' fundamental legal arguments is that "[i]t seems axiomatic that where such inquiry indicates

[7] Emphasis added.
[8] Nahimana Decision, at p. 3.
[9] *Decision on Admission of Expert Report of Geoffrey Corn,* IT-06-90-T, 22 September 2009, at paragraph 6 (*"Corn Decision").*
[10] *Corn Decision.*

overall lawful execution, the commander should benefit from the presumption that his orders and actions fully complied with obligations established under international humanitarian law, just as indications of overall unlawful execution would result in the opposite conclusion."[11] This position contradicts the conclusion of the Trial Chamber, which found that despite lawful execution in at least 95% of fired artillery rounds, the uncertainty with respect to the remaining 5% of artillery rounds rendered the entire artillery operation unlawful.[12]

This legal argument by the Applicants is directly relevant to Ground One of the Appeal.

(2) *Whether the Trial Chamber applied erroneous methodology in determining that Gotovina issued an illegal order.* As "experts in the practical application of the laws of war in military operations," the Applicants offer the Appeals Chamber valuable insight in assessing whether the Trial Chamber applied the wrong methodology in reviewing the legality of Gotovina's attack order.[13] Utilizing their collective 290 years of experience, the Applicants "are compelled to highlight what we believe are indicators that the methodology used by the Trial Chamber when assessing operational effects is inconsistent with operational practice and artillery capabilities."[14]

The Applicants' argument is relevant to Ground One and Grounds 4.6.1, and 4.6.2.

(3) *Whether the attacks on Martic constituted disproportionate attacks*. The Applicants use their practical military experience to advise the Chamber

[11] Application, paragraph 18, 21-23.
[12] The Prosecution does not dispute that the Trial Chamber found 95% of the artillery rounds fired in Knin were fired with the intent to strike military objectives. See *Ante Gotovina's Response to Prosecution Motion to Strike Appellant's Reply Brief,* 7 October 2011, at paragraphs 6-9 and Annex 1.
[13] Application, paragraphs 13-20.
[14] Application, paragraph 16.

that "few targets are designated as higher in value than enemy strategic leadership," and that "disruption [of enemy strategic leadership] is all the more vital in support of decisive military action against an enemy that is intended to isolate enemy defensive positions and exploit tactical successes against such defenses."[15] The Applicants conclude that the Trial Chamber improperly applied the legal principle of proportionality and express "our strong consensus that the attacks against Martic's residence fully complied with the proportionality obligation."[16]

This argument is relevant to Ground One, including but not limited to Ground 1.3.6.

(4) *The Trial Chamber erred in imposing the 200M Rule to assess reasonable doubt*. The Trial Chamber was unable to determine the margin of error for the HV weapons systems used in *Storm*. As a result, the Trial Chamber invented the 200M Rule as a *legal* standard establishing a bright-line rule to assess reasonable doubt. Specifically, "the Trial Chamber consider[ed] it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target."[17] The Trial Chamber thus found that reasonable doubt ("a reasonable interpretation of the evidence") concerning the intent of the artillery fire could only exist if a shell was found to have landed less than 200 meters from an identifiable military objective. The 200M Rule is therefore a *legal* test of reasonable doubt that rests upon an erroneous factual assumption (that the margin of error for HV weapons systems, including MBRLs, was less than 200 meters).

The Applicants challenge the Trial Chamber's methodology in assessing reasonable doubt. Specifically, they "are concerned with the Trial

[15] Application, paragraph 25-26.
[16] Application, paragraph 27.
[17] Judgement, paragraph 1898.

Chamber's utilization of a 200-meter radius of error in order to determine which effects were attributable to lawful objects of attack and which were not. In the collective opinion of the Amici, this standard is fundamentally inconsistent with the realities of operational employment of artillery and other indirect fire assets."[18] It is precisely this type of expertise from "experts in the practical application of the laws of war in military operations," which the Trial Chamber found to be of assistance "in understanding matters at the intersection between the laws of war and technical aspects of conducting military operations."[19]

Appellant does not consider that the Applicants submitted the reports of Generals Scales, Schoffner and Griffith as part of the substance of the Amicus Brief or to circumvent Rule 115, but rather as citation to authority for the Applicants' challenge to the factual underpinnings of the Trial Chamber's 200M Rule *legal* standard of reasonable doubt.

This argument by the Applicants is relevant to Ground One.

10. Accordingly, the Applicants have satisfied the standards established by the Appeals Chamber in *Nahimana*. The Appeals Chamber should therefore admit the proposed Amicus Brief, and invite the parties to submit their comments on the Amicus Brief.

IV. The Applicants are Distinguished Individuals Who Offer Independent and Unbiased Assessments

11. All of the Applicants have had long and distinguished careers and are able to offer the Appeals Chamber independent and unbiased assessments concerning the practical application of the laws of war. The Tribunal would do an injustice to these individuals by calling into question their objectivity without foundation.

12. It should be noted that the Prosecution both at trial and on appeal did not call into question Professor Corn's impartiality, motives or qualifications, and the Trial

[18] Application, paragraph 16(A).
[19] *Corn Decision.*

Chamber did not do so in the Judgement. Under these circumstances, there is no basis to disregard the Amicus Brief simply because Professor Corn was called by one party, particularly where Professor Corn is but one of twelve distinguished individuals who all concur in their assessment.

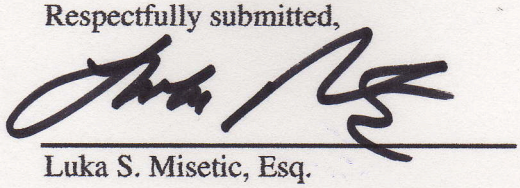
V. Conclusion

13. For the reasons set forth above, the Appeals Chamber should grant the Application because the Applicants have satisfied the standards for admissibility as set forth in *Nahimana.* Arguments concerning the weight to be afforded the views of the proposed Amici Curiae do not affect admissibility. The Appeals Chamber should grant the parties leave to file their own submissions concerning the weight to be afforded the Amicus Curiae brief after it has been admitted.

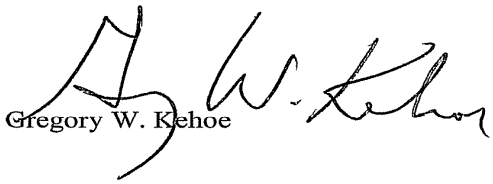
Word Count: 2167

Dated: 27 January 2012

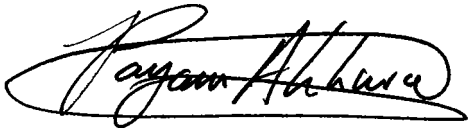
Respectfully submitted,



Luka S. Misetic, Esq.



Gregory W. Kehoe



Payam Akhavan
Defence Counsel for Ante Gotovina

Guénaël Mettraux