



Organization for Security and Co-operation in Europe

Mission to Croatia

Headquarters

10 October 2002

Background Report: The ICTY and General Janko Bobetko

Press coverage and public debate of the recent ICTY indictment against retired Croatian General and former Chief-of-Staff of the Croatian Armed Forces, Janko Bobetko, has been heavy and has led to some confusion and misunderstandings. This report provides background on this latest development within the factual and chronological sequence of events that have taken place to date.

Croatia's Obligation to Co-operate with the ICTY

Co-operation with the ICTY was an explicit condition of Croatia's membership in the Council of Europe in 1996. In that year, Parliament adopted the Constitutional Law on the Co-operation with the ICTY, authorizing the Government to establish the Government Council for Co-operation with the ICTY and legal domestic procedures by which Croatian authorities would respond to requests for co-operation or enforcement from the ICTY. The Constitutional Law provides that requests "... for co-operation or enforcement of a decision of the Tribunal shall be granted by the Government ... if the request or decision is founded on appropriate provisions of the Statute and Rules of Procedure and Evidence of the Tribunal, and if it is not in contravention of the Constitution"¹. The ICTY Statute and rules unambiguously set out Croatia's obligation to comply with court orders. According to the Statute, "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including ... (c) the service of documents, (d) the arrest or detention of persons, (e) the surrender or transfer of the accused to the International Tribunal".

Background on the Bobetko Case

On 23 September the Government received an ICTY warrant of arrest and order to surrender together with an indictment against General Bobetko². The indictment accuses Bobetko of being responsible for crimes against humanity and violation of the laws or customs of war, including the unlawful killing of 100 Serb civilians in the course of a 1993 military operation in the so-called "Medak Pocket" of south-central Croatia, near Gospic.

Bobetko is indicted on the basis of both individual and command responsibility, being directly responsible for his own acts in planning and ordering as well as for the acts of his subordinates about which he knew or should have known and which he failed to prevent or

¹ Article 3, Constitutional Law on Co-operation with the ICTY.

² The Government, through the Council for Co-operation with the ICTY, first received the warrant of arrest, order to surrender and indictment on 19 September. On 20 September, the Government returned all three documents to the ICTY, stating that the warrant of arrest was legally flawed because it called on the ICTY Prosecutor rather than Croatia to arrest Bobetko. As well, the Government argued that it had not been served with any document for which it was responsible to take action. The ICTY cured the flaw and re-issued the arrest warrant and other documents the same day. However, the documents were not formally served on the Government until 23 September due to the intervening weekend.

punish. The indictment against Bobetko is the third of its kind in Croatia. In July 2001, the ICTY delivered similar indictments against Croatian Army Generals Rahim Ademi and Ante Gotovina, the latter still a fugitive from justice [see Mission Spot Report, dated 11 July 2001]. Notably, the same legal documents were served on the Government concerning the proceedings against Ademi as were served in the current case against Bobetko. However, no arrest of Ademi was required because he opted to surrender voluntarily upon notice that his arrest and extradition were sought by the ICTY.

On 27 September, the Government confirmed that it had submitted to the ICTY a request to file an interlocutory appeal to the warrant of arrest and order for surrender. The Government's appeal, signed by the President of the Council for Co-operation with the ICTY, Deputy Prime Minister Dr. Goran Granic, argued that the ICTY trial chamber erred when it issued the arrest warrant without having determined whether such a warrant was necessary³. Instead, the Trial Chamber should have sent a "regular summons" to Bobetko to appear before the court. Only if Bobetko failed to appear would a warrant of arrest be appropriate, according to the Government. The Government argued that there was no information whether Bobetko would respond voluntarily to a request to attend trial and stated that the Government "... is ready to submit to the Appellate Chamber its most firm guarantees that Janko Bobetko will, within the abilities mentioned, participate in future proceedings". The Government argues further that the Trial Chamber erred in not contacting the Government *prior* to issuing the warrant of arrest to determine whether it was "really necessary to issue an arrest warrant". The Government posits that due to Bobetko's advanced age and ill health, detention and arrest are not necessary.

On 4 October, the Government forwarded a second request to the ICTY Appeals Chamber⁴, asking that the Trial Chamber decision confirming the indictment against Bobetko be withdrawn, as well as the warrant of arrest and order of surrender⁵. The Government argued that the Appeals Chamber should reverse the "erroneous" decision by the Trial Chamber confirming the indictment because it is "... based on claims which contradict commonly known facts in a way which impinges upon the constitutional and legal order of a state and causes serious legal and political consequences for that state...".

The Government argued further that it has a legal interest in the case; "based on the fact that the events referred to in the indictment are part of the defensive Homeland War which is an important part of Croatian history, the Republic of Croatia is interested in the accurate portrayal of the historical facts, particularly owing to the general social and political connotations that may lead to an erroneous portrayal of historical events".

³ The Government's appeal relies on procedural rules that have been repealed, i.e., Rule 73 (D), (E). Source: ICTY Rules of Procedure and Evidence, as amended 11 and 12 July 2002.

⁴ The Government's appeal relies on Rule 108 *bis* (A) which states that "a state directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the Powers of the Tribunal".

⁵ "If satisfied that a *prima facie* case has been established by the Prosecutor, [the trial judge] shall confirm the indictment.... Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial". Source: Article 19, ICTY Statute. In its appeal the Government stated that it did not receive a copy of the decision by the trial judge confirming the indictment, but assumed the indictment had been confirmed.

The Government argues that the Trial Chamber's decision should be reversed because the indictment is based on facts "which are in direct opposition to the real, known circumstances". In short, the Government argues that since the facts of the Homeland War, and the Medak Pocket Operation in particular, "... are historically and legally commonly known and recognized", the Trial Chamber would be involved in the "unnecessary proving of facts". By confirming the indictment, the judge "... implicitly confirmed the argument that the Medak Pocket Operation was planned as an illegal operation to achieve unlawful (criminal) aims. Such an assessment is legally and politically unacceptable to the Republic of Croatia, and contradicts generally known facts and international law".

According to the Government, Bobetko commanded legitimate military operations in 1993 in the Medak Pocket, as he was legally bound to do, and as a result he cannot be indicted on the basis of implementation of these military activities⁶. However, the Government's appeal does not take a position whether crimes occurred during the operation.

According to a Government press release, on 10 October, the Government submitted a formal request to the Constitutional Court for its opinion on the constitutionality of several aspects of the indictment, as well as the warrant of arrest and order for surrender. The Government challenged the indictment's characterization of the conduct of the Croatian armed forces during the military operation in the Medak Pocket.

Domestic Reactions to the Indictment

News of the indictment immediately dominated the political scene in Croatia. Prime Minister Ivica Racan and most other political leaders challenged the latest ICTY requests, while reaffirming the Government's policy of full co-operation with The Hague. Deputy Prime Minister Granic stated on 20 September that the Government should undertake measures to constitutionally challenge the indictment. The Speaker of Parliament stated that all possibilities within the confines of Croatian law should be used to prevent the General's extradition to The Hague.

The President of the Croatian Democratic Union (HDZ) stated that the HDZ would continue to reject the principal of command responsibility for war crimes. The HDZ Caucus Leader stated that the ICTY indictment represented an indictment against the Croatian State. Like the HDZ, most opposition parties continued with their demands for changes to the Constitutional Law on Co-operation with the ICTY, a similar position that the HDZ took in response to the 2001 indictments against Generals Ademi and Gotovina. The President of the Democratic Centre (DC) called on both the Government and the opposition to amend the Constitutional Law and to empower the Constitutional Court to rule on the constitutionality of the ICTY indictment. The legal question of whether the Constitutional Court has jurisdiction to review the contents of the ICTY indictment remains absent from the political discussions on this issue, however.

The Prime Minister stated on 23 September that the Government would not proceed according to the Tribunal's requests, stressing that "... [a]s of this moment, after we have read the indictment, we do not intend to extradite General Bobetko". The Prime Minister added that

⁶ The Government submitted similar written objections to the ICTY indictments against Croatian Army General Ademi and Gotovina in July 2001. The ICTY rejected the objections.

some parts of the indictment were unacceptable to Croatia, as they were not factually and historically correct with regard to the nature of the military operations conducted in the Medak Pocket. The Prime Minister described these as legitimate military operations undertaken in accordance with the Constitution to liberate occupied territory. The Prime Minister also addressed the consequences of such a stand, stating that “[w]e might have to suffer some detrimental consequences, but in this struggle it is on the one hand important to defend the truth about our own struggle for independence, and on the other not to return Croatia to a conflict with the international community, open isolation and sanctions”.

President Stjepan Mesic stated that Croatian Generals and war veterans who fought for Croatia’s independence, like any other Croatian citizen, were obliged to fully co-operate with the ICTY. The President also called on the Government to provide Bobetko with all relevant documents that would assist in his defence. In a television broadcast on 25 September, the President argued for a continuation of the Government’s policy of full co-operation with the ICTY. He rejected the politicization in Croatia of the latest ICTY indictment and manipulation of its facts by certain political forces, stressing that the indictment neither questioned the legitimacy of Croatia’s war for independence nor did it jeopardize the existence of the sovereign Croatian State. Alone among political commentators, Mesic acknowledged that crimes had undeniably been committed during the Medak operation and individual accountability for these crimes was essential. However, the President criticized ICTY authorities for having failed to discuss relevant facts with General Bobetko prior to issuing the indictment. He also alluded to the possible failure of certain Government leaders for inadequately preparing Croatia for the latest ICTY indictment, in line with widely reported information that the Government had in April 2002 received advance notice of the ensuing charges against the General.

On 27 September Parliament unanimously adopted conclusions supporting the Government in its efforts to legally challenge the Bobetko indictment. Parliament agreed that the Government should ask the Constitutional Court to judge in an urgent procedure the constitutionality of the indictment. Though the Opposition’s demands for changes to the Constitutional Law on Co-operation with the ICTY were rejected, a compromise foreseeing a future, non-binding debate on possible amendments was agreed upon.

International Reactions to the Indictment

In response to the Government’s objections to the Bobetko case, the ICTY Spokesperson announced that the Government had no legal foundation upon which to reject an ICTY indictment. The Spokesperson stated that the indictment was issued by the ICTY against General Bobetko, who can contest the charges as the indicted person. In contrast, the ICTY expected the Government to ensure that the indictment, arrest warrant and extradition order were properly executed by the Croatian authorities, as specified in the ICTY Statute and the Constitutional Law on Co-operation with the ICTY. According to the ICTY Spokesperson, the ICTY would be forced to report Croatia to the UN Security Council in the event that the Government refused to extradite the General to The Hague⁷. In this light, the Minister of Foreign Affairs, Tonino Picula, briefed a group of Ambassadors in Zagreb who represent some of the UN Security Council membership. The Minister laid out Croatia’s objections to

⁷ “... [w]here a Trial Chamber ... is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute ..., the Chamber ... may advise the President, who shall report the matter to the Security Council”. Source: Rule 7 *bis*, ICTY Rules of Procedure and Evidence.

the Bobetko indictment while re-affirming the Government's intention to continue its dialogue with the ICTY Chief Prosecutor.

On 30 September the EU Council of Ministers called on Croatia to continue co-operating in full with the ICTY, reminding the Government of its obligation to do so regardless of domestic legislation. The NATO Secretary General later supported the Council's statement, as did representatives of the Council of Europe and the Governments of the United States of America and the United Kingdom.

On 3 October, the ICTY Chief Prosecutor and the EU High Representative for Common Foreign and Security Policy called on the Government to extradite General Bobetko. The ICTY Chief Prosecutor stated that with regard to the current health condition of the 83 year old Bobetko, the Tribunal may consider his temporary release once the arrest warrant had been served. The ICTY Chief Prosecutor also confirmed that the General could be allowed to defend himself from freedom if he voluntarily surrenders to The Hague, enters a plea and undergoes questioning.

The representative of the EU to the OSCE stated on 3 October to the OSCE Permanent Council that any failure to co-operate fully with ICTY would call into question Croatia's efforts at becoming a member of the EU. The Permanent Delegation of the United States of America to the OSCE joined the EU in calling for Croatia's full co-operation with the ICTY. It also supported the statements of President Mesic, and reminded Croatia that the United States regarded it as a model in the region for its ongoing co-operation with the ICTY. The Permanent Delegation of Croatia to the OSCE stated that its policy of full co-operation with the ICTY had not changed. However, some aspects of the latest ICTY indictment would be legally challenged through due process. It also repeated the Government of Croatia position that the prosecution of war crimes would be undertaken more effectively if held before national courts.

Preliminary Assessment

To date (10 October), Bobetko has not been served with the ICTY documents. While the Government characterizes its actions as a legal dispute with the ICTY within the scope of the ICTY's statute and rules as well as domestic law, its position is subject to legal dispute and may be viewed by the ICTY as abuse of legal process and contributing to an "unreasonable delay" in complying with the ICTY requests. While Bobetko is the defendant in the criminal proceeding, he has not yet had the opportunity to present arguments to any court, either domestic or international, about the appropriateness or legality of his arrest, detention, extradition, and ultimately the allegations of the indictment against him. Additionally, the Government's and the Opposition's attempt to facilitate a final decision by the Constitutional Court on the constitutionality of the indictment would have no bearing on the ICTY proceeding against Bobetko, nor Croatia's international obligation to co-operate⁸. This action could also be interpreted by the ICTY as an unreasonable delay in compliance.

The Government's ongoing and determined challenge to the latest ICTY indictment against Bobetko has occurred in a difficult political environment. The Government only recently

⁸ Cf., "The obligations laid down in Article 29 [of State compliance with ICTY requests] of the [ICTY] Statute shall prevail over any legal impediment to the surrender or transfer of the accused ... to the Tribunal which may exist under the national law ... of the States concerned". Source: Rule 58, ICTY Rules of Procedure and Evidence.

reorganized the ruling coalition, following the departure of the Croatian Social Liberal Party (HSLP) due to differences *inter alia* on the political issue of full co-operation with the ICTY. Reliable opinion polls also show that the main opposition party HDZ is currently Croatia's strongest single political party, running slightly ahead of the main coalition party, the Social Democratic Party (SDP) of Prime Minister Racan.

The public's views of the Bobetko case and the Government's action in this case may also be influenced by President Mesic's recent testimony against Slobodan Milosevic at the ICTY. The landmark testimony has, once again, sparked a more open debate in Croatia on the causes of the armed conflict in Croatia, in particular with regard to the criteria used to describe the perpetrators of war crimes [see Fortnightly Report No. 27/2002 for further information].

At present, the majority of the Croatian public (66 per cent) supports the Government's decision to challenge the ICTY indictment against General Bobetko. Additionally, approximately 55 per cent of the population would now support changes to the Constitutional Law on Co-operation with the ICTY. However, the most recent polls indicate that the public's attitude towards the Bobetko case and the role of the ICTY may be shifting back to its previous position of majority support for continued co-operation and compliance with Croatia's commitments in this regard. Public acknowledgements in the media by Croatian officials that both sides committed war crimes have notably become more common.

The Mission expects that the political discussions surrounding the Government's current challenge to the ICTY indictment against Bobetko will continue to be part of the political landscape in Croatia until the end of 2002 and into 2003. However, the Mission believes that the legal and procedural issues involving the Bobetko case will become clearer in the coming weeks.