

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-06-90-PT

BEFORE TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Justice Maloto**

Registrar: Mr. Hans Holthuis

Date Filed: 5 April 2007

THE PROSECUTOR

v.

ANTE GOTOVINA, IVAN CERMAK AND MLADEN MARKAC

PRE-TRIAL BRIEF OF GENERAL ANTE GOTOVINA
Public Version

For the Prosecution:

Mr. Alan Tieger
Ms. Laurie Sartorio

For Ante Gotovina:

Mr. Gregory W. Kehoe
Mr. Luka S. Miletic
Mr. Payam Akhavan

For Ivan Cermak:

Mr. Cedo Prodanovic
Ms. Jadranka Slokovic

For Mladen Markac:

Mr. Miroslav Separovic
Mr. Goran Mikulicic

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I. INTRODUCTION

1. In response to the Prosecution's Pre-Trial Brief filed on 16 March 2007 ("Prosecution Brief"), Counsel for General Ante Gotovina ("Defence") file this Pre-trial Brief pursuant to Rule 65 ter (F) of the Rules of Procedure and Evidence ("Rules") of the International Criminal Tribunal for the former Yugoslavia ("Tribunal"). As required by this Rule, the Defence addresses the factual and legal issues, and sets out in general terms the nature of the defence of General Gotovina, the matters with which the Defence takes issue in the Prosecution Brief and the reasons therefore. Where an assertion by the Prosecution is not expressly agreed or denied in this brief, it should be presumed to be denied by the Defence.
2. The Prosecution will not be able to discharge its burden of proving beyond a reasonable doubt that General Gotovina bears individual criminal responsibility under either Article 7(1) or Article 7(3) for the offences alleged in the Joinder Indictment ("Indictment").
3. General Gotovina played an instrumental role in defeating the Joint Criminal Enterprise led by Milosevic, Karadzic, Mladic and Martic ("Milosevic JCE"), which inflicted extraordinary suffering in Croatia and Bosnia from 1991-1995. The Milosevic JCE had killed tens of thousands of people in Croatia and Bosnia, and ethnically cleansed millions more. In July 1995, the Milosevic JCE was openly engaging in genocide in Eastern Bosnia, and Srebrenica, yet the international community did absolutely nothing to end the horror.
4. Immediately after the Srebrenica massacre, General Gotovina did what the international community was unwilling to do – he led a military campaign to defeat the forces of Radovan Karadzic, Ratko Mladic, and Milan Martic. It was General Gotovina who was instrumental in ending the suffering of victims from Vukovar, Skabrnje, Srebrenica, and Sarajevo. Contrary to Prosecution claims, General Gotovina at all times conducted himself in accordance with

international humanitarian law. Moreover, he was not responsible for enforcing law and order in Croatia while simultaneously fighting in Bosnia to do the job that the international community had failed to do for four years – end the Milosevic JCE reign of terror.

5. The evidence will show that General Gotovina deserves gratitude from the international community, and not a war crimes indictment.

II. THE BURDEN AND STANDARD OF PROOF

6. The Prosecution brings this case, and it is the Prosecution that will have to prove every element that it is alleging against General Gotovina beyond a reasonable doubt, in accordance with Rule 87(A) of the Rules and the fundamental principle of the presumption of innocence.

III. THE MILITARY AND POLITICAL CONTEXT OF THIS CASE

7. The context of this case (which is not set out in the Joinder Indictment and is notably absent in the Prosecution Brief) is the persecutory “ethnic cleansing” campaign conducted by Bosnian Serb and “Krajina”¹ Serb forces, under the direction of Belgrade, against the non-Serb population for the express purpose of gaining control and annexing parts of Bosnia and Croatia to create a “Greater Serbia”.
8. This background, which is the key to understanding events in Croatia leading up to Operation Storm, has been put forward by the Prosecution in many indictments and confirmed by the Chambers in numerous decisions.²

¹ The Defence defines the terms “Krajina” or “RSK” to refer to an illegal para-state on Croatian territory which was the criminal vehicle of the Martić JCE.

² In particular, in the “Krajina” Serb cases (*Martić, Babić*), *Milosević* case, Srebrenica cases (*Deronjić, Krstić, Blagojević, Obrenović, Jokić, Nikolić, Pandurević*), Serb leadership cases (*Arkan, Stanišić, Simatović*), Bosnian Serb leadership cases (*Plavšić, Krajišnik, Karadžić, Mladić*), and cases involving Serb “ethnic cleansing” in Bosnia (*Foča, Nikolić*).

9. The Defence agrees with the Prosecution at paragraph 3 only to the extent that the “backdrop of this case has been the subject of previous litigation in the Tribunal”, the remainder of paragraph 3 is expressly denied.
10. Indeed, the historical context of this case has already been litigated before this Tribunal, most notably in the *Martić* case. The Prosecution Brief implies that Croatian Serbs were provoked into establishing “Republika Srpska Krajina” by legitimate fears created by the “re-emergence of symbols of Croatia’s World War II fascist state,”³ as well as President Tudjman’s “longstanding interest in ethnic homogeneity” and his “objective of removing the Serbs from the Krajina.”⁴ The Prosecution goes on to suggest that the “Krajina Serbs” were willing to negotiate in good faith, but that Croatia nevertheless attacked the “Krajina” in order to ethnically cleanse the Serb population.⁵
11. The Defence is at loss to explain how the Prosecution can justify these arguments in light of its position in the *Martić* case. The following facts are taken directly from the Prosecution’s Final Trial Brief in *Martić* and will not be disputed at trial by the Prosecution:

This section sets forth the relevant facts proven at trial. [...] during 1990 and 1991, the members of the JCE [Milan Martić, Slobodan Milošević, Milan Babić, Radovan Karadžić, Ratko Mladić, Vojislav Šešelj, and others] [...] developed the common purpose of the JCE, that is, the forcible removal of the non-Serb population from the Krajina through the commission of crimes in order to create a Serb-dominated state. This goal of a separate Serb state was defined and articulated in terms that made the crimes within the JCE inevitable: Croats were portrayed as genocidal and threatening and the implicit message was that Serbs could only be safe in a homogenous state that would be attained through violence.

The critical elements underpinning the JCE first emerged in 1990 and were firmly in place by August 1991: Serb leaders created separate Serb political structures in the Krajina, they advocated a separate state defined in ethnic terms, they used extremist propaganda to demonise Croatia and Croats, they advocated military and violent solutions to the conflict, and

³ Para.3

⁴ Para.18

⁵ Para.7

they acted to bring the JNA into the conflict on the side of the Serbs. Throughout this time, MARTIC solidified his power in the Krajina through support from Belgrade. This early period is critical in that it defined the participants to the JCE, its common purpose, and the means of accomplishing that purpose.

The first steps towards ethnic separation in the Krajina were taken long before the actual outbreak of fighting. Through a combination of political developments and nationalist propaganda, Serb leaders in Krajina began pushing for greater ethnic identification among Serbs and simultaneously began portraying Croats in ever more threatening ways.

A point of reference for many of the witnesses who testified at trial was the 1990 elections, in which ethnically oriented political parties emerged for the first time. The SDS was founded in Knin on 17 February 1990, and Jovan Raskovic elected its first president. The SDS party platform foreshadowed the ethnic division which was to follow – it decided the problems faced by the Serbs in Croatia, advocated redrawing regional and municipal lines to reflect the areas' ethnic composition, and asserted the right of territories with a “special ethnic composition” to become autonomous through a referendum. During the coming years, the SDS and its leaders (including RASKOVIC, BABIC, and others) served as the main political force behind ethnic division in the Krajina.

The HDZ, meanwhile, was established in February 1989 [**sic, should be June 1989**] and went on to win 41.5 percent of the vote and two-thirds of the seats in the Croatian Parliament (Sabor) in the 1990 elections. The primary aim of the HDZ, according to its platform at the time, was to achieve independence for Croatia (notably a goal defined in territorial or republican terms, not ethnic terms). [...] The party platform advocated the transformation of the Republic of Croatia into a multi-party state, with guarantees of basic rights and liberties for every citizen regardless of nationality, religion, or political beliefs. These values appeared to be held by the Croat population; Defence witness MM-116 testified that most Croats refused to use extremist language and slogans, and even denounced them.

[...]

This political movement towards ethnic division continued through 1990 and beyond. On 21 December 1990, the SAO Krajina was proclaimed on the territories of the Association of Municipalities of Northern Dalmatia and Lika, together with territories of municipalities with majority Serb populations which adopted decisions to join SAO Krajina, and settlements in which Serb people comprised the majority of the population and which voted at a referendum in favour of joining one of the existing or newly established municipalities with a majority Serbian population. During

1991, Serb leaders in the Krajina refused to consider any solutions that would have offered autonomy, insisting instead on a separate state. After 19 December 1991, the SAO Krajina became known as the Republic of Serbian Krajina (Republika Srpska Krajina, or “RSK”), and on 26 February 1992 two other Serb autonomous districts in Croatia—the SAO Western Slavonia and the SAO Slavonia, Baranja, and Western Srem – also joined the RSK. Thus, in less than two years, the Serb leadership in Krajina managed to create a separate Serb state (albeit unrecognized by the world) on the territory of Croatia.

Political moves towards ethnic division in the Krajina in 1990 were facilitated by the rhetoric of Serb leaders and media, which encouraged ethnic division, created fear among the Serb people in the Krajina, exaggerated the threat posed by the Croatian authorities, and blurred the line between the Croatian authorities and the Croatian people. Such propaganda served as a wedge driven between the Serb and Croat peoples in the Krajina, and its effect was separation, mutual fear and distrust. It supported and facilitated the political division discussed above, and ultimately the crimes charged in this Indictment.

One widely used tactic was to declare that the Serb people were threatened by the newly-appointed Croatian government, and to exaggerate that threat. BABIC testified that during the course of 1990, there was significant discussion in the Serb media about genocide perpetrated by the Ustasha regime of the Independent State of Croatia (“NDH”) in the 1940s and about the suffering of the Serbs at the time, coupled with an erroneous equation of the new Croatian government in 1990 with the NDH. The media described the Croatian government as the government of Ustasha; it reported that the Croats were Ustashas themselves, that keeping in mind 1940 and 1941 they ought not to be trusted, and that a similar scenario could be expected to take place in the 1990s as well. MARTIC himself used the “Ustasha” term in public statements and official documents.

A public letter by Defence witness Slobodan JARCEVIC, written in 1993 but acknowledged by him to be similar to propaganda of earlier years, raised fears about the Croat people themselves, declaring that “the villain, who was taught from his childhood to exterminate the Serbian people, must not step on Serbian land.” BABIC testified that the constant references to Croatian authorities as “Ustashas” inevitably affected how the Serb people felt about the Croatian people (who, after all, elected the authorities in the 1990 elections). He testified that as a result, Serbs first felt “uncertainty” and then “hatred” towards the Croatian people.

[...]

While MARTIC was touting his success at “disarming” Croatian police, he continued to arm the Serb population. In April 1991, MARTIC

announced that citizens were already bringing to the police station in Knin lists of those capable of bearing arms, that about 10,000 people from Krajina were on these lists to date, and that further lists were still arriving. Also in April, MARTIC said that 30,000 people from Krajina had volunteered to defend the Krajina and Knin. These statements show that MARTIC continued to prepare for conflict. In July 1991, MARTIC declared: "We are now practically at war with the authorities."

[...]

By the summer of 1991, the main components of the JCE and its common purpose were in place. MARTIC and other Serb leaders in the Krajina and Belgrade shared the goal of creating a separate Serb state, and pursued it through the JCE, whose purpose was the forcible removal of non-Serbs from the Krajina. Serb leaders (including MARTIC) defined the conflict in clear ethnic terms and inflamed Serb fears of Croatia and of Croats through their propaganda, directly laying the groundwork for crimes against Croat civilians. Serb forces after August 1991 fought together to seize territory in order to make it part of the new Serb state, and to ensure, through the commission of crimes, that Croats would be pushed out of these areas. Several witnesses testified directly or indirectly to the existence of the common purpose of the JCE, and their testimony was substantially corroborated by documentary evidence. The purpose is also evident from the pattern of attacks and crimes during the second half of 1991.

[...]

Throughout 1992 to 1995, MARTIC and other Serb leaders continued to work towards their goal of creating a separate Serb state through the JCE. This period was different, however, because by January 1992 the Serb forces controlled all of the Serb areas in the Krajina, many of these areas had already been cleansed of Croat civilians and, starting in 1992, there was a substantial international presence in the RSK. Nevertheless, the evidence shows that Serb leaders, including MARTIC, continued to pursue the goal of a Serb state through continued militarisation, links to Belgrade and a refusal to consider, in negotiations with Croat authorities, anything short of a separate Serb state. Moreover, during this period, Serb authorities, including MARTIC, refused to allow Croats to return to the Krajina and continued to pursue their forcible removal through crimes.

[...]

On 30 March 1994, the parties reached a cease-fire agreement which was intended to be the first step in a broader peace process. However, Serb leaders repeatedly found reasons to delay negotiations on economic and

confidence-building measures and as a result they dragged on until December 1994. On 30 January 1995, international representatives presented the Z-4 plan, which would have provided for substantial autonomy in areas where Serbs had a majority before 1991 (i.e., Sectors North and South), first to President TUDJMAN and then to the leadership of the RSK. TUDJMAN did not like the plan but agreed to negotiate on the basis of it, but MARTIC refused even to touch the document despite Ambassador GALBRAITH's repeated urgings to negotiate. In fact, MARTIC was opposed to any relationship between Knin and Croatia, imagining that the RSK could be an independent state or perhaps become part of Greater Serbia.

Even when it became clear in August 1995 that Croatia was preparing to attack the RSK and seize control of its territory, the evidence is that both MARTIC and MILOSEVIC refused to engage seriously in the negotiation process [...]."⁶

12. The "Greater Serbia" project, and the appalling violence, suffering and persecution against non-Serbs which it engendered, is the very basis for the OTP's prosecutions of a large number of indictees.⁷
13. Yet, extraordinarily, this background is entirely omitted from the Prosecution Brief. The section entitled "Overview of the case" does not mention any of these facts. Indeed, the presentation of the historical background to the conflict in the Prosecution Brief is so distorted that the Prosecution contradicts its own submissions in other cases.
14. The Prosecution seeks to bury the historical fact of the "Greater Serbia" project because it is inconvenient to the account that it wishes to present in this case. The Prosecution's approach in this case does not serve the interests of justice or the historical mandate of the Tribunal to compile a true account of the conflict in the former Yugoslavia. The Defence submits that the Prosecution should strive to assist the Judges by presenting a truthful and balanced account of the events that are the subject of the Indictment, including the "inconvenient" facts

⁶ *Prosecutor v. Martić*, IT-95-11-T, *Prosecution Final Trial Brief*, paras.5,22-25,30-33,58,81,95,217,224-225(emphasis added).

⁷ *Supra*,fn.2.

of the Martić Joint Criminal Enterprise (“JCE”) and “Greater Serbia” project led by the Prosecution in many other cases.

15. For the reasons outlined herein, the Defence takes strong issue with the “Overview of the case” section of the Prosecution Brief.

IV. THE ROLE OF ANTE GOTOVINA IN OPERATION STORM

16. The Defence takes issue with the Prosecution’s attempt to characterise Operation Storm as involving a common criminal purpose. The Defence specifically denies the allegations set out in paragraphs 16 to 49 of the Prosecution Brief, and in particular, all references to an alleged JCE and the alleged implementation of a common criminal purpose. The Prosecution – as with all elements that it has to prove at trial beyond a reasonable doubt – will be put to the strict proof thereof.

1. The Objective of Operation Storm was Legal

(a) The Martić JCE

17. The Defence takes issue with paragraphs 18 to 26 of the Prosecution Brief.
18. Contrary to its own position in *Martić*, the Prosecution now contends at paragraphs 3 and 18 through 26 of the Prosecution Brief that President Tudjman had a “longstanding interest in ethnic homogeneity”, harboured plans for ethnic cleansing of “Krajina” Serbs, and “resurrected” Serbian fears and “memories of World War II genocide at the hands of Croatian forces [...] by the re-emergence of symbols from that period.”
19. The Prosecution in *Martić* submits that it has proven beyond a reasonable doubt that it was the Martić JCE that deliberately instilled fear of the Croatian government in the “Krajina” Serb population. The Prosecution in *Martić* further establishes that the Croatian government (and in particular, President

Tudjman and the HDZ Party⁸) did not harbour any “genocidal” intentions toward the “Krajina” Serbs. These allegations (including allegations of the resurrection of *Ustasha* symbols) were propaganda used by Serb leaders to achieve ethnic division and ethnic cleansing in furtherance of the “Greater Serbia” project.⁹

20. By July 1995, it was clear to all observers that Bosnian Serbs were pursuing their “endgame,” which involved the completion of “six strategic objectives” outlined by Radovan Karadzic in 1992. As identified by the Prosecution in an earlier case:

The first such goal is separation from the other two national communities – separation of states. [. . .]

The second strategic goal, it seems to me, is a corridor between Semberija and Krajina [...] there will be no Krajina, Bosnian Krajina or Serbian Krajina or alliance of Serbian states if we do not secure that corridor.

[. . .].

*The sixth strategic goal is the access of the Serbian Republic of Bosnia and Herzegovina to the sea.*¹⁰

21. The Prosecution has already proven in earlier cases that in March 1995 Radovan Karadzic issued an operational directive to his forces to eliminate the Muslim enclaves of Srebrenica and Zepa, in furtherance of the “six strategic objectives”.¹¹ Throughout July 1995, Serb forces launched attacks on UN Safe Areas, and in particular, the Bosnian towns of Srebrenica, Zepa, and Gorazde.¹²

⁸ *Hrvatska Demokratska Zajednica*, a Croatian political party led by Franjo Tudjman.

⁹ *Supra*, para.8

¹⁰ *Prosecutor v. Krajisnik*, IT-00-39-T, *Trial Judgement*, 27 September 2006, para.994. Emphasis added.

¹¹ *Prosecutor v. Stanisic and Simatovic*, IT-03-69-PT, *Revised Second Amended Indictment*, para.55.

¹² *Ibid.*, para.56.

22. “Krajina” Serb forces together with other Serb forces also launched a coordinated attack on the town of Bihac in an effort to create a corridor from Belgrade to Knin that would forever cement the creation of “Greater Serbia”.
23. In an effort to stop the Serbian assault on Bihac, Presidents Tudjman and Izetbegovic signed a mutual defence pact on 22 July 1995 (“Split Agreement”). The Split Agreement was negotiated under the auspices of the United States. Pursuant to the Split Agreement, the Bosnian government invited Croatian forces into Bosnia to defend it from Serb aggression. The Split Agreement thereby authorized a joint Croatian-Bosnian military action in Bosnia.
24. Pursuant to the Annex of the Split Agreement, General Ante Gotovina was no longer simply the Commander of the Split Military District, but was given the title of “Commander of Croatian Forces”, making him the Operational Commander of Croatian (“HV”) and Bosnian Croatian (“HVO”) forces in Bosnia (“Croatian Forces”). General Gotovina’s counterpart in the Croatian-Bosnian defence force was General Vahid Karavelic.
25. General Gotovina’s operational command centre was located in Bosnia at all relevant times in this Indictment.
26. The evidence will show that General Gotovina’s engagement in Bosnia throughout the relevant time period was at the request of both the governments of Bosnia and the United States. Beginning in July 1995, General Gotovina was explicitly ordered to conduct military campaigns in Bosnia in order to defeat the Bosnian Serb forces of Ratko Mladic. Matters of law and order in Croatia were under the jurisdiction of other branches in the Croatian government.
27. Bosnia and Croatia were forced to undertake military action in July 1995 because the Milosevic JCE (1) was aggressively pursuing its “strategic objectives” to create a “Greater Serbia”, (2) Serbian leaders (including Martić and Milosevic) refused to seriously engage in peace negotiations, and (3) the

United Nations was unable or unwilling to come to the assistance of Bosnia and Croatia.

28. By the summer of 1995, the United Nations Protection Force (“UNPROFOR”) in Zagreb had adopted a policy of appeasement towards Bosnian Serb and “Krajina” Serb leaders. The chief UN negotiator, Yasushi Akashi, was “slavishly neutral” and wanted to avoid a confrontation with the Serbs at all costs. Akashi’s appeasement of the Serbs even frustrated Kofi Annan, who was then head of the Department of Peacekeeping Operations.¹³
29. In late July 1995, Bosnia and Croatia – with the support of the United States – began military operations in the Livno Valley of Bosnia (“Livno Operation”). The Livno Operation, led by General Gotovina, involved a fierce battle that was ultimately won by Croatian Forces. Croatian Forces successfully reduced pressure on the Bihac pocket and simultaneously cut off Knin from Belgrade by seizing the strategic towns of Grahovo and Glamoc.
30. In late July 1995, Croatian Forces were in a strategic advantage against RSK forces, but they would not be for long. Radio intercepts will prove that, almost immediately, Mladic began preparations to launch a counter-offensive to rout Croatian Forces in the Livno Valley.
31. The evidence will show that, on 2 August 1995, Croatian government representatives travelled to Washington and received a diplomatic endorsement for Croatia’s desire to launch military operations. Croatian representatives were told explicitly that the United States “would not object to” a Croatian operation to liberate the “Krajina” region and outlined specific conditions that must be met in this regard (“United States Conditions”).¹⁴
32. A White House spokesman identified the United States Conditions:

¹³ Cable from Annan to Akashi, No. 1981 (15 June 1995)

¹⁴ White House Press Briefing, Mike McCurry, (2 August 1995)

The point of the discussion was really to emphasize to the President that in the meetings with Croatian officials we have urged that their forces exercise the utmost restraint, that they seek to minimize civilian casualties as they conduct their operations, currently, that they respect the human rights of the civilian population and ensure the safety of United Nations personnel in the area. In these meetings with these officials from the government of Croatia they've also cautioned against the danger that might exist from a wider Balkan conflict and expressed concerns in those areas as well.¹⁵

33. Testimony from witnesses will show that at all times prior to and during Operation Storm, Croatian government officials took great care to ensure that the United States Conditions were met.

(b) Brijoni Meeting

34. The Defence takes issue with paragraphs 16 to 17 of the Prosecution Brief. Contrary to assertions made by the Prosecution regarding a meeting held in Brijoni on 31 July 1995 (“Brijoni Meeting”), the Brijoni Meeting was not the meeting that “finalized military plans for Operation Storm”.
35. Aside from questions of authenticity of the Brijoni transcript, military plans for Operation Storm were finalized in a meeting attended by Croatian military leaders on 2 August 1995 in Zagreb (“True Final Meeting”).
36. The evidence will show that at the True Final Meeting, the United States Conditions were taken seriously, and strenuous efforts were made to ensure compliance with them. Minister Susak informed senior military leaders, including General Gotovina, that Operation Storm “has received a certain blessing of the West but we must make sure nothing happens to UNPROFOR.” Minister Susak also informed leadership that the “military police must be

¹⁵ *Ibid.*

energetic in preventing all crime [...] The commanders of military districts must pass along orders to their subordinates that all excesses are prohibited (burning, looting, etc) [...] We must ensure that we do not have reason to put the heroes of the Homeland War on trial.”

37. The Prosecution Brief admits that General Gotovina issued orders consistent with Minister Susak’s exhortation that all crime by HV members must be prevented.¹⁶ When issuing orders for the beginning of Operation Storm, subordinate troops were given strict instructions that the Geneva Conventions and international humanitarian law are to be respected and that all criminal conduct was to be prevented and punished. In response to disciplinary problems with troops in Bosnia, on the eve of Operation Storm, General Gotovina replaced commanders with new officers who recently completed training and education at Commander Staff School in Zagreb, with the expectation of maintaining better discipline.
38. The Prosecution alleges that General Gotovina remarked at the Brijuni Meeting that all Serbs would leave Knin except those who could not.¹⁷ To the extent that the Brijuni transcript is authentic, which is expressly denied, the Defence submits that this was a reasonable intelligence assessment based on Serbian actions throughout the war in areas that they could not retain militarily. The evidence will show that, on 2 August 1995, Ambassador Galbraith told Milan Babic that if the HV launched a military operation, “most of the Krajina Serbs will leave” and they would never return.¹⁸ In light of these statements, it is not clear from the Indictment whether the Prosecution believes Ambassador Galbraith to be a member of the JCE.
39. By 3 August 1995, Croatia was prepared to retake occupied territory in “Krajina”. Contrary to assertions at paragraphs 16 to 26 of the Prosecution

¹⁶ Para.62

¹⁷ Para.16

Brief, there was no criminal plan being implemented. Operation Storm was legal, and the Croatian government received strict instructions from the United States regarding the conditions that must be met in order for Croatia to launch military operations without suffering diplomatic consequences. The evidence will show that Croatia took extraordinary measures to comply with the United States Conditions and international humanitarian law.

2. Operation Storm was implemented in accordance with the Laws of War

(a) No illegal shelling of civilian areas

40. The Defence takes issue with paragraphs 27 to 35 of the Prosecution Brief.
41. The Prosecution Brief asserts that “Krajina” Serbs left because of “excessive shelling of civilian targets”. The evidence will show that Operation Storm, and in particular the shelling of Knin and other towns in the Split Military District, was done in accordance with United States military doctrine (known as AirLand Battle 2000) and in compliance with the laws of war.
42. There is no credible evidence that Knin or any other town in “Krajina” was excessively shelled, or that civilians or civilian objects were targeted. The mistaken impression of “excessive shelling” was created by a limited number of Canadian UN peacekeepers in Knin (“UN Peacekeepers”). The evidence will show that the UN Peacekeepers were not trained by the United Nations to examine the shelling, nor were such military observations within their mandate. An internal OTP report on Operation Storm that was leaked to the *New York Times* cites one Prosecution conclusion that the UN Peacekeepers are “not capable of detached analysis.”¹⁹ The Defence submits that the Trial Chamber will come to the same conclusion.
43. Unlike the UN Peacekeepers in Knin, United Nations Military Observers (“UNMOs”) were specifically trained by the United Nations to conduct military

¹⁹ *New York Times*(21 March 1999)

assessments and to report those assessments to the Security Council. Indeed, the Secretary General regarded UNMOs as the “eyes and ears of the Security Council”. The evidence will show that, contrary to the amateur and unreliable assessments of UN Peacekeepers, UNMOs conducted a formal assessment of the shelling of Knin and determined that it was in accordance with the laws of war:

[T]he HV shelling of Knin can be justified since the ARSK main HQs was deployed there [...]. I will consider the HV use of weapons and force as reasonable, especially compared with other methods to capture the city. According to my interpretation of the Law of War, the Croatian shelling of Knin which took place on 4 August should **not** be considered a war crime.²⁰

44. UNMOs never once protested HV shelling, despite the fact that UNMOs were deployed in Sector South.
45. Accordingly, the Prosecution’s allegations regarding the shelling of Knin are not supported by evidence. With respect to other towns in Sector South, the Prosecution has not produced one single professional assessment that concludes that shelling employed in other areas was contrary to international law.
46. On or about 4 August 1995, UN Peacekeepers spread disinformation to international media that Knin was being reduced to rubble by excessive shelling of HV forces. Immediately upon the conclusion of Operation Storm, international media confirmed that the UN Peacekeepers had misreported and exaggerated their claims. Roy Gutman of *Newsday* reported from Knin:

At the United Nations base in Knin, UN officers chafed at a continued curfew and restrictions on movements. But they acknowledged that the UN had overstated the damage to Knin during the height of the fighting.

²⁰ Doc.0045-9519-0045-9523,p.5

The UN commander, Brig. Gen. Alain Fourand of Canada, said there had been no direct hits on Knin's hospital. Reporters saw some large craters from shells that shattered most of the windows in a nearby apartment house, but there was no evidence of indiscriminate shelling.²¹

47. Similarly, the *New York Times* reported from Knin:

The town does not appear to have been as badly damaged as reports of the shelling over the past few days would have suggested. For one thing, the hospital was not shelled, as had been reported. Only one shell hit the modern hospital building, and the Croats appeared to be aiming at a rebel Serbian tank firing from nearby, a United Nations official who had been at the hospital said today. "I don't think they were shelling us," said the official, who spoke on condition of anonymity.

In three passes over the town by helicopter, little evidence was seen of the kind of damage that extensive shelling would cause. The red tile roofs on most houses are intact. The only gutted building was the Roman Catholic Church, which served the Catholic Croats, and the Serbs, who are Orthodox, did that during their occupation.²²

48. Similarly, the *National Public Radio* reported from Knin:

When Knin was under Croatian artillery bombardment last Friday and Saturday, U.N. officers in their compound counted up to 1,800 explosions in the town. They reported that the only hospital in Knin had been shelled and they suggested a very large number of civilians had been killed, but a visit to Knin tells a different story. The main commercial and residential neighborhoods of the town were spared destruction from shelling, as was the hospital. Only one building on the main street was hit and demolished.

²¹ Newsday, "In Krajina, Disorder Reigns" (8 August 1995)

²² *New York Times*, "Croats Celebrate Capturing Capital of Serbian Rebels" (8 August 1995)

The town is littered with broken glass. Most of the storefronts have been smashed in, apparently by triumphant Croatian troops. Looting was widespread. The intense shelling and attack turns out to have been focused on villages in the hills around Knin where Serb resistance was strongest. Civilian casualties appear to have been minimal in the town itself but it is not known how many died in the villages.²³

49. The shelling of Knin was not excessive and was not in violation of international law. Indeed, the total number of Serbian casualties (civilian and military) in the Split Military District during Operation Storm was 166, and another 48 civilians were killed in the Split Military District after Operation Storm.²⁴ Meanwhile, the HV suffered 215 dead and 829 wounded during Operation Storm.
50. The Defence submits that the reason the Prosecution has not charged General Gotovina with indiscriminate attacks on civilians and civilian objects, or of spreading terror, is that the evidence does not support such charges. The Prosecution could not, in good faith, bring such charges in light of the evidence described herein.

3. “Krajina” Serbs left as part of the Martić JCE

51. The Defence takes issue with paragraphs 9 to 11 and paragraph 36 of the Prosecution Brief.
52. The overwhelming evidence at trial will show that “Krajina” Serbs fled from the fear and panic caused by (1) four years of intense propaganda directed at them by the Martić JCE, (2) the order to evacuate “Krajina” issued by Milan Martić on 4 August 1995, and (3) fear of prosecution for the four-year reign of terror inflicted by the Martić JCE.

²³ National Public Radio, Transcript of *Morning Edition*, (10 August 1995)

²⁴ As pointed out by the Prosecution in *Martić*, there were tens of thousands of armed civilians in “Krajina,” and therefore the Prosecution must provide strict proof that any alleged “murder victims” were in fact non-combatants.

(c) Peace Negotiations

53. The Martić JCE and “Krajina” Serbs refused to accept the possibility of re-integration of “Krajina” into the Croatian state. The Prosecution submits that Croatia rejected a peace proposal on 3 August 1995 that “international representatives believed was sufficient to forestall military action”.²⁵ The Prosecution is alleging by implication that Croatia undermined peace efforts in order to implement the criminal purpose of the JCE. The overwhelming evidence at trial will refute this allegation.
54. The evidence will show that the Martić JCE, as late as the afternoon of 3 August 1995, had no intention of ever “peacefully reintegrating” the “Krajina” into Croatia. The following excerpt from a telephone conversation between Ilija Prijic (the Chief negotiator of the “Krajina” Serb delegation in Geneva) and Martić on 3 August 1995 at 14:42 supports the Defence’s submission:

Martić: Hey Ico, have you finished?

Prijic: No it’s still ongoing, we have before us one big problem concerning the resolution of this situation, it is not favorable for us, I will explain to you and then you....

Martić: Yes, yes...

Prijic: The following is proposed: on the basis of today’s agreement, delegations of the Croatian government and Serbian representatives of the government in Knin have agreed to stop all hostilities and military activities by 12 on Friday. In other words, on the basis of this agreement it has been agreed:

- 1. That the oil pipeline in accordance with the agreement of 9 december 1994 shall be opened by 7 August 1995.*

Martić: And nothing more?

Prijic: Nothing more except if technical reasons require something else. A meeting concerning the oil pipeline for Petrinja would be held at Pleso on 8 August.

²⁵ Para.7

Martic: That is out of the question.

Prijic: Under point two, it says

- 2. A meeting shall be organized on Friday (inaudible) 9 August in Knin in order to specify the modalities and means of opening and controlling the railway between Zagreb and Split through Knin*

Martic: God forbid!

Prijic: 3. That we are moving towards inclusion of the political question of the Serbian Krajina on the basis of negotiations based on the Z-4 plan.

Martic: Not that, either.

Prijic: The first meeting would be held at Pleso on 10 August, and the next one in Knin on 17 August.

Martic: As a first point, request that these meetings be held outside Krajina and outside Croatia. Let them be held in Geneva.

Prijic: Ok.

Martic: That we agree that the negotiations be held on the basis of equality.

Prijic: And fourth, that we must allow the normal flow of humanitarian aid to Bihac.

Martic: Ok, that's fine.

Prijic: And fourth (sic), that the border posts, that the border crossing into Bihac is controlled by international forces, that is acceptable. Fifth, that we enforce the complete implementation of the agreement on the mandate of the international forces to be deployed on the borders.

Martic: Internationally recognized borders?

Prijic: It does not say here internationally recognized borders but rather it is written there in resolution 981, that is that segment and seventh: in order to establish segments of this political agreement and more specifically to establish the existence of a cease-fire that on Friday on Saturday (sic) 5 August a meeting will be held between the military leaderships of Croatia and Krajina under the auspices of General Janvier.

Martic: That is Ok, but on the front line.

Prijic: And now this, this is what we are thinking about here now but we of course don't know how it is. It depends on the situation, we believe that in certain aspects with respect to the oil pipeline we have to accept that.

Martic: OK

Prijic: With respect to the railway line, we agree that we that we should formulate our own request with respect to this.

Martic: No, no. First there must be an unconditional withdrawal of forces.

Prijic: Of course, but let me finish. With respect to this point we will of course do as you have just suggested. With respect to the oil pipeline, we can agree to solve that problem.

Martic: Yes.

Prijic: Next we will go on that concerning the railroad that we will not accept it like this but rather we can...not in Knin but abroad...

Martic: Not in Pleso or in Knin!

Prijic: Next under number three, we agree that there should be political negotiations but not on the basis of Z-4.

Martic: Without a plan, political negotiations but without any conditions.

Prijic: We agree, we agree that the process of political negotiations should begin.

Martic: Without, and nothing more.

Prijic: They've suggested a date of 10 August to begin the process of political talks.

Martic: Not 10 August.

Prijic: We will agree once the Croatian forces have withdrawn.

Martic: The date of negotiations will be determined subsequently, after the withdrawal of forces and in order to allow for the respect of the cease-fire agreement.

Prijic: Should we put that the negotiations will be held during August?

Martic: Yes, yes.

Prijic: That gives us a lot more time, good and for this part concerning Bihac that is no problem, next...

Martic: Yes, yes, did you report this to Radio Knin?

Prijic: We shouldn't pretend, I don't know how this is going to work out.

Martic: He's expecting you to call, listen I'm going to step out, I'll be gone for a moment, and you hold firm as we had agreed and there are to be no concessions and you are not to come close to accepting this concerning the railway and I want....

Prijic:.....negotiations.

Martic: Good, but a precondition of agreeing to withdraw to the ceasefire lines is that both sides agree to demobilization. Seek the demobilization of forces on the zone of separation line, on the previously agreed zone of separation lines

Prijic: (constantly yelling) Yes, yes, yes!

Martic: Ask for that and then after that we can start all negotiations including political negotiations, but without the Z-4 plan, and the political negotiations must be held outside Krajina and Croatia, again ask that the negotiations be held in Geneva.

Prijic: Ok.

Martic: The political negotiations are to be held in Geneva.

Prijic: Understood.

Martic: Don't let them trick you, because they want us to bring this to a military matter in order that we remain firm, don't be afraid, we're in good shape. We are now in a better position, they are now in a situation.

Prijic: The commentary here from De la Prelle and others that like Jarens...

Martic: OK, good, they want to put you in a psychosis, we are just about finished here, if they could do something they would. Up north they are trying to test us but they are suffering casualties everywhere.

Prijic: Good.

Martic: The situation is good, there are absolutely no problems. And listen, make sure that we are treated as an equal party, we should not be treated as "local authorities," but rather Croatian and Serbian, and the

Serbian side. If they are Croatia, then we are “RSK.” If they are Croatian, then we are Serbian. So that’s it, that equality is what you have to achieve. But under no circumstances will we allow them through threats to get us agree to peace talks, we will agree to discuss peace but without any ultimatums, we will try to resolve this conflict through peace talks, so that everything becomes ours. Don’t let them slip past you Stoltenberg and internationally recognized borders and the UNCRO mandate, because as soon as you’ve recognized the UNCRO mandate you’ve recognized everything.

Prijic: That is point 5.

Martic: Yes, Yes.

Prijic: They are dispersed there but we cannot accept the Z-4 plan.

Martic: Out of the question, out of the question. There will be no discussions about the Vance Plan or about Z-4.political negotiations after August, or rather after, immediately we can commence negotiations as soon as Croatian forces have withdrawn to the zone of separation line, in other words that there is a demobilization and a reduction in war tensions, and we can then begin immediately with political negotiations.

Prijic: Good.

Martic: Yes that, and we will be the ones to decide whether they’ve stopped their bullshit, and then we will agree to begin talks and they will not threaten you. No Pleso, and it should not be an “internal problem” so we want Geneva. So that’s it, good Ico.²⁶

55. This evidence will be corroborated by an interview Prijic gave to Radio Knin five hours later at 19:33, when he stated that the peace talks had ended in Geneva because the “Croatian side insisted on the peaceful reintegration of the ‘Krajina’ into Croatia”.²⁷

²⁶ Intercepted telephone call Transcript(3 August 1995)

²⁷ Interview Transcript

(b) “Krajina” Serbs left because of a previously planned evacuation and not because of shelling by HV

56. Committed to an ideology of ethnic separation and division, Martić under no circumstances would agree to the peaceful reintegration of the occupied territories. Instead, the Martić JCE began preparations in 1993 for the complete withdrawal of the “Krajina” Serb population from Croatia. The criminal purpose behind the Martić JCE’s withdrawal of its own population from “Krajina” was explained by the Prosecution in *Milosevic*.²⁸ The Prosecution submitted that Milosevic and Martić evacuated “Krajina” Serbs from Croatia as part of an overall criminal plan to resettle areas of eastern Bosnia that had recently been ethnically cleansed, as well as to resettle Kosovo.
57. The overwhelming evidence at trial will show that plans for evacuation of the population of the “Krajina” existed as early as 1993.
58. A “strictly confidential” document²⁹ authored by “Krajina” Serb authorities reveals the plan for evacuation (“Confidential Evacuation Plan”). The Confidential Evacuation Plan lists names of drivers on permanent “call”, as well as those on “stand-by” and those who “would be called only if the evacuation became large scale and was to be carried out in haste”. Vehicle capacity, along with vehicle locations in case of evacuation, was also specified, as well as the number of kilometres that coaches could travel on the quantity of fuel available.
59. In August 1994, the Republican Staff of the Civilian Protection in Knin (“Civilian Protection”) produced a comprehensive report classified as “state secret” and entitled “Assessment of Threat and Capability to Protect and Rescue” (“Knin Report”).³⁰ The Knin Report states that the evacuation of the civilian population of “Krajina” would commence only after a decision by “appropriate organs”. The Knin Report also lists bodies of the Civilian

²⁸ *Prosecutor v. Milosevic*, IT-02-54, *Trial Transcript*, p.133-34.

²⁹ *Autotransport Benkovac* DOC.22/95(26 January 1993)

³⁰ *Knin* DOC(August 1994)

Protection responsible for carrying out the “quick and effective” evacuation of the civilian population. Outlined below is the hierarchy of the Civilian Protection which was responsible for carrying out the decisions of the leadership of the RSK:

Republican Staff of the Civilian Protection [“Republican Staff”]

Regional staffs of the Civilian Protection [“Regional Staff”]

Municipal staffs of the Civilian Protection [“Municipal Staff”]

Civilian protection staffs in parts of the municipality [“Civilian Protection Staff”]

Civilian Protection commissioners in large apartment buildings, blocks of buildings, streets, populated areas, companies, and other legal entities [“Civilian Protection Units”]

60. By mid July 1995, “Krajina” Serb authorities had already issued guidelines for the implementation of the evacuation plans. Continuous duty service was ordered, and measures were designed to ensure timeliness in the evacuation and “moving the population”. “Krajina” Serb authorities also suggested that continuous cooperation with the commands of the Serbian Army of “Krajina” (“SVK”) should be established and that reports should be submitted daily and, if necessary, more frequently.³¹
61. In planning for the evacuation, “Krajina” Serb authorities discussed the issue of fuel for vehicles transporting the population, both in internal memoranda and in public meeting assemblies.³²
62. The atmosphere of general dissatisfaction among the population of “Krajina” was facilitated and encouraged by statements made by leading public figures, including politicians and religious leaders.³³

³¹ DOC.03-21/2-95(15 July 1995)

³² *Supra*,fn.29.DOC.01-1020-2/94(26 March 1994)

63. By the end of July 1995, RSK leaders judged the security situation in the “Krajina” territory under its control to be dire. On the basis of the information submitted by its intelligence and military bodies, the “Supreme Defence Council” and “Government” of the RSK, the two highest bodies of this quasi-state, adopted a decision to declare a state of war.
64. Responsibility for the preparation of the evacuation of the population lay with the Civilian Protection of the RSK.
65. On or about 29 July 1995, the Republican Staff ordered all its units in the field to prepare the entire population to leave as soon as the order arrived. This was to be done in cooperation with other civilian and military structures of the RSK in accordance with existing plans for evacuation. The evidence shows that orders were communicated from the top down to the units in the field. Feedback reports by Civilian Protection Staff and Civilian Protection Units in the field also indicate that the population in the “Krajina” was ready to leave before Operation Storm began. Many “Krajina” Serbs decided to leave their homes on their own initiative, frightened by the “evacuation” activities of the civilian and military authorities of the RSK.
66. In addition to the evacuation of the civilian population, RSK leadership paid special attention to removing important documents, and other cultural and material assets. This unauthorized removal was done by the “ministries” of the Civilian Protection.
67. On or about 29 July 1995, a session of the “Government” of the RSK was held in Knin (“Knin Meeting”). The minutes³⁴ of the Knin Meeting indicate that those in attendance were informed of the decision of the “Supreme Defence Council” of the RSK to declare a state of war in Croatia. Immediately after this announcement was made, RSK officials adopted a decision whereby the

³³ “IKA” *Catholic Information Agency*, II, (29 June 1995) pg.4; “Serious accusations of *Knin* Bishop”, *Glas Koncila*, XXXV, (2 July 1995) 27 pg.3

³⁴ “Minutes from the 2nd session of the Government of the RSK” (29 July 1995)

“Ministry of Defence” would issue a special instruction activating war plans and wartime staffing plans (including evacuation plans) in all “ministries and other government institutions”. That the leadership of the RSK seriously considered evacuation is evident in the decisions adopted during the Knin Meeting, including those adopted to make special “cash deposits in Dinars and foreign currencies” and to “urgently make the routes through Doljani and Tiskovac passable”.

68. Doljani and Tiskovac are mountain villages on the border between Croatia and Bosnia-Herzegovina (“BH”), and at that time under the supervision of the RSK and the Bosnian Serb Army under Ratko Mladic (“VRS”). These villages were used at the time as road communications with Republika Srpska Bosnia-Herzegovina (“RSBH”). Making those communications passable would enable the population of the RSK to extend to RSBH, and then, onward to Serbia (“FRY”) in furtherance of the “Greater Serbia” project.
69. On or about 29 July 1995, [REDACTED] issued a confidential order³⁵ (“First [REDACTED] Order”) activating all “regional Civilian Protection staffs” for the purposes of “moving” the population to “shelter, evacuation, and care”. Regional Staff were responsible for alerting all the members of the Civilian Protection through Municipal Staff and for “updating plans for sheltering, evacuation, and care, alerting those in charge of implementing particular tasks”. The First [REDACTED] Order stipulates that the implementation of tasks should be carried out in cooperation with the SVK and that “this staff should be kept regularly informed on a daily basis”.³⁶
70. The Regional Staff immediately forwarded the First [REDACTED] Order to the Municipal Staff where it was re-emphasized that all members should be alerted to “the measures for sheltering, evacuation, and care” of the population, “updating the existing plans to fit these measures”, and “examining the

³⁵ DOC.01-78/95(29July1995)

³⁶ DOC.01-82/95(2August1995)

possibility of businesses joining the implementation of protection, rescue, moving, and evacuation of the population”.³⁷

71. The First [REDACTED] Order was then implemented by members of the Civilian Protection in the field. It is evident from a report, dated 31 July 1995 and authored by the Chief of the Municipal Staff in Drnis, that Civilian Protection Units were informed about the measures. In particular, “emphasis was put on sheltering and preparatory work associated with evacuation”, and that “permanent duty service was introduced for all members of the staff and employees of the Ministry of Defence”. All vehicles designated to take part in the evacuation were checked for roadworthiness, as was the fuel that had been distributed to them as early as November 1994.³⁸
72. Given the Confidential Evacuation Plan, Knin Report, Knin Meeting, and the First [REDACTED] Order, everything was in place for the evacuation of the “Krajina” Serbs in accordance with the Martić JCE. The only remaining task was the issuance of a final evacuation order by senior “Krajina” Serb leaders.
73. On or about 31 July 1995, Toso Paic issued an order (“Paic Order”) to all lower units ordering the preparation for speedy evacuation of archives and current documents relating to the most important and most confidential matters of administration. These included personnel documents, along with documents relating to finance, operations, defence preparations, duty service, “the police”, and other “special matters”. The RSK government signalled urgency through an express warning in the Paic Order that every “Secretary of the Interior” is to be held personally responsible for the “implementation of this task”.³⁹
74. On or about 2 August 1995, [REDACTED] issued another strictly confidential order⁴⁰ (“Second [REDACTED] Order”) to all Regional Staff. The Second

³⁷ DOC.03-179/1-95(30July1995)

³⁸ DOC.01-10/95(31July1995)

³⁹ DOC.08/1-1-6314/95(31July1995)

⁴⁰ DOC.01-83/95(2August1995)

[REDACTED] Order instructs “municipal staffs, organs and organizations, organs of municipal administration, businesses and other legal entities” immediately to commence preparations for the evacuation of “material assets, archives, records of births, marriages and deaths, records and documents of a sensitive nature, movable cultural assets, money, inventories of valuables, and other relevant documentation”.

75. The Second [REDACTED] Order was also issued to all lower units of the Civilian Protection and emphasized that the evacuation of the population shall have priority over evacuation of material assets “if the order for evacuation is issued in time”.
76. The fact that RSK authorities were implementing preparations for the evacuation of the entire “Krajina” Serb population caused immediate panic among the population. The spread of hysteria and fear, and the “leakage” of information relating to the evacuation plans contributed to the fact that the civilian population began spontaneously to leave their homes.
77. According to eyewitness accounts, several days before 4 August 1995 (i.e. before the start of Operation Storm) the civilian population in locations under the control of RSK authorities began to leave their homes.⁴¹
78. On or about 1 August 1995, excerpts from a private telephone conversation reveal that the entire civilian population evacuated the town of Strmica, which is located 10 km north of Knin.⁴²
79. On or about 3 August 1995, excerpts from a private telephone conversation of an unidentified female from Plaski reveal: “[w]e’re packing and we’re going to leave while there is still time.”⁴³

⁴¹ Intercepted Telephone Transcript

⁴² Transcript(1August1995,19:40hours)

⁴³ Transcript(3August1995,20:00hours)

80. Further evidence will show that the civilian population in “Krajina” was leaving for RSBH and FRY.

(c) Serb Policy from 1991 to 1999 – in Croatia, Bosnia and Kosovo – was to evacuate its own population

81. On the first day of Operation Storm on 4 August 1995 at 17:00, RSK leadership in the “Supreme Defence Council” headed by “President” Martić adopted the decision to evacuate the civilian population of “Krajina” (“Martić Evacuation Order”). The Martić Evacuation Order instructed RSK authorities “to organise the evacuation of the civilian population of northern Dalmatia and southern Lika for preventative and security reasons”⁴⁴. This order related to the towns of Knin, Benkovac, Obrovac, Drnis and Gracac, and it was to be conducted in accordance with “prepared plans”.⁴⁵
82. The Martić Evacuation Order related only to the area of northern Dalmatia and southern Lika under the control of the “Krajina” Serb rebels. However, the civilian population also left in an organized manner from the remaining parts of Lika, Kordun, and Banovina, which were also under the control of RSK authorities.
83. Before the adoption of the Martić Evacuation Order, excerpts from a telephone conversation between Milan Babic and General Mile Mrksic (in the presence of a third unidentified person) reveal:

Unidentified person: Milan, of the Supreme Defence Council only the General and I are here, and we are thinking of getting the women and children out.

Milan BABIC: There’s no alternative. I’ve spoken to GALBRAITH (the US Ambassador to RH) an hour ago. From what he said, I don’t think they’re going to stop. Take all the steps in accordance with the plan.

⁴⁴ Sekulic, *Knin je pao u Beogradu*, (Germany:2000), p.179

⁴⁵ *Ibid.* Florence Hartmann, *Milosevic, dijagonala laufera*, (DanGrafBelgrade:2001)

Unidentified person: Does that mean that we should pull out?

Milan BABIC: That's right.

*Unidentified person: OK. We're going up there, as agreed.*⁴⁶

84. The Martić Evacuation Order was also issued to SVK units in the field through the military chain of command. With the support of civilian authorities, these SVK units then organized the exodus of the population. However, immediately after the civilians left, the military units of the SVK left too.⁴⁷
85. Immediately after the Martić Evacuation Order was issued, a meeting of the military leadership of the SVK was held at 20:00 hours in the "Operational Centre of the Main Staff" under the chairmanship of General Mrksić. General Mrksić informed the officers of the "7th Dalmatian Corps" of the SVK about the decision to evacuate the civilian population and gave them specific tasks in furtherance of this objective. According to Milisav Sekulić, "they did not talk about an evacuation of only the populations of northern Dalmatia and southern Lika. All those present realized that the decision applied to the entire territory of the western part of the RSK".⁴⁸
86. On 4 August 1995, the entire population of Knin left their homes, beginning at 20:00, in a manner organized by the RSK and the *Martić* JCE. This evidence is corroborated by General Mrksić, who was in Knin with his associates when he held this telephone conversation at 21:58:

Mile MRKSIĆ: It's all over here. Knin is emptying. It's an organized exodus.

*Mile MRKSIĆ: Knin is empty but we are going to defend Knin, tomorrow and the day after tomorrow, by all means necessary.*⁴⁹

⁴⁶ Transcript(4August1995,16:30or16:43hours)

⁴⁷ *Supra*,fn.43,p.197

⁴⁸ *Ibid.*,p.180. The author used "western parts of the RSK" because this entity also included eastern part, the temporarily occupied areas of Eastern Slavonija, Baranja, and Western Sirmium, where lines of separation remained unchanged during Operation Storm.

⁴⁹ Transcript(4August1995,21:58hours)

87. All available intelligence information suggested that General Mrksic would indeed defend Knin on 5 and 6 August 1995, as he stated above. Moreover, in a conversation with Radio Belgrade at 21:30 on 4 August 1995, General Mrksic promised that, “if the VRS [Bosnian Serb Army under Mladic] succeeds in putting pressure on the [HV] forces that are attacking from the direction of Grahovo-Knin, we will stabilize the lines and then launch a counteroffensive.”
88. As he prepared for military operations on 5 August 1995, it was reasonable for General Gotovina to assume that General Mrksic would defend Knin and that the combined VRS-RSK forces would launch a counterattack.
89. According to witness statements in “Krajina”, at the beginning of Operation Storm, members of the local civilian and military structures of the RSK were going from house to house telling people that the evacuation was underway and calling on people to leave their homes. In some places, these announcements became orders, issued by armed members of the SVK or armed civilians, and there were cases where armed Serbian individuals expelled their own population from their homes, forcing them to leave. Witnesses claim that individuals spread panic among the local population.
90. Florence Hartmann, a former OTP spokeswoman and journalist in the region at the time of Operation Storm, will testify that:

Each and every refugee could confirm that the population fled after their leadership invited them to do so. Every soldier could confirm that Serbian soldiers were deliberately withdrawn, that shifts at night duty service would not turn up in those areas where officers deserted, and that heavy weapons were withdrawn in an organized manner. In short, about the conscious decision to leave Krajina.⁵⁰

⁵⁰ Supra,fn.45.

91. The exodus of the Serbs from “Krajina” was not caused by shelling or “psychological warfare” by the Croatian government or HV. Rather, the overwhelming evidence at trial will show that the members of the *Martić* JCE deliberately planned and executed the mass exodus of the “Krajina” as a consequence of their relentless propaganda over a five-year period, in which they convinced their own population of the impossibility of co-existing in a multi-party and multi-ethnic Croatian state.
92. Moreover, it was the policy of the *Martić* JCE to withdraw the Serbian population from territories which would not remain “purely Serbian.” The evidence will show that the mass evacuation of Serbian civilians was not the “spontaneous result” of the actions of the Croatian army, but rather was the *modus operandi* of the Serbian JCE from 1991 through 1999.
93. Indeed, after the Dayton Agreement was signed, NATO peacekeepers entered Bosnia-Herzegovina in January 1996. The Dayton Agreement called for the unification of Sarajevo, including Serb-held suburbs of Ilidza and Grbavica. In March 1996, Serb leadership ordered all Serbs in Sarajevo to burn down their own apartments and leave the city.⁵¹ Serbian authorities even broadcast instructions on how to set fires. Serbian extremists roamed the streets warning Sarajevo Serbs that if they did not destroy their homes and leave, they would be punished severely, perhaps even killed.⁵² In the week before the reunification of Sarajevo, a steady stream of Serbs clogged the roads out of Sarajevo, mostly carrying furniture, plumbing fixtures, and even doors. “We must not allow a single Serb to remain in the territories which fall under Muslim-Croat control,” said Gojko Kličević, head of the Bosnian Serb Resettlement Office.⁵³ According to UNHCR, of the 70,000 Serbs that lived in Sarajevo at the

⁵¹ Holbrooke, *To End a War*, pg.335

⁵² *Ibid.*, pg.336

⁵³ *Ibid.*

beginning of March 1996, only 10,000 remained after the exodus ordered by Serb authorities.⁵⁴

94. In 1999, the same strategy was implemented by the Milosevic JCE in Kosovo. After NATO's deployment to Kosovo on 12 June 1999, well over 164,000 Serbs were withdrawn from Kosovo by the Serbian leadership, in the presence of NATO forces.⁵⁵ This tactic of the Serb leadership was by 1999 well known to the international community. At a press conference of the United States Department of Defense on 7 June 1999 discussing the imminent arrival of NATO forces in Kosovo, Pentagon spokesman Ken Bacon predicted the mass departure of the Kosovo Serbs:

Q: Do you have any concerns about Kosovar Albanians or KLA retaining their small arms and engaging in small arms fights with paramilitary who may remain and NATO getting caught in the crossfire?

Mr. Bacon: We always have to be concerned about possible threats to NATO troops. The fact of the matter is that I don't think that Kosovo is going to be a very happy place for Serbs when NATO comes in, and I don't think Serbs want to stay there. I think they'll want to return to Serbia. I don't anticipate that's going to happen. I anticipate people will want to get home and rebuild their lives, and that's what they'll devote their energies to.

Q: Does that include the Serb minority? You said that Kosovo won't be a very happy place for Serbs. What about...

Mr. Bacon: The Serb minority will be allowed to stay if it wants to stay. We're already getting some reports and suggestions that most Serbs will want to go. We don't know how big the Serb minority is there. It's probably around 100,000, could be a little more than that. But as Kosovar Albanians flow back in, our assumption is that many Serbs will probably return to Serbia.

Q: It sounds like you're encouraging the Serbs who now live in Kosovo then to leave.

⁵⁴ *Ibid.*

⁵⁵ HumanRightsWatch, August 1999, Vol. 11, No. 10., pg. 7

Mr. Bacon: I'm not encouraging them at all, I'm just stating what we anticipate the facts will be.⁵⁶

95. The evidence at trial will also show that Serbs fled even from areas which were peacefully reintegrated into Croatia. During the two-year UN administration of Eastern Slavonia from 1996-98, more than 60,000 Serbs simply left on their own accord, rather than live in a multi-party and multi-ethnic Croatian state.
96. The evidence at trial will be overwhelmingly in favor of the Defence. The evacuation of the "Krajina" Serbs was the result of a deliberate, pre-mediated policy of the Milosevic/Martic JCE. Any arguments to the contrary by the Prosecution will be refuted by the evidence.

(d) There were no deliberate obstacles to return

97. The Defence takes issue with paragraphs 46 to 47 of the Prosecution Brief.
98. "Obstacles to return" were created primarily by the fact that "Krajina" Serbs were victims of the Martić JCE. The Prosecution argues that Serb civilians were "refused entry" at the borders when attempting to return to Croatia. What the Prosecution fails to point out is that these Serbs had never claimed Croatian citizenship as a result of their status as citizens of "RSK," and thus did not have proper papers to cross an international border. This was an administrative issue caused directly by RSK policy. As soon as Serbs went to Croatian diplomatic missions in FRY to obtain citizenship and passports, they were readmitted into Croatia.
99. The evidence will show that 13,173 Serbs returned to Croatia from Serbia in 1996; 19,328 by 1997; 27,664 by 1998; 34,096 by 1999; 51,436 by 2000; 60,977 by 2001; 69,427 by 2002; and 75,295 by 2003. The total number of Serbs who returned from Serbia, Bosnia and other parts of Croatia by 2003 was

⁵⁶ Transcript(7June1999)

105,805. The Defence submits that this is proof that measures were not taken to ensure a “new demographic picture”.

V. THE ALLEGED CRIMINAL RESPONSIBILITY OF ANTE GOTOVINA

100. The Defence takes issue with paragraphs 37 to 45 and 48 to 71 of the Prosecution Brief.
101. At all relevant times in this Indictment, General Gotovina’s operational command centre was located in Bosnia. From July 1995 to October 1995, General Gotovina’s operational headquarters were located in the Bosnian towns of Rujani, Sajkovići, Vrba and Sipovo – and not in Knin as the Prosecution suggests.
102. Prior to, during, and after Operation Storm, General Gotovina took all reasonable steps that an operational commander is required to take under the laws of war and international humanitarian law.
103. Upon the conclusion of Operation Storm, General Gotovina justifiably relied on other organs of the Croatian government, who were directly responsible for maintaining law and order in the newly liberated areas of Croatia. General Gotovina also justifiably relied on relevant laws and enforcement procedures, including the *Constitution of the Republic of Croatia*.
104. On 4 August 1995, the Croatian government decided that civilian police forces (“MUP”) would take over responsibility for law and order immediately as towns were liberated by the HV.
105. On 7 August 1995, General Gotovina ceased to be Operational Commander in relation to Knin. This was in accordance with international norms and standards. Since Croatia was reintegrating its own territory, there was no reason to install military rule.
106. Indeed, that same day on 7 August 1995, the Croatian government was advised that MUP had taken over responsibility for law and order throughout the

liberated areas. The Ministry of Justice also announced that it was functioning and operational in the liberated areas. Thus, the military no longer had any responsibility for maintenance of law and order. Rather, it was now the responsibility of the civilian government.

107. The evidence will show that MUP had the authority and responsibility to detain anyone caught committing a criminal act. This included HV troops. If an individual caught looting or burning (“Looter”) was an HV soldier, the civilian police were required to identify the Looter and detain him. If the Looter was identified as an active duty HV soldier, the police could detain the Looter, but were then required to call the Military Police for further prosecution. Furthermore, if the identity of the Looter was unknown (even if it was known that the Looter generally belonged to a military unit), MUP had sole jurisdiction to investigate the crime. Under Croatian law, if MUP identified the Looter by name and certified that he was an active duty HV soldier, then the Military police would take over jurisdiction.
108. The Defence submits that the civilian authorities functioned properly and in accordance with Croatian law, as did the military.
109. The evidence will show that a considerable amount of war booty was recovered by the HV in accordance with international law, and thousands of these items were properly registered and recorded.
110. With respect to looting, the evidence will show that General Gotovina issued stringent written and verbal orders to prevent and punish such illegal activity.
111. The Prosecution Brief makes assertions against General Gotovina that are based on a fundamental misunderstanding of Croatian law, as well as egregious misstatements of fact. In particular, the Defence take issue with paragraphs 46-49 of the Prosecution Brief.
112. General Gotovina did not have any legal ability to command the military police in the performance of its policing function—the military police was commanded

exclusively by the Military Police Administration—and this is clear from the overwhelming weight of documentary evidence.

113. The Prosecution is apparently confused by the fact that certain combat units of the Military Police were temporarily subordinated to all Military District commanders during combat operations. However, regular Military Police units, including the criminal investigations section of the Military Police, were never subordinated to Military District commanders. Rather, they were under the exclusive command of the Military Police Administration.
114. The Prosecution admits that “Gotovina issued a number of orders between 4 August 1995 and 18 August 1995 that criminal activities cease and that disciplinary measures be taken.”⁵⁷ Yet, at paragraph 53, the Prosecution asks the Trial Chamber to draw “an inference that the action in question were ordered” by Gotovina, because the criminal activities were on a widespread basis. The Prosecution’s position is unsound. There is no precedent to support the Trial Chamber drawing such an adverse inference given the evidence that Gotovina issued orders for criminal activity to stop and for disciplinary measures to be taken.
115. It is not true that “Gotovina received extensive information from the representatives of international organizations monitoring the situation.” The evidence will show the exact opposite. Everyone understood that General Gotovina was an operational commander in Bosnia and had nothing to do with issues of law and order in Croatia. For this reason, not one international organization sought a meeting with General Gotovina after Operation Storm for the purpose of advising him of crimes. Not one international organization wrote a letter to General Gotovina asking him to intervene. While General Gotovina did have two meetings with international organizations in September, the international organizations in question requested these meetings for purposes of protocol, i.e. to introduce a new head of mission to the commander of the

⁵⁷ Para.62

district in which the mission was located. The fact that international organizations did not contact General Gotovina in August 1995 to seek assistance proves that General Gotovina was not perceived to have any responsibility for maintaining law and order in Croatia upon the conclusion of Operation Storm.

116. The Defence takes strong issue at paragraph 68 of the Prosecution Brief, wherein it states, “subordinates identified as having committed crimes were commended and decorated.”⁵⁸ This statement is categorically false, and is made more outrageous by the fact that the document cited by the Prosecution in support of this claim makes no such reference to any subordinates being decorated for having committed crimes.
117. None of the institutions in Croatia responsible for maintaining law and order sought assistance from General Gotovina. General Gotovina was not advised that MUP, the Military Police, or any civilian or military prosecutors were having any difficulty performing their work – requiring General Gotovina to turn his attention away from his responsibilities in Bosnia and return to Croatia. In fact, the evidence will show that on 15 August 1995, General Lausic reported that the Military Police were functioning properly and without any major difficulties in fulfilling their policing and criminal investigative functions.
118. During those times when General Gotovina was made aware of disciplinary or criminality problems among his troops, he issued strict and vigorous orders for such conduct to stop, be prevented, and for the appropriate authorities to take action. In a videotape of one such meeting with his senior commanders on 6 August 1995, the Trial Chamber will see that General Gotovina condemned in the strongest possible terms criminal conduct on the part of troops, and he demanded that military police take immediate action as “the defender of the Code of Military Conduct.” The evidence will show that General Gotovina

⁵⁸ Para.68

went so far as to issue an order that “all criminal conduct committed by HV troops should be videotaped for future prosecution.”

119. The Prosecution’s position – imposing immediate disciplinary measures or disciplinary sentences on suspected subordinates to prevent further crimes – is based on a fundamental misunderstanding of Croatian military law. An HV commander issues disciplinary measures upon known violators of the Code of Discipline. However, in circumstances where it is suspected that an HV soldier has committed a crime but his identity is unknown, pursuant to Croatian law exclusive jurisdiction for the commencement of a criminal investigation rests with the military police and military prosecutors, who are not within General Gotovina’s chain of command.
120. Moreover, once the military police identified the perpetrator of a crime, the military police had the responsibility and authority to seek both criminal sanctions from the Military Court and disciplinary sanctions from the Military Disciplinary Court. The military police were not required to consult the commander of the Military District (i.e. General Gotovina) in this regard. Thus, General Gotovina would have breached his obligation to impose discipline for a criminal act only in the circumstance that General Gotovina was personally aware of the identity of the perpetrator of a criminal act, and where the Military Police did not know said identity. In that circumstance, the Military District Commander could issue an immediate disciplinary sanction, and then refer the matter to the military police. The Prosecution, however, has not offered a single instance where General Gotovina had such extensive knowledge and failed to act.
121. General Gotovina believed in good faith that the institutions of the Republic of Croatia were restoring order and discipline in the liberated areas of Croatia, and that orders for discipline were being implemented. He was informed that the military and civilian police were taking effective action to enforce the laws of the Republic of Croatia. According to the statistics of the civilian and military

police, for the months of August and September 1995, the Military Police brought 485 disciplinary complaints against members of the HV, and criminal indictments against 211 members of the HV were filed by the Military Police. MUP filed additional misdemeanor charges against an additional 123 members of the HV. With respect to an additional 1100 cases concerning arson, MUP filed 1069 criminal indictments and 844 criminal indictments for looting, all against civilian perpetrators. MUP and the Military Police together filed an additional 20 indictments against HV members for arson.

122. Although military operations ended in Croatia on 7 August 1995, the war in the former Yugoslavia was not over. The battlefield had simply shifted back to neighbouring Bosnia. Upon the taking of Knin, Ratko Mladic was organizing military operations against General Gotovina's forces which had remained in Bosnia.⁵⁹
123. General Gotovina was immediately notified that Mladic was planning a counteroffensive against Croatian forces in Bosnia. The evidence will show that on or about 12 August 1995, Mladic launched his counteroffensive against HV forces in Bosnia, killing 27 HV troops and wounding dozens of others.
124. General Gotovina's primary responsibility as Commander of the HV and HVO was to defeat Mladic's Bosnian Serb forces and thereby liberate western Bosnia. General Gotovina was informed that he would be leading military operations in Bosnia with the support of the United States government.
125. The Prosecution now admits that General Gotovina, along with his operational forces and staff, were at all times relevant to this Joinder Indictment physically located in Bosnia, conducting military operations. The Prosecution further concedes that these military operations included defending Bosnian front lines

⁵⁹ Transcript, (6 August 1995, 09:38 hours)

in August 1995, Operation Maestral in September 1995, and Operation Southern Sweep in October 1995.⁶⁰

126. The evidence at trial will show that General Gotovina was the Commander of HV and HVO forces with his headquarters in Bosnia throughout the relevant time period to this Indictment. While he was liberating Bosnia, General Gotovina took all necessary and reasonable steps to ensure compliance of his subordinates with international law. Indeed, the Prosecution admits that General Gotovina issued repeated orders to maintain discipline and stop criminality. After issuing such orders, he received confirmation that matters were improving. It was reasonable for General Gotovina to rely on such information, especially given that he was physically located in another country waging military operations to defeat the Bosnian Serb forces of Ratko Mladic. In short, General Gotovina took all necessary and reasonable measures that any military commander fighting a war in a different country would take.

VI. THE ELEMENTS TO BE PROVED BY THE PROSECUTION

127. The Defence has already indicated to the Prosecution, in several Rule 72 and Rule 73 motions⁶¹, of the areas in which it disagrees with the Prosecution's analysis of the applicable law. For the sake of brevity, the Defence will refer to those motions where appropriate, and respond specifically to certain points made in the "Counts" section of the Prosecution Brief.
128. The Defence takes issue with paragraphs 105 to 112 and paragraphs 127 to 132 of the Prosecution Brief.
129. The Prosecution (a) fails to satisfy the elements of Articles 5 and 3 of the Statute as charged in the Indictment, and (b) fails to establish the criminal responsibility of General Gotovina under Articles 7(1) and 7(3).

⁶⁰ Para.107

⁶¹ Please refer to all Rule 72 and 73 motions filed by Defence.

1. General Requirements of Article 5 and Article 3

(a) No unlawful attack directed against a civilian population

130. With respect to the general requirements of crimes against humanity under Counts 1, 2, 3, 6, and 8 of the Indictment, the Prosecution fails to establish that General Gotovina's acts were part of an unlawful attack directed primarily against a civilian population, or that he had knowledge that his acts were part of an unlawful attack, as required by the *chapeau* of Article 5. The large-scale displacement of Serb civilians was neither the purpose nor result of Operation Storm.
131. To the extent that crimes against humanity are committed during an armed conflict, the laws of war provide a benchmark against which the Trial Chamber assesses legality.⁶² Determining whether an attack is unlawful is critical in determining whether the general requirements of Article 5 have been met.⁶³ A military operation consistent with the laws of war cannot be the basis for a finding of "an attack directed against a civilian population" under Article 5.
132. Furthermore, under Article 5, the acts of the accused must comprise a pattern of widespread or systematic crimes directed against a civilian population, and the accused must have known that his acts fit into such a pattern.⁶⁴ The Trial Chamber is obliged to judge the situation as it appeared to the accused at the time.
133. The evidence will show that General Gotovina exercised reasonable judgment – considering "all the factors and existing possibilities". Therefore, his actions

⁶² Prosecutor v. Kunarac, IT-95-16-T, *Appeal Judgment*, para.91

⁶³ Prosecutor v. Galic, IT-98-29-T, *Trial Judgment*, para.144

⁶⁴ Prosecutor v. Tadic, IT-94-1-A, *Appeal Judgment*, para.248

cannot be deemed criminal “even though the conclusion reached may have been faulty”.⁶⁵

134. The fact that military operations create terror among the civilian population does not *ispo facto* render an attack unlawful.⁶⁶
135. Against these exacting requirements, the Prosecution has not established that Operation Storm was unlawful or directed against a civilian population.
136. The legitimate military purpose of Operation Storm was: (a) to end Serbian shelling and rocket attacks against Croatian cities; (b) to liberate occupied territories in Croatia; (c) to counter the “Greater Serbia” project by defeating Ratko Mladic’s forces in Bosnia; and (d) to set the stage for the Dayton Peace Accord.
137. Operation Storm was not directed at displacement of the civilian population. Rather, (a) Croatian forces complied with the principles of distinction and proportionality; and (b) RSK ordered the evacuation of “Krajina” civilians in furtherance of the “Greater Serbia” project.
138. General Gotovina took all reasonable care and precautions to avoid and minimize civilian casualties and damage to civilian objects.
139. In alleging “large-scale” persecutory killings in paragraphs 38 to 39 of the Prosecution Brief, the Prosecution fails to distinguish between combatant and civilian deaths.
140. Even if the Prosecution’s distorted casualty figures are accepted – ranging from 336 to 750 – they compare favourably with the 1999 NATO bombing campaign in Kosovo. In deciding that NATO forces had complied with the laws of war – the Prosecutor’s Report states that approximately 500 civilians were killed and

⁶⁵ Hostages Trial, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law, No. 10 (vol. XI), 1296

⁶⁶ ICRC Commentary, Protocols I & II, para. 1940

820 wounded⁶⁷ – but nevertheless concludes that these figures do not indicate that NATO aimed at causing civilian casualties “either directly or incidentally”.⁶⁸ What the Prosecution calls “an atmosphere of death” in Croatia was a tolerable casualty rate for NATO, despite the fact that NATO had vastly superior precision-guided weapons.

141. Insofar as the Prosecution has not established that Operation Storm was an unlawful attack directed primarily against civilians and civilian objects under the laws of war, and that General Gotovina knew that his acts were part of an unlawful attack against a civilian population, the *chapeau* requirement of crimes against humanity is not satisfied and, consequently, all of the Counts charging crimes against humanity must fail.

(b) Scope of Armed Conflict

142. The Defence takes strong issue with paragraphs 107 to 108 of the Prosecution Brief.
143. The Indictment alleges an armed conflict solely in the “Krajina” region of the Republic of Croatia. The allegations in paragraphs 107 to 108 of the Prosecution Brief – that the armed conflict now extends to eastern Slavonia and Bosnia-Herzegovina – constitute new charges. Accordingly, these words should be struck from the Prosecution Brief, as they are not charges that General Gotovina will have to face at trial and it is unduly prejudicial to include matters in the Prosecution Brief that are beyond the scope of the Indictment.⁶⁹

⁶⁷ *Final Report to Prosecutor by Committee Established to Review NATO Bombing Campaign*, paras.90-91.

⁶⁸ *Ibid.* para.54

⁶⁹ *Supra.* fn.61.

(c) Debellatio

144. The Defence takes issue with paragraphs 105 to 109 of the Prosecution Brief.
145. By referring to the “successful conclusion” of Operation Storm on 7 August 1995, the Indictment pleads *debellatio*.⁷⁰ Nothing in the Prosecution Brief suggests otherwise. Since there was no armed conflict in Croatia beyond 7 August 1995, both Article 3 and 5 cease to apply.
146. With respect to Article 3, the Trial Chamber must be satisfied that each of the alleged acts was in fact closely related to the hostilities.⁷¹
147. With respect to Article 5, a nexus with the accused’s acts is only required for the attack on any civilian population. A nexus between the accused’s acts and the armed conflict is not required. The armed conflict requirement is satisfied by proof that there was an armed conflict.⁷²
148. Thus, since there was *debellatio*⁷³, neither Article 3 nor 5 apply beyond 7 August 1995. All conduct charged in the Indictment beyond this date falls outside the jurisdiction of the Tribunal.

⁷⁰ Ibid.

⁷¹ Tadic Trial Judgment, para.573

⁷² Tadic Appeal Judgment, para.251

⁷³ ICRC Commentary, Geneva Convention IV, p.62

2. Criminal Responsibility of General Gotovina under Articles 7(1) and 7(3)

149. Aside from the Prosecution's misinterpretation of *dolus eventualis* standard⁷⁴ under JCE extended liability, JCE extended liability only applies if the Prosecution can establish a common criminal purpose.⁷⁵ Since this requirement has not been met, extending JCE liability to General Gotovina for murder and inhumane acts under Counts 6, 7, 8, and 9 must fail.
150. The Defence categorically denies that General Gotovina bears any responsibility under Article 7(3) for any alleged acts of pillage, wanton destruction, murder, or cruel treatment that may have occurred as alleged in the Indictment. The Prosecution is put to the strict proof that the alleged crimes were committed, that these crimes were committed by individuals who were General Gotovina's subordinates and who were under his "effective control", that General Gotovina knew or had specific information in his possession providing notice of the risk of offences having been committed or about to be committed, and that he failed to take the necessary and reasonable measures available to him in the circumstances to prevent or punish the crimes.
151. General Gotovina did not have command or "effective control" over Croatian forces or others in the liberated territories after Operation Storm.⁷⁶ There is a fundamental difference between "operational command" and "executive authority" over occupied territories, and this distinction is not blurred where military commanders with executive authority are subordinated to an operational commander.⁷⁷ In determining whether "effective control" exists, the US Military Tribunal in the *German High Command Trial* held as follows:

⁷⁴ *Supra*,fn.61.

⁷⁵ Tadic Appeal Judgment,para.227

⁷⁶ Celibici Appeal Judgment,para.192,266; German High Command Trial, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law,No.10(vol. XI)(emphasis added)("High Command Trial")

⁷⁷High Command Trial,p.554-555

The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone.⁷⁸

152. The Tribunal gave considerable weight to the realities of war and what can be reasonably expected of a high-ranking military commander such as von Leeb engaged in combat:

In this comparatively brief period of time he had moved a great army over a vast territory under the arduous conditions of combat. As stated his function was operational. Many administrative duties had been left to his subordinate armies and his army group rear area. He and his staff alike would have the right to assume that the commanders entrusted with such administrative functions would see to their proper execution.⁷⁹

153. Upon the completion of Operation Storm, General Gotovina was relieved of his duties in the liberated territory on account of: (a) his operational command ceased upon the conclusion of Operation Storm, and (b) the transfer of power from military to civilian rule. From 22 July 1995, General Gotovina was fully engaged as an operational commander in Bosnia, and forces that remained in the liberated areas in Croatia were no longer under his “effective control”.

⁷⁸ High Command Trial, p.543

⁷⁹ *Ibid.*, p.555

VII. THE CHARGES

1. Deportation and Forcible Transfer (Counts 2 and 3)

154. The Defence takes issue with paragraphs 113 to 118 of the Prosecution Brief.
155. The Prosecution alleges the displacement of all but “a small fraction”⁸⁰ of Serbian civilians prior to actual Croatian control over liberated areas. As set forth above, the displacement of the vast majority of Serbs was the result of the Martić JCE. Even assuming *ex hypothesi* that it was the result of Croatian shelling, this theory of deportation and forcible transfer is supported by the unprecedented argument that when charged as crimes against humanity under Article 5, the *actus reus* of deportation differs from the customary law standard contained in Article 49(1) of Geneva Convention IV.⁸¹ The Appeals Chamber confirms that Article 5(d) and (i) is defined by customary international law contained in Article 49(1) of Geneva Convention IV, which does not apply to displacement prior to occupation of territory.⁸²
156. Applying this established customary law standard, the Prosecution fails to prove that the alleged displacement constituted deportation or forcible transfer under Article 5.
157. Furthermore, the narrower customary law standard contained in Article 17(1) of Protocol II applies in internal armed conflict.⁸³ The Prosecution thereby must also establish that General Gotovina “ordered” the deportation or forcible transfer of civilians from territory under Croatian authority.

⁸⁰ Para.11

⁸¹ *Supra*,fn.61

⁸² Krnojelac Appeal Judgment,para.220

⁸³ *Supra*,fn.61

2. Plunder and Wanton Destruction (Counts 4 and 5)

158. The Defence takes issue with paragraphs 119 to 122 of the Prosecution Brief.
159. The alleged attacks in the Indictment consist of legitimate actions against military and strategic targets. Some of the destruction allegedly caused during Operation Storm might have been “collateral damage”. Collateral damage is recognized feature of warfare and not a war crime. It may also be the case that a certain amount of destruction was caused by individuals who were not General Gotovina’s subordinates, in which case he cannot be held criminally liable for their acts under Article 7(3) of the Statute.
160. The Tribunal is, by its nature, dealing with extremely serious crimes, indeed the most serious crimes known to man. Offences more properly characterized as isolated acts of criminal damage to property or theft do not, therefore, come within the Tribunals’ purview as not being “serious” violations of international humanitarian law.

3. Murder (Counts 6 and 7)

161. The Defence takes issue with paragraphs 123-124 of the Prosecution Brief for the reasons herein discussed.

4. Inhumane Acts and Cruel Treatment (Counts 8 and 9)

162. The Defence takes issue with paragraph 125 of the Prosecution Brief for the reasons herein discussed.

5. Persecution (Count 1)

163. The Defence takes issue with paragraph 126 of the Prosecution Brief.
164. The Prosecution refers to “unlawful attacks on civilian and civilian objects”. No such crimes are charged in the Indictment against General Gotovina. Having failed to charge unlawful attacks in any of the Counts, the Prosecution

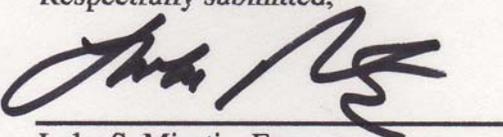
cannot arbitrarily include this as a basis for the crime of persecutions in Count 1 in paragraph 126 of its Brief. Accordingly, these words should be struck from the Prosecution Brief, as they are not charges that General Gotovina will have to face at trial and it is unduly prejudicial to include matters in the Prosecution Brief that are beyond the scope of the Indictment.⁸⁴

VIII. CONCLUSION

165. For the reasons set out above, the Defence denies the Prosecution allegations that General Gotovina is criminally liable under Article 7(1) and (3) for the crimes that may have been committed in this case. On the assumption that the acts alleged in the Indictment were even committed – to which the Prosecution is put to the strict proof – and that, if committed, the conduct was not justified by necessity or otherwise excused under the law of armed conflict, then General Gotovina denies that he exercised effective *de facto* control over the perpetrators of the crimes charged. Nor did General Gotovina in any way aid and abet or instigate such crimes.
166. The Prosecution will not be able to discharge its burden of proving beyond a reasonable doubt that General Gotovina bears individual criminal responsibility under either Article 7(1) or Article 7(3) for the offences alleged in the Indictment. General Gotovina was an operational commander who ended the war in Croatia and Bosnia, and should be applauded internationally for his contribution. To label him a war criminal would be an injustice not only to him, but to the victims whose suffering he ended when no one else in the international community would.

⁸⁴ *Supra*,fn.61

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Respectfully submitted,


Luka S. Misetic, Esq.

Defence Counsel for Ante Gotovina