THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-06-90-A

BEFORE THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Date Filed: **2 August 2011**

THE PROSECUTOR

v.

ANTE GOTOVINA AND MLADEN MARKAC

APPELLANT'S BRIEF OF ANTE GOTOVINA

PUBLIC REDACTED VERSION

For the Prosecution:

Ms. Helen Brady
Mr. Douglas Stringer

For Ante Gotovina:

Mr. Gregory W. Kehoe
Mr. Luka S. Misetic
Mr. Payam Akhavan
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For Mladen Markac:

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

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

AJ: Appeals Judgement

B/C/S: Bosnian/Croatian/Serbian language

CLSS: Conference and Language Services Section of the International Criminal Tribunal for the Former Yugoslavia

D_____: References to Defence exhibits shall be cited in this format

DFTB: Gotovina Defence's Final Trial Brief

ECHR: European Court of Human Rights

ECMM: European Community Monitor Mission

fn.: footnote

HRC: Human Rights Commission

HV: Hrvatska Vojska/ Croatian Army

ICRC: International Committee of the Red Cross

IHL: International Humanitarian Law

JCE: Joint Criminal Enterprise

MBRL: Multiple Barreled Rocket Launcher

OTP,FTB: Office of the Prosecutor's Final Trial Brief

OTP,PTB: Office of the Prosecutor's Pre-Trial Brief

P_____: References to Prosecution exhibits shall be cited in this format.

pg(s).: page(s)

RSK: Republika Srpska Krajina/ Republic of Serbian Krajina

SVK: Srpska Vojska Krajine/ Army of the Republic of Serbian Krajina

T._____: Pages of the trial transcript shall be cited herein as

TJ: Trial Judgement

UN: United Nations

UNCRO: United Nations Confidence Restoration Operation

UNMO: United Nations Military Observer

VP: Vojna Policija/ Military Police

INTRODUCTION

1. Pursuant to Article 25 of the Statute of the Tribunal and Rule 108 of the Rules of Procedure and Evidence, General Ante Gotovina ("Appellant") hereby submits his Appellant's Brief in support of his appeal against Trial Chamber I's Judgement dated 15 April 2011 (IT-06-90-T) (hereinafter "Judgement"). The Trial Chamber convicted the Appellant of eight counts of crimes against humanity and war crimes, and imposed a sentence of 24-years imprisonment.

2. Appellant adopts the procedural history as set forth in the Judgement at Paragraphs 2267-2685.

OVERVIEW OF THE APPEAL

3. Ante Gotovina's orders and actions took place within a military operation (*Storm*) to recover occupied Croatian territory. In the context of *Storm*, he ordered the use of artillery to engage military objectives on the front lines as well as on the military objectives in the SVK's operational depth in the Croatian towns of Knin, Benkovac, Obrovac and Gračac and in Drvar in Bosnia. Even employing its own range of error standard, the Trial Chamber presumed[1] that of the approximately 1205 artillery rounds fired into these Croatian towns,[2] about 1140 (or 94.5%) were directed at military objectives. The 94.5% presumption is consistent with the overwhelming weight of the evidence:

- Three UN investigations conducted immediately after the completion of *Storm* concluded that there was no indiscriminate or deliberate shelling of civilians or civilian areas, finding instead that it was "concentrated against military objectives;"[3]
- The United States' on-site investigation concluded that there was no evidence of illegal shelling.[4] [REDACTED] concurred;[5]

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[1] The presumption of innocence required the Trial Chamber to presume that a round of artillery was fired at a military objective unless proven beyond reasonable doubt to have been fired unlawfully. The Trial Chamber created its own range of error standard based on no evidence, which is discussed below at Section 1.1.3 *et seq.*

[2] See Annex A.

[3] P64; P228; D29; P111, pg.3; T.7081-7082, T.3371.

[4] D66, pg.1; T.5045-5046.

[5] T.18620-18621.

- The UN Secretary General reported to the Security Council that the shelling was "concentrated" (not indiscriminate), and made no reference to any claim of unlawful shelling;[6]

- Marko Rajcic, Gotovina's Chief of Artillery who implemented Gotovina's orders, testified that he never interpreted Gotovina's order as one to "treat whole towns as targets;"[7]

- The Trial Chamber could not establish beyond reasonable doubt that any civilian had been killed or injured by HV shelling;[8] and

- The damage to civilian structures was minimal.[9]

The Trial Chamber should have concluded that all of this evidence corroborated its finding that 94.5% of fired projectiles were intended to strike military objectives. Therefore there is "a reasonable interpretation of the evidence" other than that Gotovina "ordered whole towns to be treated as targets." Instead, the Chamber unreasonably concluded that the remaining 5.5% of projectiles allegedly hitting "civilian areas," not civilians or civilian objects, permitted the Chamber to ignore the rule, *i.e.,* 94.5% concentrated on military objectives. Instead, the Trial Chamber used the 5.5% exception to conclude that "whole towns were treated as targets."

4. From this irrational finding, the Trial Chamber concluded that Serb civilians left Knin, Benkovac, Obrovac and Gračac due to fear created by the "artillery attack,"[10] despite the following overwhelming evidence to the contrary:

- In all areas except Knin, Benkovac, Obrovac and Gračac, the Trial Chamber itself concluded that Serbs left Krajina for reasons independent of any unlawful HV conduct. [11] Yet, the Chamber found that these reasons could not have been "a reasonable explanation" for why Serb civilians left the four towns at issue;[12]

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6 D90, pg.2; D1666, pg.3.
7 D1425, 45.
8 TJ, 1360-1364.
9 P64; P228; D29; D66.
10 TJ, 1743,1744.
11 TJ, 1754-1755,1762.
12 TJ, 1743,1744.

- The UN Sector South Commander believed that Serbs left due to an evacuation order issued by their own RSK leadership.[13] This was confirmed to the Trial Chamber in testimony by [REDACTED],[14] and by [REDACTED] and U.S. Ambassador to Croatia.[15] The Trial Chamber in the Judgement ignored the testimony of all four witnesses;

- No Serb civilian ever claimed to have been terrorized by any unlawful HV shelling, or to have left Croatia as a result of such unlawful HV shelling. Nevertheless, the Chamber concluded that tens of thousands of nameless, unidentified Serbs were deported as a result of indiscriminate shelling;

- International organizations (the UN and ECMM[16]) and human rights organizations (Human Rights Watch and the Croatian Helsinki Committee[17]) investigated *Storm* and none of them mentioned HV artillery fire as even a potential cause for the departure of Serb civilians from Krajina.

5. The Trial Chamber nevertheless unreasonably concluded that there was "no reasonable explanation of the evidence" other than that Serbs fled Knin, Benkovac, Obrovac and Gračac due to fear of unlawful shelling.

6. Next, the Trial Chamber concluded that there was insufficient evidence to establish that Croatian authorities, including the civilian and military police had a policy of non-investigation of crime.[18] The Trial Chamber also concluded that Gotovina himself had issued numerous orders to prevent and punish crime.[19] Retired US Lieutenant General Anthony R. Jones was called as an expert witness on necessary and reasonable measures, and testified that Gotovina took all necessary and reasonable measures under the circumstances, and General Jones could think of nothing else he would have done differently.[20]

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[13] P398.
[14] T.18477.
[15] T.4940,18620-18621.
[16] D90; D798.
[17] D183; P2402.
[18] TJ, 2203.
[19] TJ, 2353-2365.
[20] D1633; T.20968-20971.

7. The Trial Chamber rejected every "necessary and reasonable measure" proposed by the Prosecution as part of its case that Gotovina had failed to take "necessary and reasonable measures."[21] Nevertheless, the Trial Chamber on its own found that Gotovina failed to intervene in the work of the Military Police that was functioning to capacity,[22] and failed to take three measures created by the Chamber. These measures were so inconsequential that neither the Prosecution nor the Trial Chamber mentioned them during the trial. Regardless, the Trial Chamber found that Gotovina's failure to take these three irrelevant measures to prevent and punish non-core JCE crimes was so "reckless" that it amounted to a second "substantial contribution" to the JCE.

8. General Gotovina requests the Appeals Chamber intervene and reverse his conviction on all counts. The Trial Chamber's findings are so gravely unreasonable that the Judgement must be overturned and his conviction for JCE liability set aside. Because the Trial Chamber made no findings with respect to any other forms of liability pursuant to Article 7(1) or 7(3) of the Statute, the Appeals Chamber should not consider these alternative modes of responsibility[23] and should enter a Judgement of not guilty on all counts.

<u>GROUND ONE</u>: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN CONCLUDING THAT THERE WAS AN UNLAWFUL ATTACK ON CIVILIANS AND CIVILIAN OBJECTS

1.1. The Trial Chamber erred in fact and law when it concluded that the HV unlawfully attacked civilians and civilian objects in Knin, Benkovac, Obrovac and Gračac because "too many projectiles impacted in areas which were too far away from identified artillery targets. . .for the artillery projectiles to have impacted in these areas as a result of errors or inaccuracies in the HV's artillery fire."[24]

1.1.3. The Trial Chamber erred in fact and law in evaluating the lawfulness of artillery attacks based on an arbitrary standard (the "200M Rule") that did not form part of the Prosecution case and of

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[21] OTP,FTB, 206-208.
[22] TJ, 2138-2140.
[23] *Blaškić AJ,*93.
[24] TJ, 1906.

which the Defence had no notice at trial and thus no opportunity to confront it.

Relevant Findings

9. The Prosecution case was that the HV artillery shelling was indiscriminate because

(i) HV's imprecise artillery was unable to distinguish between legitimate military objectives and civilians or civilian objects, and was therefore, *per se* indiscriminate;[25] and

(ii) There were virtually no (or few) military objectives in the towns,[26] HV artillery fire as a whole could be said to be indiscriminate.

10. The Trial Chamber's findings are of an altogether different nature:

(i) The Judgement completely rejected the Prosecution's allegations that HV weapon systems were indiscriminate *per se* and identified a large number of legitimate military objectives in those locations.[27]

(ii) However, rather than simply entering an acquittal because of the Prosecution's failure to prove its case, the Trial Chamber created its own case against General Gotovina (the "*Chamber's case*"), thus violating his right to fair notice, and to a fair and impartial Tribunal. The Trial Chamber's indiscriminate shelling finding is based on an arbitrarily created standard which it applied on an incident-by-incident analysis to determine whether an inference of deliberate attacks could be made where projectiles fell beyond the 200M Rule. The Chamber then assessed whether a more general inference of "indiscriminate" shelling could be drawn. Indeed the *Chamber's case* was fundamentally at odds with the Prosecution's case: the Prosecution alleged that the HV artillery was so imprecise as to be indiscriminate while the Chamber concluded that the HV artillery was so precise that any projectile falling beyond 200 meters was fired with the intent to strike civilians and civilian objects.

Lack of adequate notice and right to an adversarial hearing

11. By inventing the 200M Rule and replacing the Prosecution's "indiscriminate shelling" case, the Chamber violated the right to adequate notice of the charges and to a fair

[25] T.29059:8-T.29061:3; OTP,PTB, 31; P1260, pg.7; T.1984-1990, 2158-2161, 14312-14317; OTP,FTB, 548, 586.
[26] OTP,PTB, 31.
[27] Instead, the Trial Judgement treats HV artillery as precise and reliable enough to hit specific locations intended as targets (and precise enough to deliberately target what are said to be civilian areas).

and impartial tribunal.[28] The accused had no notice of the following material elements of the *Chamber's case*: (1) presumption of unlawfulness beyond 200m; (2) the projectile by projectile assessment of the attack rather than assessment of the attack as a whole; and (3) HV inability to hit targets of opportunity.

12. The Chamber failed to put its case to the Prosecution's expert Konings or the Defence's expert, Professor Corn, whom the Chamber itself found to be an "expert in the application of the laws of war in military operations."[29]

13. The Chamber's adoption of an unpleaded case also constituted a violation of Gotovina's right to confront *the Chamber's case*, and to call evidence to challenge the 200m-range as baseless.[30] As a factual matter, even Leslie, an experienced artillery officer and the Prosecution's witness, testified that the range of error was 400m on the first shot.[31] The Chamber thus violated General Gotovina's right to be heard and right to fully litigate all pertinent issues.[32]

Conclusions and relief

14. The denial of these rights is an error of law and only the quashing of the Chamber's impugned findings can remedy the resulting prejudice.[33]

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[28] This right is guaranteed in Article 21(4)(a) and is a basic element of the guarantee of fair trial. *Kupreskic* Appeals Judgement, 88; *Kovacevic*, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, 30. *See also Sipavicius v Lithuania*, Judgement of 21 February 2002, 28; HRC, General Comment 13 [1984], 8.

[29] See *Decision on Admission of Expert Report of Geoffrey Corn*, 22 September 2009, p.6.

[30] On the right of an Accused not to be caught by surprise by the Court by new arguments not advanced by the Prosecution, see *Skondrianos v Greece*, 29-31 (ECHR).

[31] TJ, 1167,1898; T.1989-1990.

[32] *Jelisic* AJ, 27-28; *Kunarac* AJ, 62.

[33] For list of impugned findings, see below Section 1.1.4.

1.1.4. The Trial Chamber erred in law and fact when it failed to consider and exclude other reasonable explanations for why shells may have impacted more than 200 meters from "military targets" identified by the Trial Chamber.[34]

15. The Trial Chamber held that only "artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that artillery target."[35] Conversely, any beyond that range were treated as deliberately aimed at civilian areas.[36] It also found that "too many projectiles impacted in areas which were too far away from identified artillery targets for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire."[37]

16. Thus the Trial Chamber *assumed* with no evidence in support that the range of error of HV weapons systems was 200m or less. The only incidental testimony regarding an artillery error-range came from a Prosecution witness who stated that 400m was an "acceptable" range for HV artillery on the first shot.[38] The Trial Chamber refused to rely on this evidence because range "depends on a number of factors on which the Trial Chamber has not received detailed evidence."[39] However, instead of holding that the evidence of a range of error was insufficient, the Trial Chamber on its own assumed it was less than 200m. Ironically, the Chamber later acknowledged that the range of error might be significantly more than 200m.[40]

17. By inventing a "200M Rule," the Trial Chamber circumvented the Prosecution's failure to exclude all explanations favorable to the accused as to why projectiles landed in certain locations. The "200M Rule" created a fiction: that which was a reasonable explanation for a projectile falling within that range became unreasonable if falling outside of it.

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[34] TJ, 1906; see also TJ, 1918, 1920, 1932-1933, 1940.
[35] TJ, 1898, 1906.
[36] Compare TJ, 1899-1902(shells within the 200m-range) and 1903-1909(those outside that range).
[37] TJ, 1906, 1920, 1932, 1940.
[38] TJ, 1167,1898; T.1989-1990.
[39] TJ, 1898.
[40] TJ, Footnote 932.

18. The Trial Chamber failed to consider the following reasonable explanations for projectiles landing more than 200 meters from "known artillery targets": (i) the range of error of the weapons system employed was beyond 200m; (ii) the HV fire at a tactical level unknown to Rajcic would have provided additional military objectives;[41] (iii) there were other "military targets" not identified in evidence;[42] (iv) the shells' landing location may, for some or all of these cases, have been caused by errors, inaccuracies or negligence; and (v) malfunctioning of weaponry or ammunition.

Effects of errors on Trial Chamber's reasoning

19. The 200M Rule must be quashed and reversed. This reversal would affect the following findings, which all rely on the preliminary assumption of unlawfulness beyond 200 meters:

(i) Individual findings of *deliberate* targeting of "civilian areas" in Knin, Obrovac, Benkovac and Gračac.[43] Without employing the 200M Rule, there is no indication that any of these incidents might, *a priori*, have been carried out unlawfully with a culpable *mens rea*;

(ii) The finding that shelling was indiscriminate and therefore unlawful because of supposedly "deliberate" targeting;[44]

(iii) The finding that Gotovina's attack order was unlawful based in part on the manner in which it was implemented;[45]

(iv) The inference that Gotovina's culpable *mens rea* could be inferred, in part, from the allegedly unlawful *result* of his order;[46]

(v) The finding that the nature and meaning of discussions at Brioni were inculpatory in light of the allegedly indiscriminate shelling activities;[47]

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[41] D1425, 39,42; T.16577.
[42] The Trial Chamber erroneously failed to account for the fact that there were "artillery targets" other than those that it could locate on available artillery documents. It thus made findings concerning distance of a projectile from a "known artillery target" despite being fully aware of its inability to identify each and every "artillery target" in the relevant areas. See *E.g.* TJ, 1267, discussed below, 1.1.5-1.1.6.
[43] See next sub-ground.
[44] TJ, 1903-1908,1920-1921,1932-1933,1940.
[45] TJ, 1920.
[46] TJ, 2305,2324,2370,2371,2373.
[47] See, *e.g.*, TJ, 2305("Within days of the discussion at Brioni, Gotovina's words became a reality.").

(vi) The finding that Gotovina shared the *mens rea* to deliberately and indiscriminately shell civilians and civilian objects.[48] This inference relies on the preliminary finding that Gotovina ordered an unlawful attack on civilians/civilian objects, which in turn is inferred from the *result* of that supposed unlawful/indiscriminate attack;[49]

(vii) The inference that shelling was the "primary and direct cause" of the departure of Serb civilians from Knin, Benkovac, Obrovac and Gračac[50] which in turn is based on the preliminary finding that towns/cities had been shelled indiscriminately. Without unlawful shelling as the supposed means of expulsion, there was no deportation/forcible transfer;

(viii) The finding of Gotovina's "significant" contribution to a JCE;[51] and

(ix) The finding that some crimes were a "natural and foreseeable" consequence of the JCE.[52]

Conclusions and relief

20. The Trial Chamber's adoption of the 200M Rule for which there was no evidence constitutes an error fact, which caused a miscarriage of justice. It also constitutes an error of law by creating an evidential presumption of unlawfulness in relation to shells landing beyond the 200m-range.

21. As noted by the Chamber, because the record evidence does not set forth the factors relevant to the range of error for each individual incident of disputed shelling,[53] none of the disputed shelling incidents may be said, *prima facie*, to have been carried out unlawfully or with a culpable mindset.

22. The practical effect of this error is to nullify the entire basis of Gotovina's conviction.

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[48] TJ, 2324,2370.
[49] TJ, 2370.
[50] TJ, 1743-1745.
[51] TJ, 2370-2373.
[52] TJ, 2373-2374.
[53] The Prosecution has not appealed the Trial Chamber's finding that the 400 meter range of error mentioned by Leslie was not reliable.

1.1.5. The Trial Chamber erred in fact when making erroneous findings of fact in relation to individual shelling incidents.

23. The Trial Chamber committed a number of significant errors when assessing the lawfulness of particular artillery attacks. Each shelling incident cited by the Trial Chamber will be discussed in turn.

1.1.5.1. The Trial Chamber erred in fact in finding that at least 50 projectiles impacted in Knin more than 200 meters from known "military targets."[54]

A) "40 shells" did not impact near the ECMM Headquarters and HV did not fire shells near the ECMM Headquarters.

24. This incident accounts for 40 of the approximately 50 projectile impacts in Knin cited as proof of orders to "treat whole towns as targets." No reasonable trier of fact could have concluded beyond reasonable doubt that 40 artillery projectiles impacted near the ECMM Headquarters and that the HV fired those projectiles.

25. This finding was based solely on the uncorroborated testimony of one witness, Murray Dawes, who claimed counting up to 40 such projectiles while traveling through Knin with witness Andries Dreyer inside a UN APC. Notably, Dreyer did not corroborate Dawes's account on this point, and there was no other evidence such as photographs, videos or crater analyses to support Dawes's claims.[55] Other witnesses, including Hendricks and Liborius, mentioned that no more than two projectiles had landed near ECMM Headquarters.[56] In other respects, the Trial Chamber found that Dawes's testimony was unreliable, particularly in his allegation that the HV fired cluster bombs into Knin.[57]

26. At trial Dawes could not even identify the location of the ECMM Headquarters.[58] Using a map of Knin, Dawes drew the route he took on the "ECMM trip," which was

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54 TJ, 1893-1913, in particular 1903-1906,1386-1392.
55 T.1708-1860.
56 P802, 4; P931, 14; D820, pg.3; T.9700.
57 TJ, 1282,1371.
58 T.10426-10428.

several hundred meters away from the ECMM Headquarters.[59] As the map attached at Annex B demonstrates, Dawes's "ECMM trip" actually took him next to the Northern Barracks and the empty field codenamed "Hospital" (two legitimate military objectives according to the Chamber)[60] when this alleged firing took place. At his closest proximity to the ECMM Headquarters, Dawes was much closer to the Northern Barracks and the empty field "Hospital," than he was to the ECMM Headquarters.

27. Furthermore, the Trial Chamber erroneously assumed that the projectiles identified by Dawes could only have been fired by the HV. The Trial Chamber dismissed evidence that SVK forces were firing mortars and grenades at the UN compound in Knin on the morning of 4 August,[61] and had placed mines at the entrance to the UN compound.[62]

28. Moreover, Berikoff testified that on 4 August, his UN convoy was attacked by a Serb soldier who firing a rocket at Berikoff's UN APC.[63] Dreyer, part of the UN convoy close to the ECMM compound, testified that on this same trip through Knin, the UN convoy had been "held hostage" by Serb soldiers.[64] Dawes himself was stopped during this incident and confirmed the hostile actions of the SVK toward the UN.[65]

29. In blaming the HV, the Trial Chamber also ignored Dawes's testimony that during this ECMM trip UN personnel were "bracketed by mortar shells, some of which fell 40 to 50 meters short of the vehicle and others which landed 40 to 50 meters ahead of the vehicle."[66] Dawes testified that he and other UN personnel were "targeted" by "mortar fire"[67] on 4 August, which would require direct observation to attack moving targets of opportunity rather than fixed targets. In light of the Trial Chamber's finding that the HV did

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[59] D857.
[60] TJ, 1899,1901.
[61] TJ, 1294,1300,1396.
[62] TJ, 1284,1300,1306,1393.
[63] TJ, 1397.
[64] P72, pg.5,15; D105, pg.19(map of the route taken by this UN convoy).
[65] P980, pg.4; T.10504.
[66] TJ, 1285.
[67] TJ, 1285; T.10391,10393,10508-10509. The Trial Chamber incorrectly states in 1285 that the witness said he felt he was targeted by "artillery or mortar fire." The witness made no mention of artillery fire near the ECMM.

not have direct observation capability in Knin and the consequent inability to attack targets of opportunity,[68] it is clear that, if Dawes's testimony is accepted and the Chamber's logic adopted, these alleged 40 projectiles could not have come from HV artillery.

30. There is additional evidence that Serb forces fired these rounds near the ECMM Headquarters:

(i) First, Dawes testified that his UN convoy had been bracketed by mortar fire. The HV was not in mortar range of Knin on 4 August. In contrast, SVK forces did have a mortar position close to the ECMM headquarters.[69]

(ii) Second, in a footnote the Trial Chamber inexplicably chose to "interpret" Dawes's testimony to mean that "artillery or mortar" projectiles were fired, when in fact Dawes mentioned only mortar fire.[70] The Trial Chamber was aware that the Defence in cross-examination put to Dawes that this "mortar fire" could not have been fired by the HV because the HV was out of mortar range of Knin, and Dawes agreed that he had "no idea" who fired the projectiles.[71] In re-examination the Prosecution never suggested that it was perhaps "artillery" rather than mortar fire. Had the Trial Chamber accepted Dawes's testimony that his convoy was attacked with 40 mortar projectiles, the only possible conclusion was that this fire had come from SVK forces.

(iii) Third, the Trial Chamber noted that Gotovina at Brioni reassured Tudjman that the HV could attack objectives in Knin without targeting the UNCRO barracks.[72] Obviously, the purpose was to avoid hitting any United Nations facility or personnel.[73] It defies logic that the HV would fire 40 rounds at a UN convoy near the ECMM Headquarters in direct contravention of Tudjman's express desire and Gotovina's express undertaking not to hit the UN.

(iv) Finally, the Trial Chamber offered no reasoned opinion[74] to support its conclusion that the HV fired these 40 projectiles at the UN convoy, nor did it explain why this conclusion is the "only reasonable interpretation of the evidence."

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[68] TJ, 1907.
[69] TJ, 1213,1383.
[70] TJ, pg.728, fn.5360.
[71] T.10508-10509; TJ, 1285.
[72] TJ, 1993.
[73] See also Susak's order to protect the UN. D409, pg.3.
[74] Regarding the right and duty to render a reasoned opinion, see above Article 23 of the Statute; *Blaškić* AJ, 722.

31. Accordingly, it was unreasonable for the Trial Chamber to have concluded based on Dawes's testimony that 40 shells had been fired near the ECMM headquarters, and to dismiss the overwhelming evidence that Serb forces, not the HV, were targeting UN convoys in Knin on 4 August. The Trial Chamber's failure to consider this evidence when assessing Dawes's uncorroborated claims of 40 shells landing near the ECMM Headquarters resulted in a miscarriage of justice. The Appeals Chamber should quash and reverse the Trial Chamber's finding.

B) The "three artillery projectiles at three separate times which impacted in the empty field in front of the UN compound in the Southern barracks"[75]

32. The Trial Chamber found that at least 3 artillery projectiles impacted at different times in an empty field in front of the UN Compound on 4 August 1995, and that Dijkstra testified that a shell hit this field every 15-20 minutes beginning at 8 AM on 4 August 1995.[76] The Trial Chamber offered no record cites to support its claim that Dijkstra said that the shelling of this empty field occurred on 4 August. To the contrary, Dijkstra testified that the shelling of this field took place on 5 August, not 4 August.[77] Berikoff[78] and Williams[79] also confirmed the 5 August date. If it was 5 August, the Trial Chamber acknowledged that it is virtually impossible to determine whether artillery fire in Knin on 5 August was the result of HV or SVK fire.[80]

33. Moreover, assuming *arguendo* that this incident took place on 4 August, the Trial Chamber offered no reasoned opinion for the conclusion that the HV fired the projectiles. In light of the evidence discussed that Serb forces were firing at the UN and the HV was instructed not to hit the UN,[81] no reasonable trier of fact could have concluded that the only reasonable interpretation of the evidence pointed to the HV as the party firing the 3 shells.

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75 TJ, 1904.
76 TJ, 1392.
77 P429, 25; P428, pg.3; T.4774.
78 D284, pg.13; P743, 2.
79 P925, pg.6.
80 Compare with TJ, 1396,1353.
81 See above, Section 1.1.5.1(A). See also TJ, 1284,1300,1306,1393,1396.

This error of fact resulted in a miscarriage of justice, which calls for the quashing and reversal of this finding.

C) 4 artillery projectiles near the hospital

34. The Trial Chamber found that the HV indiscriminately fired 4 artillery projectiles near the hospital in Knin.[82] No reasonable trier of fact could have made that finding.

35. The Trial Chamber failed to explain how it concluded that "at least four artillery projectiles" impacted "in the immediate vicinity of the hospital," and offered no explanation of how it concluded that it was "artillery projectiles" as opposed to mortar fire projectiles.[83] Further, it cited no support for its conclusion that the HV fired those projectiles. The Trial Chamber also found that this shelling took place "on 4 and/or 5 August."[84] As explained above, if the projectiles impacted the area on 5 August, then the Chamber itself found that it was virtually impossible to know whether the projectiles were fired by the HV or the SVK.[85]

36. The evidence was undisputed that the SVK had targeted UN forces in Knin on 4 August.[86] SVK fire near the UN compound was intended to make the international community believe that the HV was targeting the UN to bring immediate international condemnation of the HV offensive and halt the operation.[87]

37. The SVK through witness Novakovic had released propaganda to the UN on the morning of 4 August that the HV was targeting the Knin hospital.[88] Later that same day, Novakovic accompanied UN personnel on a visit to the hospital.[89] It was during this trip that "the buildings around the hospital were being shelled."[90] However, the Trial Chamber

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82 TJ, 1389,1905.
83 TJ, 1389.
84 TJ, 1905.
85 TJ, 1294,1300,1396.
86 Compare with TJ, 1396,1353.
87 D923, pgs.3,14; T.11763,11769.
88 D331.
89 TJ, 1272.
90 TJ, 1272.

found that there was "an SVK mortar position in or near the school marked F on P1095,"[91] less than 500 meters from the hospital. Indeed, Berikoff testified that after departing Knin hospital, his UN convoy was targeted by SVK soldiers.[92]

38. Notwithstanding the foregoing, the Chamber erroneously failed to consider or exclude the reasonable possibility that fire came from the Serb mortar position, which was firing "near the hospital" so that the UN personnel would believe that the HV was firing at the hospital. Given that the SVK had deliberately targeted UN personnel for propaganda purposes in Knin on 4 August, one reasonable interpretation of the evidence was that SVK forces likewise fired mortar rounds near the hospital. Inexplicably, the Chamber erroneously failed to even consider that reasonable possibility.

39. Assuming *arguendo* that the projectiles near the hospital were fired by the HV, the evidence would still support a reasonable inference that there was an SVK military presence in the hospital vicinity at various times throughout the day.[93] Remarkably, the Trial Chamber disregarded the evidence of witness Flynn that an SVK tank had been stationed near the hospital. The Chamber did so simply because this testimony could not be corroborated with "other evidence."[94] In fact, witness Hill did corroborate this evidence.[95] Furthermore, there was other evidence of the presence of legitimate military objectives, such as SVK trucks at the hospital that could have been lawfully targeted.[96]

40. In the absence of contradictory evidence and considering that the burden of proof remained with the Prosecution, the Chamber's reasoning constitutes an error of law and fact, resulting in a miscarriage of justice. This finding should be quashed and reversed.

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[91] TJ, 1213,1383.
[92] TJ, 1397.
[93] T.1303.
[94] TJ, 1389.
[95] P292, pg.98; see also T.1969.
[96] TJ, 1284,1307,1385.

D) The building marked "L" on P681.

41. The Trial Chamber found that the building marked "L" on P681 was subjected to deliberate HV artillery fire.[97] No reasonable trier of fact could have come to that view.

42. Based on the testimony of Roberts, the Trial Chamber concluded that on 4 or 5 August 1995, an artillery projectile damaged a house in a residential area approximately 300 meters east of the Northern Barracks and approximately 350 meters northeast of the police station (marking L on P681).[98] The Trial Chamber held that "this location borders on the area marked S-16 on the coded map Ivančića. The 7th Guards Brigade reported firing at 'right from the bridge S-16' on 4 August 1995. Based on the foregoing evidence, the Trial Chamber finds that the HV fired the projectile which damaged the house identified by Roberts."[99]

43. Employing contradictory logic, the Trial Chamber first found that this house was so close to HV targets such as the Northern Barracks, police station and "the right of S-16" that it must have been hit by HV fire, and later concluded that this house was so far away from HV targets that the shelling must have been intended to hit civilian areas.[100]

44. Furthermore, the Trial Chamber was unable to determine when this house was hit by artillery fire. If it was 5 August, then it is virtually impossible to determine whether it was HV or SVK fire.[101] The Chamber failed to provide a reasoned opinion for its conclusion that the only reasonable explanation of the evidence was that the building at issue was hit by a projectile fired by the HV.

45. For the foregoing reasons, no reasonable trier of fact could have found that the HV fired the projectile that struck the building marked "L" on P681. This finding should be quashed and reversed.

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97 TJ, 1387,1903.
98 TJ, 1387.
99 TJ, 1387.
100 TJ, 1903,1906.
101 Compare with TJ, 1396,1353.

E) One projectile in the vicinity of Knin cemetery

46. The Trial Chamber found that "on 4 and/or 5 August 1995," the HV fired at least one projectile that impacted near the Knin cemetery, approximately 700 meters from the nearest artillery target identified by Rajcic.[102] Because the Trial Chamber could not exclude that this impact occurred on 5 August, it is impossible to know whether the projectile was fired by the HV or the SVK.[103]

F) One projectile near the Railway Fuel Storage

47. The Trial Chamber found that at least one projectile impacted near the railway fuel storage in Knin on 4 August, and that this firing was unlawful because "there is no evidence indicating that the HV considered the railway fuel storage, located in this area, to have been a military target, or that it was used by the SVK."[104] With this finding, the Trial Chamber erred in several respects.

48. First, the Prosecution bore the burden of proving that the railway fuel storage was a "civilian object" for purposes of Additional Protocol I. The Trial Chamber erroneously reversed the burden of proof and required the Accused to prove that the railway fuel storage was a "military target."[105] Second, the Trial Chamber determined that the HV could have rightfully concluded that the SVK would use the railway system to transport ammunition, and that firing at the railway station was lawful.[106] If the railway system was a legitimate target, clearly the fuel used to support the railway system was also a lawful military objective, especially because the SVK was using the railway system on 4 and 5 August.[107]

49. Finally, the Trial Chamber incorrectly concluded that the HV did not consider the railway fuel storage to be a "military target." The Trial Chamber itself found that the HV

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[102] TJ, 1905.
[103] Compare with TJ, 1396,1353.
[104] TJ, 1905.
[105] *Blaškić* AJ, 111; *Kordić* AJ, 48.
[106] TJ, 1899.
[107] P804; D161, pgs.7-8; D246; D930, pg.12; D923, pg.25; D384, pg.2; D387; D715.

had fired on more targets in Knin than was reflected in the records admitted into evidence.[108]

50. Accordingly, the Trial Chamber erred by reversing the burden of proof to conclude that (1) because the Accused did not submit written records, the railway fuel storage could not have been considered a military target by the HV; and (2) the additional targets fired at by the HV in Knin were presumed to be civilian in the absence of written records.

1.1.5.2. The Trial Chamber erred in concluding that at least 10 projectiles landed more than 200 meters from known "military targets" in Benkovac.[109]

A) Benkovacko selo, Ristic Pine Woods and Ristic Hamlet

51. The present sub-ground concerns the Chamber's erroneous finding that HV fired projectiles in the Ristic Pine Woods, Ristic Hamlet and Benkovacko selo, allegedly impacting at least 500 meters from the nearest identified "target."[110]

52. The Trial Chamber recognized that Rajcic testified that there was a fourth target at a barracks in Benkovacko selo.[111] It further recognized that a crossroad near Benkovacko selo was also a pre-planned target.[112] The Chamber when assessing the lawfulness of the attack took neither objective into consideration.

53. The Trial Chamber also ignored evidence that HV had identified an SVK artillery position in Benkovacko selo[113] (Ristic and the Ristic Pine Woods are part of Benkovacko selo). In the Kozjak attack order for OG-Zadar, TS-5 was to provide artillery support for the 112th brigade, OG-Zadar's main axis of the attack.[114] It is reasonable to assume that TS-5

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108 TJ, 1267.
109 TJ, 1914-1925,1426-1430.
110 Ibid.
111 TJ, 1403.
112 TJ, 1423-1424.
113 D1426, 1.
114 P1263.

would fire at an SVK artillery battery in Benkovacko selo that was threatening the HV's main axis of attack.[115]

54. The Chamber when assessing the lawfulness of the attack took none of these military objectives, or evidence pertaining to them, into consideration. In light of this evidence, no reasonable trier of fact could have concluded that the shelling of locations in Benkovacko selo, Ristic hamlet and Ristic pine woods was indiscriminate and that the closest military "target" was 500 meters away. These findings must be quashed and reversed.

B) 3 to 4 shells in Barice

55. The Chamber found that shells "impacted" in the Barice area of Benkovac, 250 meters away from the police station as identified on the Jagoda list.[116] This finding is based on the testimony of witness Sinobad, who said that he saw three to four shells land "in front of" apartment buildings in the Barice area, which he said was "just above the letter 'A' on exhibit P2363."[117]

56. The Trial Chamber erred in concluding that these shells fell 250 meters from the police station on the Jagoda list, because the Trial Chamber had no evidentiary basis to identify the precise location of impact of these 3-4 shells. Witness Sinobad never explained how far "just in front of" the apartment buildings was. If he meant 50 meters, then this would fall within 200 meters of the "Jagoda" police station, and presumably would have been lawful in the Trial Chamber's view. In any event, the Trial Chamber erred when it attempted to calculate precise distances without precise information as to location of impact.

[115] In the map Poskok '93 it is noted that one target is a SVK artillery group in Benkovacko selo. P1273(target 24).
[116] TJ, 1920.
[117] TJ, 1412.

C) Shells fired at Bagat and Kepol factories and cool storage

57. The Trial Chamber found that the HV unlawfully fired shells at the Bagat and Kepol factories as well as the cool storage in Benkovac.[118] Contrary to its treatment of other targets in Benkovac, the Trial Chamber (1) did not give sufficient weight to the fact that the HV had identified the cool storage and Kepol factory as targets on the "Jagoda" list; (2) relied upon a witness who provided opinion testimony without foundation; and (3) ignored a reasonable interpretation of the evidence supporting the conclusion that the HV believed in good faith that firing at these targets offered a military advantage.[119]

58. One example of the inconsistent treatment of Benkovac targets by the Trial Chamber is in its analysis of the Fireman's Hall.[120] The Trial Chamber found that it was a legitimate military objective because it was on the "Jagoda" list, even though not specifically identified by Rajcic as a target.[121] As with the Fireman's Hall, the Kepol factory and the cool storage were listed as potential targets on the "Jagoda" list.[122] However, the Trial Chamber reversed the burden of proof and presumed that these targets on the Jagoda list were unlawful unless the Accused introduced additional evidence to confirm each target's military character.[123]

59. Compounding its error in failing to provide sufficient weight to the Jagoda list, the Trial Chamber also erred when it relied on witness Vukasinovic who did not establish any foundation for his claims to know what was being produced at Bagat, the Kepol chemical factory and at the cool storage. Further, Vukasinovic could not have known what the HV in good faith believed was being produced, or could be produced or stored, at Bagat, the Kepol factory or the cool storage.

60. The Trial Chamber erred when it concluded that the HV was unreasonable to believe that targeting the Bagat and Kepol factories and the cool storage could offer a military

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118 TJ, 1920-1924.
119 D1447(targets 739,740); TJ, 1921.
120 TJ, 1919.
121 TJ, 1919.
122 TJ, 1403,1921.
123 TJ, 1921.

advantage. It also erred in assuming that the Bagat and Kepol factories and cool storage were of a civilian character unless proven otherwise by the Accused.

61. Finally, a crossroads was located in the immediate vicinity of the Kepol plant in Benkovac[124] and Rajcic testified that such crossroads were targeted.[125] The Trial Chamber was unreasonable to exclude the fact that the HV was firing on the crossroads in the vicinity of the Kepol factory, which would explain any impacts at the factory even to the satisfaction of the Trial Chamber's arbitrarily created 200M Rule.

D) Shells on a house marked X on P290

62. The Trial Chamber found that, "on 4 or 5 August 1995, the HV fired shells on a second house marked X on P290, which was approximately 250-300 meters from the actual location of the police station, and an equal distance from the location of the police station according to the 'Jagoda' list."[126] The Trial Chamber erred by failing to cite any record evidence to support its finding that the two houses had been hit with artillery shells, and by improperly calculating the distance of these alleged impacts from the police station in Benkovac.

63. There was no evidence that either house had been hit by HV artillery. To support its finding, the Trial Chamber relied on Witness 56, who testified that he observed houses on fire in the early morning hours of 5 August,[127] and could not testify as to how the houses caught on fire. The Trial Chamber simply assumed that the houses were set on fire due to HV artillery rounds, and excluded other reasonable explanations, *e.g.* that retreating Serb forces had set the houses on fire,[128] or that there had been an explosion of fire. Even assuming the houses were hit by artillery shells, they were both located within close proximity of the police station, a valid military objective.

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[124] See Map attached hereto as Annex C.
[125] T.16312.
[126] TJ, 1428,1920.
[127] TJ, 1428.
[128] There was evidence that Serb forces had murdered civilians on their retreat from Benkovac. See D2023, pg.2. It is therefore not unreasonable that Serb forces could have set these houses on fire.

64. Further, the Trial Chamber gave no explanation as to how it calculated a distance of "250-300 meters" from the second house to the police station. The Chamber found that one of the two houses marked on P290 was "less than 100 meters west of the location of the police station indicated on the "'Jagoda' list," while the second house marked X on P290 was "250-300 meters" from the location of the police station indicated on the "Jagoda" list. The Trial Chamber's finding was erroneous. In fact, as is evident on the attached Annex D, both houses are the same distance away from the location of the police station on the "Jagoda" list, and the location of the second house marked X on P290 is within 200 meters of the actual location of the police station, satisfying the Trial Chamber's arbitrary rule.

1.1.5.3. The Trial Chamber erred in concluding that at least 4 projectiles landed more than 200 meters from known "military targets" in Gračac.[129]

65. From at least 150 projectiles fired on Gračac on 4-5 August, the Trial Chamber erroneously suggested that at least 4 projectiles violated its 200M Rule."[130]

66. The Trial Chamber concluded that an unspecified number of projectiles impacted near witness Steenbergen's house,[131] and concluded that Steenbergen's house was 800 meters from the nearest identifiable "target."[132] No reasonable trier of fact could have found that witness Steenbergen's house was more than 800 meters away from the nearest military objective.

67. At trial, Steenbergen located his house within 200 meters of the Gračac police station, a legitimate military target.[133] However, the Trial Chamber found that Steenbergen's testimony on the location of the police station differed from that of another witness, and chose to believe the other witness.[134] It concluded that Steenbergen's house was therefore 800 meters from the nearest "known artillery target," even though Steenbergen himself testified that it was within 200 meters.

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129 TJ, 1926-1937,(in particular 1932-1933),1455-1458.
130 Id.
131 TJ, 1456,1932.
132 TJ, 1932.
133 P538.
134 TJ, 1455.

68. In doing so, the Trial Chamber failed to adopt the reasonable inference most favorable to the Accused. Moreover, the Trial Chamber discounted the likelihood that if wrong as to the location of the police station, Steenbergen was likely wrong as to the location of his residence. Significantly, the Judgement ignores that Steenbergen believed his house to be within 200 meters of the police station regardless of where, on a map, both locations might have been.

69. The Trial Chamber also found that "several artillery projectiles landed near Gacesa's house" and that this area was approximately 300 meters from the nearest identified artillery target.[135] However, there are profound flaws in the Chamber's methodology used to establish the distance of 300 meters:

(i) Gacesa never identified the precise location of her house, but only the general area and even though Gacesa's house suffered shrapnel damage, the Trial Chamber never identified the precise location of shell impacts, finding only that they landed "near" her house; and

(ii) Even where witnesses claimed to mark "specific" areas on maps, the Trial Chamber found that such markings could only be regarded as "approximations."[136] Indeed, it is virtually impossible on maps on a scale of 1:50,000 to be accurate within 100 meters. If the witness is off by 1 millimeter this results in an error of 50 meters. Thus, if Gacesa was off by 2 mm in her drawing, this is the difference between a lawful and unlawful shelling incident under the 200M Rule.

(iii) Nevertheless, the Trial Chamber mistakenly proceeded to perform precise mathematical distance calculations on the basis of Gacesa's "approximations."

(iv) Finally, the Trial Chamber did its mathematical calculation knowing that there was an additional legitimate military objective in Gračac whose precise location the Trial Chamber could not identify: the SVK Gračac Brigade command post.[137] The Trial Chamber chose to ignore this fact because the Accused had failed to prove that it was located near Gacesa or Steenbergen's house.[138] This reversal of the burden of proof was a grave error by the Trial Chamber.

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[135] TJ, 1932.
[136] TJ, 1372.
[137] TJ, 1931,1932.
[138] TJ, 1933.

70. In fact, Gacesa testified that she saw smoke coming from a "warehouse" outside her home,[139]and Turkalj testified that "warehouses" in Gračac were targeted by the HV.[140] If the SVK command post in Gračac was located near Gacesa's home, possibly in the warehouse, then the area around Gacesa's home was not a "civilian area."

71. No reasonable trier of fact could have made these findings with respect to Gračac. They must be quashed and reversed.

1.1.5.4. The Trial Chamber erred in concluding that at least 2 projectiles landed more than 200 meters from known "military targets" in Obrovac.[141]

72. The Trial Chamber found that at least two projectiles impacted outside of 200 meters in Obrovac: one on a health clinic 200-300 meters from a known artillery target,[142] and the other on the Trio factory which fell approximately 450 meters from a known artillery target.[143]

73. However, the Trial Chamber failed to address two additional military objectives in Obrovac. It took note of Rajcic's testimony that the bridge and several crossroads/exitroads were planned artillery targets, and his marking of these crossroads/exitroads on P2328.[144] Two of the crossroads/exitroads marked by Rajcic are within 200 meters of the Trio factory and the health clinic. However, with no explanation the Chamber ignored two of the four targets identified by Rajcic on P2328.

74. The Trial Chamber also found that "the HV had identified *at least* the bridge and the cross-roads in Obrovac as potential artillery targets"[145] and thus accepted that there may have been more military targets in Obrovac. Furthermore, while not rejecting Rajcic's identification of two crossroads/exitroads located within 200 meters of Trio and the health

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139 TJ, 1446.
140 TJ, 1435,1454.
141 TJ, 1938-1945(in particular 1940-1941),1473-1476.
142 TJ, 1940,1473.
143 TJ, 1473,1940.
144 TJ, 1466.
145 TJ, 1474(Emphasis added).

clinic as HV artillery "targets," the Trial Chamber provided no reasoned opinion as to why they should be disregarded.

75. The Trial Chamber's failure to consider two "known artillery targets" in Obrovac led it to conclude erroneously that shells fell more than 200m from "known artillery targets." No reasonable trier of fact could have made that finding and it must, therefore, be quashed and reversed.

76. The combined effect of the above errors (1.1.5.1-1.1.5.4) is to render unreasonable inferences of "indiscriminate" attacks in these four towns.

1.1.6. The Trial Chamber erred in fact and law when concluding that the HV did not have the ability to strike targets of opportunity

Findings and Errors

77. The Trial Chamber excluded as unreasonable the possibility that shells falling beyond the arbitrary 200m-range in Knin, Benkovac, Gračac and Benkovac may have been aimed at mobile targets of opportunity.[146] The Chamber's finding was erroneous and unreasonably reversed the burden of proof.

78. In light of the burden of proof, the Trial Chamber did not give the appropriate weight to evidence that the HV could hit targets of opportunity and that such targets did exist in these towns. Among that evidence was the testimony of SVK General Mrksic, who stated that in the days prior to *Storm* Gotovina's forces were above Knin and were observing SVK activities with binoculars.[147] Additionally, Rajcic testified that "during Operation Storm, persons directing and correcting artillery fire were commanders of artillery groups at artillery observation points. This was the reason why our observation posts were under constant enemy artillery fire."[148] Moreover, Rajcic testified that HV used unmanned drones to correct artillery fire.[149]

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146 TJ, 1907,1908,1915,1921,1933,1941.
147 TJ, 1907.
148 TJ, 1239,1907. D1425,41,60.
149 D1425, 23.

79. The Trial Chamber also erred when it concluded that "the evidence does not establish whether the HV had artillery observers with a view of Knin at any point during 4 August 1995."[150] This finding indicates that the burden of proof was on the Accused to prove the inability to hit targets of opportunity, rather than on the Prosecution to prove the contrary.[151]

80. Further undermining this finding is that the Trial Chamber's position is based on a misinterpretation of Rajcic's testimony. The Chamber cites Rajcic as having testified that the HV "had no clear line of sight prior to Operation Storm." At that point of his testimony, Rajcic was referring to the early planning of targets in Knin that had been taking place since 1993 at a time when the HV no clear line of sight of Knin. However, this changed in July 1995 when the HV seized Grahovo and took control of the Dinara Mountains above Knin. This was confirmed by Mrksic who saw Gotovina's forces above Knin observing SVK activities with binoculars.[152]

81. In addition to Rajcic and Mrksic, the record provides ample evidence that the HV had observers:

- a car carrying RSK policemen was struck by artillery, an incident that the Trial Chamber unreasonably attributed to pure coincidence.[153]
- Leslie and Dawes testified that they saw HV bracketing its fire, which indicated to them that the HV was able to observe its fire in Knin.[154]
- Finally, by the Trial Chamber's own count, 850 out of 900 shells fired in Knin are presumed to have landed on or within 200 meters of identifiable artillery targets, strongly suggesting that the HV was able to direct its fire accurately with observers.

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[150] TJ, 1907.
[151] TJ, 1907("[i]f they did not [have artillery observers with a view of Knin], at least on 4 August 1995, the HV would have been unable to spot on, report on, and then direct fire at SVK or police units or vehicles, which would have presented so-called opportunistic targets […]").The phrase "if they did not" shows that the Trial Chamber was unable to exclude the reasonable possibility that HV had that ability and used circular reasoning to exclude that possibility.
[152] TJ, 1907.
[153] TJ, 1907-1908.
[154] TJ, 1278; T.10392,1942-1943.

82. The Trial Chamber also asserts that even if the HV had observers, there is little evidence of an SVK presence such that targets of opportunity could have been attacked. Although "a small number of tanks, trucks and RSK police moved through Knin on 4 August 1995,"[155] the Chamber unreasonably held that the HV could not have been firing on these targets.

83. The Trial Chamber found a total of 50 indiscriminate shells in Knin, of which 40 were in a grass field near the ECMM and 3 were in the grass field outside the UN compound. This leaves just 7 projectiles remaining out of 900 fired. The Chamber fails to provide a basis as to why it would be unreasonable to conclude that a very small fraction of projectiles (7) were fired against a "small number of tanks, trucks and RSK police moving through Knin on 4 August 1995." Indeed, the number of projectiles fired (7) appears to be less than the number of targets of opportunity identified by the Trial Chamber itself.[156]

84. With respect to Benkovac,[157] Obrovac,[158] and Gračac,[159] the Trial Chamber erred when it reversed the burden of proof by finding that the Accused had failed to prove the existence of opportunistic targets. The Trial Chamber should have required the Prosecution to prove beyond reasonable doubt that there were no opportunistic targets in those towns. It was entirely unreasonable for the Chamber to think that there was no VSK movement through these towns at any point on 4 August.

Conclusions and relief

85. The Chamber's finding that the only reasonable conclusion was that the HV was unable to fire at targets of opportunity and its consequent holding that artillery impacts violating its 200M Rule must be presumed to be unlawful was erroneous, unreasonable and a violation of the presumption of innocence. These errors nullify the Trial Chamber's finding that Knin/Obrovac/Benkovac/Gračac were treated as artillery targets and were fired upon unlawfully.

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[155] TJ, 1900.
[156] TJ, 1908.
[157] TJ, 1921.
[158] TJ, 1941.
[159] TJ, 1933.

1.1.7. The Trial Chamber erred in fact and law when it concluded that the attack on commander-in-chief of Serb forces, Milan Martić, was disproportionate and could be regarded as evidence of the indiscriminate nature of the attack.[160]

Findings and Errors

86. At Paragraph 1910, the Trial Chamber found that although attacks against Martić "offered a definite military advantage," they were disproportionate because they created "a significant risk of a high number of civilian casualties and injuries" demonstrating that "the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target on at least three occasions on 4 August 1995." These findings are erroneous in law and fact:

(i) There is no evidence that any civilians were present in or around Martic's location at the relevant time;

(ii) There is no evidence of any civilian death, injury, or damage to civilian objects, from which a "significant risk of a high number of civilian casualties" could be inferred;

(iii) There is no reasoned opinion or evidence to support the conclusion that the "significant risk" of civilian harm was "clearly" or "discernibly" "excessive in relation to the military advantage … anticipated,"[161] in particular considering the great importance of "disrupt[ing] [Martic's] ability to move, communicate and command;"[162]

(iv) The Judgement failed to apply the appropriate legal standard, and there is no reasoned opinion or evidence to support the conclusion, that the attack to disrupt Martic's "ability to move, communicate and command" was disproportionate in relation to the "overall military advantage anticipated" considering Storm "as a whole" rather than this "isolated or particular part[…] of that attack;"[163]

(v) The Judgement failed to apply the appropriate legal standard, and there is no reasoned opinion or evidence to support the conclusion, that "a reasonably

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[160] TJ, 1906,1907,1910,1911.

[161] Protocol I, Art. 51(5)(b); see also Statute of the International Criminal Court, Article 8(2)(b)(iv) (attack must be "clearly excessive") and Yoram Dinstein, Hostilities, pg. 120 ("excessive" means "the disproportion is clearly discernible").

[162] TJ, 1899.

[163] ICRC, Customary IHL, Rule 14 (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14). See also Rogers, pg. 27; Fleck, Handbook, pg. 205; Doswald-Beck, The value of the 1977 Protocols, 156-7.

well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[164] The Trial Chamber's analysis of proportionality is in hindsight whereas "the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight;"[165]and

(vi) The Judgement fails to apply the appropriate legal standard, and there is no reasoned opinion or evidence to support the conclusion, that the attack "was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties" to satisfy the *mens rea* of disproportionate attack.[166]

Conclusions and relief

87. These errors of law and fact caused a miscarriage of justice and invalidate the decision in relevant part. The Appeals Chamber should thus reverse and quash the finding that the attack on Martić was disproportionate or that it is evidence of a broader indiscriminate attack by either Gotovina or the HV against civilians or civilian objects.

1.2 The Trial Chamber erred in fact and law when taking the view that shelling was indiscriminate and that areas devoid of "military targets" were unlawfully attacked.[167]

88. Sections 1.1.5, 1.1.5.1 *et seq.,* 1.2.1 and 1.2.2.4 are hereby incorporated by reference.[168]

1.2.1. The Trial Chamber erred in law when it failed to render a reasoned opinion concerning the applicable legal standard to determine whether the artillery attack was indiscriminate.[169]

89. The Trial Chamber found that all projectiles that impacted within 200 meters of a "known artillery target" were "*deliberately fired"* at previously identified military

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[164] *Galic* TJ, 58; See also ICRC, Customary IHL, Rule 14 (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14). See also Rogers, pg. 27; Fleck, Handbook, pg. 205; Doswald-Beck, The value of the 1977 Protocols, 156-7.
[165] See *e.g.* Statements of Understanding made by Germany on ratification of Protocol I (14 February 1991), cited in *Galic* TJ, 58, fn.109.
[166] *Galic* TJ, 59.
[167] TJ, 1892-1945,1970-1995,2303-2320.
[168] *E.g.*, ICRC *Commentary API*, 3474, 3479.
[169] TJ, 1892-1945,2368-2375.

objectives.[170] It also found that projectiles that impacted beyond 200 meters of a known artillery target were "*deliberately fired"* into civilian areas.[171] Thus, in substance, the particular attacks were found not to be indiscriminate per Article 51(4)(a) of Protocol I, but were either directed at military objectives as permitted by Article 52(2) or else directed at "civilian areas." However, the Trial Chamber leaped from this factual finding to the legally impossible conclusion that the HV "indiscriminately shelled" the four towns.

90. The Trial Chamber inferred two types of attacks from the same sentence in Gotovina's attack order "to put the towns of Drvar, Knin, Benkovac, Obrovac and Gračac under artillery strikes," *i.e.* (1) those directed against military objectives or civilian areas and (2) an indiscriminate attack on the towns as a whole. [172] This is impossible. There are only three mutually exclusive ways to interpret Gotovina's order: (1) to put the towns under lawful artillery attack; or (2) to deliberately attack both military objectives and "civilian areas;" or (3) to indiscriminately attack the whole towns. The Trial Chamber concluded that the "only reasonable explanation" is that Gotovina ordered all three in the same sentence.[173] No reasonable trier of fact could have reached this conclusion.

91. Because the Prosecution charged "unlawful attacks on civilians and civilian objects,"[174] it must be deemed to have charged the specific crime of "direct attack" to the exclusion of indiscriminate or disproportionate attack.[175] The Trial Chamber was thus required to determine pursuant to Article 51(2) whether Gotovina's order and the attack were directed against the "civilian population as such, as well as individual civilians," or whether they constituted "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."

92. Ultimately, the Trial Chamber made no finding that the attack order was directed at civilians or the civilian population, or that its "primary purpose" was to spread terror. To do

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[170] TJ, 1898.
[171] TJ, 1906,1920,1922,1932,1934,1940,1942.
[172] TJ, 1187.
[173] TJ, 1911.
[174] OTP,PTB, 31-33. Each distinct category of unlawful attacks has differing elements of crime: *Galic*, AJ, 134; *Kordić*, AJ, 416; *Strugar*, TJ, 281.
[175] *Kordić*, AJ, 416; *Galic*, TJ, 41; *Galic*, AJ, 134; *Strugar*, TJ, 281.

so, the Chamber would have had to determine, incident by incident, whether a civilian or civilian object was the object of the attack or was terrorized by unlawful attacks.[176] Instead, the Chamber found that Gotovina ordered deliberate attacks against "civilian areas," without further establishing that there were any civilians or civilian objects deliberately targeted within each "civilian area." To salvage the Prosecution's "unlawful attack" charge, the Trial Chamber conflated deliberate attacks of "civilian areas" which it did not find to be in violation of Article 51(2) or 52, with "indiscriminate attacks" against whole towns. This resulted in reversible error on several grounds.[177]

93. First, General Gotovina's rights to fair notice and right to be heard were violated. He was convicted of a crime in which a material element ("indiscriminate attack") was not pleaded in the Indictment.

94. Second, the Trial Chamber labeled the attack as "indiscriminate" without addressing the requisite elements of an "indiscriminate attack" as defined in Article 51(4) of the Protocol. Indiscriminate attacks are those that "strike civilians or civilian objects and military objectives without distinction."[178] The Trial Chamber interpreted Gotovina's order as an order for two distinct, deliberate attacks, one directed at military objectives and the other at "civilian areas."[179] Neither was found to be in violation of Articles 51(2) or 52. The Chamber then concluded that the attack was indiscriminate. The attack cannot be both, and the Trial Chamber failed to explain how two deliberate attacks can constitute an indiscriminate attack.

95. The Trial Chamber did not find that Gotovina had the intent to "strike civilians or civilian objects and military objectives without distinction," and did not find that the towns as a whole were attacked so as to "strike civilians or civilian objects without distinction." On the contrary, the Chamber found that the HV had (1) prior to *Storm* identified military

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176 *Dragomir Milosevic* AJ, 55-56,139,143.
177 *Galic* AJ, 132-133.
178 *Galic* TJ, 57; Article 51(4) of the Protocol.
179 TJ, 1911.

objectives within the towns;[180] and (2) "deliberately fired at previously identified military targets"[181] with a 94.5% accuracy rate.[182] These two findings make it impossible to conclude that the HV was "firing without distinction" on the four towns. Indeed, in the entire Judgement the Trial Chamber makes no reference to the principle of distinction.[183]

96. Had the Trial Chamber simply rejected the Prosecution's case of deliberate attack for lack of evidence, it would have acquitted Gotovina. Instead, by applying the label of "indiscriminate attack" on conduct found to be deliberate, the Trial Chamber was able to cite to *Blaškić* and *Kordić* to conclude that "indiscriminate attacks can amount to unlawful attacks against civilians and civilian objects."[184] By improperly applying the label of "indiscriminate attack," the Trial Chamber was able to convert "deliberate attacks on 'civilian areas'" that it did not find to be unlawful, into "unlawful attacks on civilians and civilian objects." The Trial Chamber concluded as such even though it was unable to find a single shelling attack against the civilian population and less than a handful of strikes which had any effect on civilian objects.

97. The Trial Chamber's re-labeling of deliberate attacks into indiscriminate attacks as unlawful attacks against civilians and civilian objects had a sequential effect on the balance of its holdings: it allowed the Trial Chamber to save the Prosecution's Persecution and Deportation counts, and preserve its Brioni JCE theory. The Trial Chamber's error in misapplying the legal standards for "indiscriminate attack" are so grave that they must result in a reversal of the Trial Chamber's findings (1) of unlawful attack against civilians or civilian objects; (2) of the existence of a Joint Criminal Enterprise whose purpose was to terrorize Serb civilians into fleeing through an artillery attack; (3) that the primary and direct cause of the departure of Serb civilians was fear caused by unlawful shelling; (4) that Gotovina is guilty of Persecution and Deportation, and (5) that Gotovina is responsible for

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[180] TJ, 1893-1894.
[181] TJ, 1911.
[182] See Annex C.
[183] The Judgement cites only to Rajcic's assertion that the principle of distinction was respected by the HV. TJ, 1910.
[184] TJ, 1841, citing *Blaškić* AJ, 159; *Kordić* AJ, 47,57,105.

"natural and foreseeable crimes" resulting from the JCE and the "unlawful attack against civilians or civilian objects."

1.2.2. The Trial Chamber erred in fact and law (repeatedly and in several significant ways) when interpreting the legal standard relevant to determining whether shelling could be said to be indiscriminate.[185]

98. The Chamber's finding of indiscriminate attacks in turn rests on its conclusion that Gotovina "deliberately targeted 'civilian areas.'"[186] International law does not prohibit attacks on "civilian areas,"[187] but rather attacks against civilians or the civilian population (Protocol Article 51(2)) or against "civilian objects" (Protocol Article 52(2)). Because the Chamber failed to find any violation of Articles 51(2) or 52, the Chamber failed to find that the deliberate attacks against "civilian areas" were unlawful and should have acquitted Gotovina.[188]

99. Nevertheless, assuming *arguendo* that the Chamber intended to find the deliberate targeting of "civilian areas" was unlawful because it amounted to an attack on the civilian population and/or civilian objects, this finding still amounted to an error of law and fact. First, the Trial Chamber erroneously defined "civilian area" as any area "devoid of military objects" rather than areas that contained civilians and civilian objects.[189] Second, the Trial Chamber did not apply the relevant legal standards in Articles 51(2) and 52 to assess whether Gotovina had violated the prohibitions on deliberate attacks on the civilian population. Third, the Trial Chamber erred in fact when it concluded that Gotovina and the HV deliberately targeted civilians and civilian objects.

A) Legal elements of deliberate attacks against civilians

100. The Appeals Chamber has held that it is not sufficient for a Trial Chamber to determine whether a "civilian area" was struck. Instead, the Trial Chamber must determine, on an incident-by-incident basis, whether the civilian populations as such, or individual

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185 TJ, 1911,1923,1935,1943.
186 TJ, 1911.
187 *Dragomir Milosevic* AJ, 55-56,139,143; *Blaškić* AJ, 156-159.
188 *Kordić*, AJ, 433.
189 TJ, 1911; *Dragomir Milosevic*, AJ, 57,139; *Blaškić* AJ, 111; *Kordić* AJ, 48.

civilians, were unlawfully targeted.[190] In making this assessment, the Appeals Chamber has held that the following factors are relevant to determining whether civilians were the target of an attack:

- Scale of casualties[191]
- Scale of damage to civilian objects;[192]
- Means and method used in the attack;[193]
- Lack of evidence of intentional targeting of civilians or civilian objects;[194]
- No evidence of widespread/systematic character of acts of unlawful shelling;[195]
- Existence of fierce fighting;[196] and
- Number of incidents compared to overall size of the relevant location.[197]

B) The Trial Chamber erred in failing to consider the Appeals Chamber's factors

101. Although not exhaustive, the Trial Chamber took none of these factors into account in determining whether civilians or civilian objects were deliberately attacked. Had it done so, the Trial Chamber would have found the following in relation to each disputed shelling incident:

- **Scale of casualties:** The Trial Chamber was unable to establish a single death or injury. Furthermore, the Trial Chamber was unable to identify a single civilian terrorized by any disputed shelling incident. Not a single civilian death or injury was linked to unlawful shelling, a fact most

190 *Dragomir Milosevic* AJ, 55-56,139,143; *Blaškić* AJ, 156-159.
191 *Blaškić* AJ, 446,464; *Kordić* AJ, 446.
192 *Kordić*, AJ, 453.
193 *Strugar*, AJ, 271.
194 *Blaškić*, AJ, 464.
195 *Blaškić*, AJ, 156.
196 *Blaškić*, AJ, 464.
197 *Blaškić*, AJ, 464.

evidently relevant to establishing an *absence* of intent to deliberately fire at civilians.[198]

- **Scale of damage to civilian objects:** The damage to civilian objects from each incident was minimal. Most of the disputed projectiles fell into empty fields,[199]which militates against any suggestion of "deliberate shelling of civilian objects."

- **Means and method used in the course of the attack:** The Trial Chamber rejected the Prosecution's argument that the HV used improper weapons systems in launching the artillery attack.[200] Moreover, Annex A demonstrates that, based on the trial record and using the 200m-range, only 5.5% of all (approximately 1,205) shells[201] fired during *Storm* impacted beyond 200 meters of an identifiable "artillery target." Under Leslie's 400-meter standard, less than 1% fell outside 400 meters. With these statistics, no reasonable trier of fact could have inferred that there was a deliberate attack against civilians and civilian objects.

- **Lack of evidence of intentional targeting of civilians or civilian objects:** The Trial Chamber made no finding that civilians or civilian objects were intentionally targeted, only areas.

- **No evidence of widespread/systematic character of acts of unlawful shelling:** The disputed shelling was not "widespread" and in Gračac and Obrovac was limited to two locations.

- **Existence of fierce fighting:** The shelling took place during fierce fighting between warring sides, in the context of an operation to liberate territory.

- **Number of incidents compared to overall size of the relevant location:** The number of disputed incidents is minimal in relation to the overall geographic scope of *Storm*.[202]

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[198] Furthermore, Appellant contends that there can be no conviction for indiscriminate attacks where there is no proof of death or injury. Under Article 3 of the Statute, unlawful attacks against civilians/civilian objects require proof that the acts "resulted in serious injury to body or health." *Kordić* AJ, 57. There is no authority, and no basis in customary law, which suggests that there is no result requirement if the indiscriminate attack is charged as a crime against humanity. (*E.g.*, ICRC *Commentary API*, 3474, 3479). Indeed, there is no basis to conclude that an indiscriminate attack resulting in no death or injury is of comparable gravity to the enumerated crimes in Article 5, all of which require serious physical mistreatment.

[199] TJ, 1903-1909.

[200] TJ, 1897.

[201] See Annex A.

[202] The geographic area of "Krajina" was approximately 11,000 square kilometers and Sector South was approximately 5,000 square kilometers. See T.9456-9457,T.25645-25646.

Accordingly, had the Trial Chamber taken into account the Appeals Chamber's factors in considering whether civilians or civilian objects had been deliberately targeted, it would have found that the evidence overwhelmingly demonstrated that they were not.

C) The Trial Chamber erred in failing to consider other relevant factors

102. The Trial Chamber failed to consider additional factors which demonstrate that there was no deliberate attack:

(i) Immediately upon the end of the operation, the UN and the United States conducted investigations into allegations of unlawful shelling.[203] Three UN investigations in Knin conducted immediately after *Storm* and one Human Rights Watch report prepared one year after *Storm* found no evidence of indiscriminate shelling.[204] An investigation by U.S. military personnel came to the same conclusion.[205] An UNMO report in Gračac concluded that the shelling was concentrated on the "main junction" and made no mention of evidence of an indiscriminate attack;[206]

(ii) Based on the 200M Rule or Leslie's 400M standard, 94.5-99% of all shells were lawful.[207] As already noted, there is no evidence to support the view that a 1-5.5% inaccuracy rate would be abnormal in evaluating artillery fire in military circumstances such as *Storm*.[208]

(iii) The Trial Chamber's failure to assess the operation as a whole for the purpose of evaluating the objective of the shelling constitutes a grave error of law (resulting in errors of fact), which invalidates the decision. In determining the lawfulness of target selection and the consequent lawfulness of an attack, customary law required the Trial Chamber to "consider the military advantage to be anticipated from an attack as a whole and not from parts thereof."[209]

(iv) There was clear evidence of efforts to discriminate between legitimate military objectives and civilian objects, which the Trial Chamber acknowledged, including:

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[203] D66, pg.1; D29; P64; P228.
[204] D29; P64; P228; D183(contains no allegation from Krajina Serb refugees reporting any indiscriminate shelling as a fear motivator).
[205] D66, pg.1; T.5045-5046.
[206] P111, pg.3.
[207] Annex A.
[208] See above, Section 1.1.4.
[209] ICRC Customary IHL, Rule 8 (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8).

(a) Efforts made to identify, locate and aim fire at legitimate military objectives;[210] and

(b) Instructions/orders given to protect civilians from harm.[211]

(v) There was no evidence of deliberate shelling of civilians in Drvar despite the fact that Gotovina's supposedly unlawful order of attack also pertained to that location.[212]

D) The Trial Chamber's factors did not exclude reasonable inferences in favor of the Accused.

103. The Trial Chamber acted unreasonably when it failed to consider these factors, which were all relevant to determining whether there was a "reasonable explanation of the evidence" other than there was an effort to deliberately target civilians. Instead, the Trial Chamber arrived at its conclusion by relying on nine of its own factors:

(i) A single sentence in Gotovina's attack order;

(ii) The fact that "TS-4 reported firing at the general area of Knin or at Knin, without specifying an artillery target,"[213] while the 134th Homeguard Regiment reported firing at the "general area of Benkovac;"[214]

(iii) 7th Guards Brigade's report of firing at S-numbered targets on the Ivančića map;[215]

(iv) "General impression" gained by Prosecution witnesses that "the shelling impacted all over Knin and was indiscriminate;"

(v) "The insufficient regard paid to the risk of civilian casualties and injuries and damage to civilian objects in the disproportionate firing at two locations where the HV believed Martić to have been present;"[216]

(vi) Distance between general areas of artillery impacts and possible military objectives;

(vii) Number of disputed shells;

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210 TJ, 1893-1902; P1125, P1205; D1425; T.16352.
211 D1425, 6,10,17,19,31; T.16266,16276,16277,16483-16484.
212 P1125.
213 TJ, 1906.
214 TJ, 1923.
215 TJ, 1911.
216 TJ, 1911.

(viii) Spread of disputed shelling incidents;[217]

(ix) "Small number of stray shells may do a lot of harm" argument.[218]

Each factor will be reviewed in turn:

(i) A single sentence in Gotovina's attack order

104. The Trial Chamber found that Gotovina's order to put the towns of Drvar, Knin, Benkovac, Obrovac and Gračac under artillery strikes was, on its face, an order to treat whole towns as targets for artillery fire,[219] *i.e.,* an order for an indiscriminate attack. However, as explained above, this interpretation is contradicted by the Trial Chamber's own findings, namely that the result of the attack was a deliberate attack against military objectives and a deliberate attack against "civilian areas." Accordingly, the Trial Chamber's interpretation that the order was for an "indiscriminate" attack was improper and not supported by the evidence.

105. Furthermore, the Trial Chamber ignored alternative reasonable explanations of that order offered by Corn[220] and Rajcic. Rajcic, the man who implemented the order, testified that cities/towns had not been treated as military objectives,[221] and that is not how the order was interpreted by Gotovina's subordinates.[222]

106. The Trial Chamber found Rajcic to be credible when describing locations of artillery targets. Conversely, because Rajcic had not identified military objectives in certain areas, the Trial Chamber concluded that Rajcic was firing at civilian areas, even though Rajcic himself testified that he was under strict orders to protect civilians and civilian objects.[223] Thus the Chamber used Rajcic's failure to identify military objectives in certain areas to reject Rajcic's testimony denying an HV effort to target civilians and civilian areas.

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217 TJ, 1906.
218 TJ, 1922,1934,1942.
219 TJ, 1893,1911.
220 TJ, 1893,1172,1173.
221 D1425, 45.
222 TJ, 1183,1184,1188.
223 TJ, 1183,1184,1188.

107. Rajcic was not given an opportunity to explain whether a military objective was located in the "civilian areas" highlighted b the Trial Chamber because not a single disputed shelling incident was put to Rajcic. This "shell by shell" approach was not OTP's case, but rather the *Chamber's case*. If such an approach was of a concern to the Chamber, then the Chamber had a duty to put its questions to Rajcic and give him an opportunity to explain why projectiles may have landed in certain locations.[224]

108. Rajcic's testimony that the HV did not indiscriminately fire upon whole towns was a "reasonable explanation of the evidence" and was powerfully corroborated. Subsequent investigations by international observers confirmed that there was no evidence of an indiscriminate artillery attack. Rajcic's testimony was also corroborated by Corn[225] and by the Chamber itself, which found that 94.5% of shells fired pursuant to Gotovina's order were presumed to have been intended to hit military objectives. Accordingly, it was a grave error for the Trial Chamber to conclude that the only reasonable interpretation of the order was to shell towns indiscriminately.

109. As the Appeals Chamber made clear, it is not for a Chamber to second-guess the meaning of a military order, or to do so to the prejudice of the accused, when the context allows for a finding that the order was a lawful military order.[226] There "was a military justification for issuing"[227] the order and the trial evidence does not support the Trial Chamber's finding of a criminal order issued by Gotovina.

(ii) The fact that "TS-4 reported firing at the general area of Knin or at Knin, without specifying an artillery target,"[228] while the 134th Homeguard Regiment reported firing at the "general area of Benkovac."[229]

110. The Trial Chamber mistakenly found that "TS-4 reported firing at the general area of Knin or at Knin, without specifying an artillery target." First, this finding is at least in part based on a mistranslation of the B/C/S phrase "sire podrucje/rejon" which is

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224 *Jelisic*, *AJ,*27-28.
225 TJ, 1893,1172,1173.
226 *Blaškić AJ,*330 *et seq*.
227 *Blaškić AJ,*335.
228 TJ, 1906.
229 TJ, 1923.

interchangeably translated by CLSS as "general area" or "wider area." In this case, CLSS translated the phrase as "general area" of Knin.[230] It made the same translation for a report that the 134th Homeguard Regiment reported firing at the "general area of Benkovac."[231] In fact, the translation on both documents reported that they were reporting shelling in the "wider area" of Knin and Benkovac, respectively. This translation substantively changes the meaning.

111. Second, the Trial Chamber itself found that these reports "provide only a partial and at times coded account of the targets fired at in Knin. Consequently, based on these reports alone, the Trial Chamber is unable to determine whether the TS-4 in fact treated Knin itself as a target, or whether its reporting falsely created the impression that it was doing so as a result of a lack of details, errors, or other inaccuracies in the reports."[232] The Trial Chamber decided to interpret these reports as inculpatory only in light of its findings using the "200M Rule." Accordingly, if the use of the 200M Rule was improper, then the Trial Chamber's interpretation of these reports is erroneous as well.

(iii) 7th Guards Brigade's report of firing at S-numbered targets on the Ivančića map

112. The Trial Chamber considered the 7th Guards' Brigade's report of firing at S-numbered targets to be consistent with an order to "treat whole towns as targets." However, the Trial Chamber also found that, "based on these reports alone, the Trial Chamber is unable to determine whether the 7th Guards Brigade in fact used the Ivančića map to direct MBRL fire at Knin, or whether its reporting falsely created the impression that it was doing so as a result of a lack of details, errors, or other inaccuracies in the reports."[233]

113. Further, given that the Trial Chamber made no finding that a single rocket was found in one of the Chamber's "civilian areas," there is no evidence to support the conclusion that Ivančića was used to fire MBRLs at "civilian areas." The Trial Chamber's

[230] P1268, pg.1.
[231] P1200, pg.2.
[232] TJ, 1895.
[233] TJ, 1896.

subsequent finding that the Ivančića map supports the conclusion that "whole towns were treated as artillery targets" was therefore entirely unreasonable. Accordingly, there was no basis to conclude that the Ivančića map was used by the 7th Guards Brigade to direct MBRL fire on civilian areas.

(iv) "General impression" gained by Prosecution witnesses that "the shelling impacted all over Knin and was indiscriminate"

114. The Trial Chamber also relied upon a "general impression" of individuals present in the area at the time.[234] That impressionistic evidence was supported neither by any detailed investigation, nor by any objective elements. In particular, none of the witnesses in Knin on 4 August knew what the HV was targeting, nor had knowledge of all of the military objectives that existed in Knin.

115. The Trial Chamber did not give sufficient weight to the fact that the United Nations and United States conducted at least 5 different investigations into the witnesses' shelling allegations, and failed to find evidence of indiscriminate or unlawful shelling.[235] The Trial Chamber simply ignored or disregarded this compelling evidence, which countered the vague impressions of the witnesses not substantiated by the evidence.

116. Furthermore, this impressionistic evidence pertains to Knin only, and would not be of any relevance to the other three towns.

(v) "The insufficient regard paid to the risk of civilian casualties and injuries and damage to civilian objects in the disproportionate firing at two locations where the HV believed Martić to have been present"[236]

117. Because this incident is discussed in full above, the Appellant refers to his submissions by reference.[237] The record provides no support for a finding of disproportionate attack on Martić or on the alleged targeting of an entire city. The attacks on

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234 TJ, 1911.
235 D29; D66; P64; P111, pg.3; P228; P444, 43; T.5045-5046,18626.
236 TJ, 1911.
237 See above, Section 1.1.7.

Martić were focused on a legitimate military objective, which caused no civilian casualties. They provide no evidential support for the Chamber's conclusion of a citywide attack.

(vi) Distance between general areas of artillery impacts and possible military objectives;

118. The Trial Chamber's conclusion of indiscriminate attacks centers on presumptions arising from the 200M Rule, *i.e.,* that a shell falling beyond 200 meters of an identifiable military/artillery "target" may be treated, *prima facie*, as unlawful and evidence of deliberate targeting of civilian areas. Should the Appeals Chamber find this standard to be erroneous, the linchpin for the Chamber's indiscriminate shelling findings would be nullified.[238]

119. Moreover, even assuming the 200M Rule is the correct standard, in virtually every case, the Trial Chamber did not know the precise point of impact of any shell, thus making it impossible to do precise calculations of distance which were so central to the Chamber's conclusions.

(vii) Number of "disputed" shells;

120. This factor relates to Knin only.[239] The Trial Chamber stated that "too many" shells fell "too far away from identified artillery targets."[240] First, the Trial Chamber erred in concluding that 50 out of 900 shells landed beyond 200m of military objectives, as explained above. Second, because the Trial Chamber had no evidence as to the range of error of the weapons systems used, it could not have known how far was "too far . . .for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire."[241] The Trial Chamber simply assumed that the range of error was within 200 meters. The Judgement also acknowledges that the range of error could have been substantially greater.[242] The failure to take into account the lack of

[238] See above Sections 1.1.2-1.1.4.
[239] TJ, 1906.
[240] TJ, 1906.
[241] TJ, pg.965, fn.932.
[242] TJ, 1906.

evidence regarding the range of error is a mistake so grave that it resulted in a miscarriage of justice.

121. The Trial Chamber also had no evidentiary basis (*e.g.*, evidence of the margin of error, expert testimony, etc.) to determine how far was "too far" from military objectives, and how many was "too many." By relying upon an unspecific and unproven standard ("too many" and "too far"), the Trial Chamber acted unreasonably and unfairly.

(viii) Spread of "disputed" shelling incidents;

122. In concluding that shelling was "indiscriminate," the Trial Chamber also referred to the geographical scope over which supposedly deliberate targeting of civilian areas had occurred.[243]

123. The spread of disputed shells, *i.e.*, the surface over which shells landed away from their intended targets, has no reasonable bearing on whether shelling may be said to be indiscriminate. A shell is no less and no more likely to miss its intended target when the artillery operation covers a large area of land rather than when it covers a small one: the larger the territory concerned by the operation, the more likely it is that incidents of missed targets will be spread out. The inference drawn by the Trial Chamber on that basis is thus unreasonable.

124. Based on the above, it may be said that the Trial Chamber's consideration of the "spread" of disputed shelling incidents was irrelevant, unproven and inconclusive. By relying upon this factor, the Trial Chamber, therefore, acted unreasonably and unfairly.

(ix) Small number of stray shells "may do a lot of harm" argument.

125. Confronted with the statistical improbability of its position, the Trial Chamber suggested that even a small number of shells could have a negative effect on civilians.[244] This fails to support the conclusion that the shelling from which such negative effect resulted was deliberate rather than a collateral effect of lawful shelling.

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[243] TJ, 1906,1920,1932,1940.
[244] See *e.g.*, TJ, 1909,1922,1934,1942.

126. On the evidence, no reasonable trier of fact could have regarded this factor as supporting the view that shelling was deliberately aimed at civilian areas or was indiscriminate in character.

Conclusions

127. Accordingly, assuming *arguendo* that the Trial Chamber in finding that the HV "deliberately targeted civilian areas" intended to find a violation of Articles 51(2) and/or 52, the Trial Chamber erred in fact and law when it concluded that the HV had deliberately targeted civilians or civilian objects, or deliberately spread terror as the "primary objective" of the shelling. Had the Trial Chamber considered relevant factors as established by the Appeals Chamber, the Trial Chamber would have concluded that the evidence was sufficient to establish the reasonable inference that there was no deliberate attack.

128. This in turn would have resulted in the Trial Chamber rejecting any finding of indiscriminate shelling. The Trial Chamber's mistake in erroneously finding a deliberate attack against civilians and civilian objects is so grave that it must result in a reversal of the Trial Chamber's findings (1) of unlawful attack against civilians or civilian objects; (2) of the existence of a Joint Criminal Enterprise whose purpose was to terrorize Serb civilians into fleeing through an artillery attack; (3) that the primary and direct cause of the departure of Serb civilians was fear caused by unlawful shelling; (4) that Gotovina is guilty of Persecution and Deportation; and (5) that Gotovina is responsible for "natural and foreseeable crimes" resulting from the JCE and the "unlawful attack against civilians or civilian objects."

1.2.2.4 The Trial Chamber erred in failing to determine the lawfulness of the attack on the basis of whether Gotovina acted within the limits of honest judgment on the basis of the conditions prevailing and information available at the time.

129. A military commander can only reasonably be expected to make an evaluation of the factual circumstances based on the information available to him at the time of issuing his

order and in relation to the circumstances ruling at that time as they appeared to him.[245] This was established by the U.S. Military Tribunal in *Rendulic*.[246]

130. The Trial Chamber erred in failing to consider whether Gotovina acted within the limits of honest judgment on the basis of information available to him at the time when issuing his impugned attack order.[247]

131. In determining his *mens rea*, the Trial Chamber cited no evidence to demonstrate that Gotovina knew that his acts were unlawful in light of the facts and circumstances as "it appeared to [him] at the time."[248] Instead, the Trial Chamber rejected Rajcic's own interpretation of the artillery order from the supposedly unlawful manner in which it was implemented, *i.e.*, with hindsight and based on the acts of others.[249]

132. When assessing the lawfulness of an attack order, the tribunal may not infer unlawfulness *ex ante* from the result of a military operation unless there is evidence that a commander knew it was unlawful at the time he issued the order.[250] Any other standard of liability would fall short of customary international law.[251]

133. Thus, whilst the implementation of his order might have been faulty, Gotovina cannot be held to possess the *mens rea* for unlawful attack if he exercised reasonable judgement in perceiving that his acts were not directed at civilians or expected to cause excessive harm to civilians.[252] From the facts listed below, it is clear that he possessed no such *mens rea* at the time of making his order:

(i) he believed that there were 2000-3000 civilians in Knin on the eve of *Storm*, which was less than one-fifth of Knin's population;[253]

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245 See Section 1.1.7 above.
246 *Hostages Case*, 1297.
247 TJ, 1892-1945,2329-2375.
248 *Hostages Case*, pg.68; D1642, pgs.6-7.
249 Ibid; TJ, 1911.
250 Fleck, Handbook, at 205 (footnotes omitted). See Section 1.1.7, above.
251 See, in particular, ibid.
252 *E.g. Hostages Case*, pgs.68-9; *Galic* TJ, 56; D1642, pgs.6-7.
253 T.16483-16484.

(ii) he knew that Knin was under a curfew and that there would be even fewer civilians on the streets of Knin at 5 AM when the artillery attack was launched;[254]

(iii) he knew there were numerous military objectives which HV artillery would have to neutralize;

(iv) he knew that many of these military objectives had been specifically identified for artillery fire. Gotovina's understanding of the terms of his order was the same as that of Rajcic, the man most directly charged with its implementation, *i.e.*, that artillery fire should focus on pre-identified targets;[255]

(v) he knew that ammunition was limited;[256]

(vi) he knew that the United States would provide diplomatic support for *Storm* only if civilian casualties were limited;[257] and

(vii) at the time of making his order, he had no reason to think that any of his subordinates would violate his order and deliberately fire shells into civilian areas.

134. The Judgement failed to consider that Gotovina's attack order was made on the basis of available information interpreted in light of the situation as it appeared to him at the time, and not as it may appear to the Trial Chamber 15 years later. The Trial Chamber erred, in law and fact, when it inferred and imputed unlawfulness to Gotovina's order *ex post facto* and with hindsight based on incidents of allegedly unlawful shelling of which he had no demonstrated knowledge beforehand or afterwards. Indeed, international investigations confirmed that there was no evidence of indiscriminate shelling.[258]

135. These errors resulted in a miscarriage of justice and invalidate the decision of the Chamber. Accordingly, the Appeals Chamber should reverse the Trial Chamber's finding that Gotovina's order was unlawful. This, in turn, would nullify the Chamber's finding that Gotovina contributed to and was a member of a JCE based on an unlawful order to attack civilians and civilian objects.

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254 T.16286.
255 D1425, 44-45.
256 D1425, 10,14.
257 D1485, 16; T.24666,T.5039; D1578, 20.
258 P64; P228.

1.3. The Trial Chamber erred in fact and law when drawing impermissible inferences and/or reversing the burden of proof

136. The Trial Chamber systematically violated the Appellant's presumption of innocence. If the burden of proof is properly placed upon the Prosecution and erroneous presumptions of fact are set aside, the Trial Chamber's core findings collapse. The Trial Chamber made the following reversals of the burden of proof:

- Range of Error: The Trial Chamber found that the Prosecution had failed to establish the proper range of error for HV weapons systems. However, the Trial Chamber chose to conclude that the range of error was no more than 200m despite the lack of evidence.

- Presumption of intent: Every time a projectile was found to have landed more than 200m from a "known artillery target," the Chamber presumed that the intent was to strike a civilian area. This shifted the burden of proof to the Accused to disprove such intent.

- Targets of Opportunity: The Trial Chamber found that the HV did not have the ability to strike targets of opportunity because "the evidence does not establish whether the HV had artillery observers with a view of Knin at any point during 4 August 1995,"[259] and because the Accused had failed to prove the existence of opportunistic targets.[260] The burden of proof was on the Prosecution to establish that the HV did not have artillery observers and that there were no targets of opportunity.

- Absence of artillery logs: The Trial Chamber noted that there were more HV targets in Knin and Gračac, but that the documents did not provide a complete accounting of all such targets.[261] The Trial Chamber chose to ignore the presence of these other targets in Knin and Gračac in doing its 200M Rule assessments because the Accused had failed to provide the additional evidence of the location of these additional targets. Alternatively, the Chamber assumed that these additional unidentified targets were unlawful targets. In both instances, the Trial Chamber reversed the burden of proof.

- Mortar vs. Artillery: Even where witness Dawes's sole testimony was that his convoy was targeted by 40 mortar shells (which could not have been fired by HV), the Trial Chamber "assumed" Dawes meant "artillery" shells.[262]

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[259] TJ, 1907.
[260] TJ, 1921,1933,1941.
[261] TJ, 1267,1933.
[262] See Section 1.1.5.1(A), above.

- Military character of targets: If an objective was identified on an HV target list, the Trial Chamber assumed that the target was nevertheless civilian in character unless the Accused provided additional corroborative evidence that the target was of a military character.[263] The Trial Chamber should have required the Prosecution, not the Accused, to meet its burden of proving that the items identified in HV evidence such as the *Jagoda* list were civilian.

- HV's good faith belief: The Trial Chamber required proof from the Accused that the HV in good faith believed a target to be a military objective, rather than requiring the Prosecution to prove that it did not or could not have had that belief. This was the case with the railway fuel storage[264] and the Knin hospital.

- "Civilian areas": The Trial Chamber simply assumed that every "area" in which a projectile landed more than 200 meters from a "known artillery target" was civilian in character *e.g.* empty fields, Pine Woods, fuel storage facilities and factories in Benkovac and Obrovac. No evidence was presented by the Prosecution to justify such inferences. This was a direct violation of the Appeals Chamber's holdings in *Blaškić* and *Kordić* that the burden of proof rests upon the Prosecution to prove the civilian character of the objects struck.[265]

- Causes of fire: The Chamber presumed that shells caused fires to two houses in Benkovac, even where there was no evidence to support that inference. The Chamber thus placed the burden on the Accused to rebut the presumption.[266]

137. The Trial Chamber's systematic reversal of the burden of proof violated the defendant's presumption of innocence and constitutes an error of law, which invalidates the Judgement.

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[263] TJ, 1914,1921,1926,1938(concerning the Jagoda list).
[264] TJ, 1905.
[265] *Blaškić* AJ, 111; *Kordić* AJ, 48.
[266] See Section 1.1.5.1(D).

1.4 The Trial Chamber erred in fact and law when it failed to establish the existence and presence of the relevant mens rea requirement in relation to individual incidents of supposed unlawful attacks on civilians and civilian objects.[267]

Legal considerations

138. The required *mens rea* for the crime of "unlawful attacks" consists of the knowing and willful targeting of civilians or civilian objects, *i.e.,* intentional targeting in the knowledge or reckless disregard for the fact that the target is a civilian or civilian object.[268] Negligence is insufficient.[269]

Findings and Errors

139. There was no direct evidence that anyone responsible for an individual act of supposedly unlawful shelling had deliberately targeted civilian areas, and the Judgement contains no specific finding to that effect. Instead, the Trial Chamber erroneously inferred an intent to deliberately target civilians on the part of "the HV," *i.e.,* from a legal entity irrelevant to the issue of *mens rea.*[270] Drawing a culpable inference from a legal entity was an error of law and fact. It was also erroneous to draw a general inference of culpable mindset in relation to all beyond-200-meters incidents without proof that the person responsible for any of these incidents had acted with the requisite *mens rea*.

140. The Trial Chamber erred in several other respects concerning the *mens rea* element of this underlying offence:

(i) First, the "*mens* rea" was established in relation to attacks against "civilian areas" without a further finding that established the "civilian status of the *population* targeted in specific incidents."[271] Within the Trial Chamber's "civilian areas," virtually no "civilian objects" were found to have been hit directly by artillery fire. The Trial Chamber thus applied a non-existent legal standard of "civilian areas." Because customary law protects only "civilians

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267 TJ, 1892-1945.
268 See, generally, *Galic* AJ, 139-140 and references.
269 *Galic* AJ, 140.
270 TJ, 1906,1920,1932(referring to "Croatian forces"),1940.
271 *Dragomir Milosevic* AJ, 55.

and civilian objects," the Chamber's findings violated the *nullem crimen sine lege* principle to the prejudice of the Appellant.

(ii) Second, proof of a culpable intent is personal. If an individual acts with culpable intent, that intent may not be transferred onto the Accused unless he is shown to have shared that intent. Therefore it is unreasonable to infer that A (the Accused) intended to shell towns indiscriminately from proof of the fact that B (the person manning the artillery) possessed a different mens rea, namely, an intent to deliberately target civilian areas.[272] In other words, in such a scenario, there is no sharing of intent, and no reasonable trier of fact could infer an intent to shell towns indiscriminately on the part of the Accused from proof that other individuals may have deliberately fired at civilian areas.

(iii) Third, where "unlawful attacks on civilians and civilian objects" is alleged, the Prosecution must establish that the accused "acted consciously and with intent, *i.e.,* with his mind on the act and its consequences."[273] In this case, the Trial Chamber failed to even consider this requirement let alone establish it based on the evidence. The Trial Chamber thus erred.

Conclusions and relief

141. The above errors of law, individually or in combination, invalidate the Judgement. They affected the Chamber's findings of fact, which as a result are necessarily erroneous, incomplete and unreasonable. This warrants the quashing and setting aside of the Trial Chamber's finding that each and all of the supposed incidents of "unlawful attacks" were committed with the requisite *mens rea*. This, in turn, would mean Gotovina's acquittal upon this part of the charges.

[272] The Trial Chamber's approach implies a transfer and transformation not just in the quality of *mens rea* (from deliberate to indiscriminate) but also in regard to the object in relation to which this *mens rea* is supposed to have existed (from localized civilian areas to entire towns).
[273] ICRC Commentary API, 3474.

GROUND TWO: THE TRIAL CHAMBER ERRED IN FACT AND IN LAW WHEN CONCLUDING THAT THE ONLY REASONABLE EXPLANATION OF THE EVIDENCE WAS THAT UNLAWFUL ATTACKS AGAINST CIVILIANS AND CIVILIAN OBJECTS FORCIBLY DISPLACED SERB CIVILIANS AND WERE THE "PRIMARY AND DIRECT CAUSE" OF THEIR DEPARTURE

Relevant findings

142. The Trial Chamber found that deportation of Serb civilians was one of the *core* JCE crimes.[274]

143. It held further that the means of deportation consisted of the following: (i) unlawful attacks against civilians and civilian objects, *i.e.* indiscriminate artillery attacks; and (ii) additional crimes "including murder, inhumane acts, detention, plunder, and destruction."[275] The Judgement also found that there was no shared intention among JCE members to commit these additional crimes.[276] Where the parties have no agreement or shared intent with respect to the criminal means in question, those means may not serve as a basis for a conviction under the JCE theory.[277] As far as Gotovina's liability for "deportation," it is therefore limited to a finding of deportation by means of unlawful artillery attacks.[278]

144. The Judgement also found that "fear" of HV artillery attacks was the "primary and direct cause" of the forced displacement of 20,000 Serb civilians.[279] No reasonable trier of fact could have concluded that this was the "only reasonable explanation of the evidence."

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[274] TJ, 2314.
[275] TJ, 1754-1763.
[276] TJ, 2321. These crimes were said to be "natural and foreseeable" consequences of the JCE.
[277] *E.g. Krajisnik* AJ, 163.
[278] TJ, 2320. To the extent that the Trial Chamber found that deportation as a core crime was also committed by means of crimes including murder, inhumane acts, detention, plunder, and destruction, it erred as these did not form part of the shared agreement and a contribution to the commission of these crimes could not constitute a contribution to the JCE. See Section 4.7 *et seq.*
[279] TJ, 1743.

2.1 The Trial Chamber erred in fact and law when it failed to distinguish between lawful and unlawful artillery attacks in determining the cause of the departure of civilians.[280]

145. The Judgement notes that forced displacement constitutes deportation only if it is "without grounds permitted in international law."[281] Where displacement of civilians results from conduct that does not violate international law, it cannot constitute deportation. However, the Chamber failed to distinguish between civilian displacement caused by fear of *lawful* as opposed to *unlawful* artillery attacks.[282] Instead, it treats all civilian departures as deportation, regardless of whether the shelling was "without grounds under international law." This constitutes an error of law resulting in errors of fact.

146. The Trial Chamber committed other related errors. First, "fear" caused by lawful artillery attacks is not a violation of humanitarian law. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." This crime was not charged and the Judgement makes no such findings.[283] Humanitarian law does not recognize "fear" of artillery attacks as a crime merely because it causes fear among civilians. Such a finding would render lawful warfare impossible. As the ICRC Commentary observes (Paragraph 1940; emphasis added):

> "there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence *the primary purpose of which is to spread terror among the civilian population* without offering substantial military advantage."

147. Second, the Judgement fails to make a specific finding that the displacement of 20,000 civilians was caused by fear of *unlawful* attacks:

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[280] TJ, 1710,1720,1742-1763,1862,1863,2098,2305,2310,2311,2314,2369,2370,2372,2373.
[281] TJ, 1738.
[282] *E.g.* TJ, 1740.
[283] Furthermore, the *Galic* Trial Judgement clarifies that this crime requires a predicate finding of the crime of deliberate attacks against civilians (Paragraph 133). No such finding was made in the Judgement here.

(i) Even if the findings with respect to specific instances of unlawful attack are accepted, there is no evidence that these specific attacks were the "direct and primary cause" of the forced displacement of a single civilian, let alone a civilian population of 20,000. No finding links the departure of a single civilian to an incident of supposedly "unlawful" shelling.[284] None of the witnesses lived in the areas where the Chamber made findings of unlawful attacks. Furthermore, those witnesses who said they left Knin because of artillery attacks (Witnesses 6, 54, and 136) all lived within 200 meters of identified military objectives that the Chamber considered to be the subject of lawful attacks.[285] [See Annex E]. Clearly if they left as a result of fear of shelling, that fear resulted from *lawful* shelling and therefore there is no reasonable basis to conclude that their departure was "without grounds under international law."

(ii) Since 95-99% of all projectiles fired on Knin, Benkovac, Obrovac, and Gračac were presumed "deliberately fired" at "identified military targets," there is no reasonable basis for an inference that the "civilian population," *i.e.* 20,000 Serb civilians rather than individual civilians, was deported because of unlawful attacks. Of the small fraction of projectiles that impacted beyond 200 meters, the majority of those shells landed in empty fields and none was shown to have caused anyone's departure. The only reasonable conclusion is that unlawful attacks were *not* the direct and primary cause of the mass-departure of civilians.

148. Under the Chamber's approach, any act of shelling, whether lawful or unlawful, is equally capable of causing "deportation" of civilians if displacement occurs in the context of what, the Chamber says, is an unlawful attack. With this generic approach, a civilian whose departure is unrelated to an "unlawful" act of shelling would nonetheless be a victim

[284] It is inferentially relevant to note that civilians left from other areas of Krajina where there had been no finding of unlawful shelling, thereby further undermining the Chamber's connection between HV's supposedly unlawful shelling and the departure of Serb civilians. See TJ, 1754,1762.
[285] P4; T.628-630; P17; T.885; P188.

of "deportation" if the unlawful attack was committed in the general area where he lived. Such an approach has no support in customary international law and would constitute *ex post facto* violation.[286] In each case, to be a victim of an act of "deportation" a person must be shown to have been forcibly displaced "without ground under international law" *i.e.*, not a lawful act of warfare.[287] None of the shelling incidents cited as "unlawful" (Ground 1) was shown to have caused anyone to leave. No reasonable trier of fact could, therefore, have suggested that civilians left as a result of an act "without grounds permitted in international law."

Conclusions and relief

149. Accordingly, the Trial Chamber erred in law and fact, by failing to establish that the "direct and primary cause" for displacement of Serb civilians was unlawful acts of shelling so that their displacement could be said to have been committed "without grounds permitted in international law." This error resulted in a miscarriage of justice, which invalidates the decision. The decision must therefore be quashed and Gotovina acquitted of Count 1 (in relation to acts of supposed "deportation") and Count 2.

2.2 The Trial Chamber erred in fact and law by concluding that indiscriminate artillery attacks were the "primary and direct cause" of the departure of Serb civilians from Knin, Benkovac and Obrovac.[288]

Findings and Errors

150. The Trial Chamber found that the supposedly indiscriminate artillery attacks were "the primary and direct cause" of the departure of Serb civilians from the relevant towns/cities. This finding is erroneous.

151. The legal standard relied upon by the Chamber ("primary and direct cause") was not appealed by the Prosecution and is not, therefore, in dispute.

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[286] The Chamber cited no authority, nor did it produce any evidence of state practice/*opinio juris* supporting this proposition. Such an approach also constitutes an impermissible reversal of the presumption of innocence, insofar as it creates a presumption regarding any person leaving from an area found to have been subject to an "unlawful attack."

[287] TJ, 1738.

[288] TJ, 1743-1746,1754.

152. The Trial Chamber erred in fact when concluding that fear of indiscriminate HV shelling was the "primary and direct cause" of Serb civilians leaving. As set forth below, no reasonable trier of fact could reach that conclusion and exclude all other explanations as unreasonable:

a. No reasonable trier of fact could conclude that fear of shelling was the "primary and direct cause" of the departure of civilians from Knin.

153. Not a single witness-victim testified to having left as a result of fear of indiscriminate/unlawful shelling. The Trial Chamber relied on the testimony of Witnesses 6, 54 and 136 as well as Dawes and Berikoff for the proposition that "several witnesses testified that the shelling caused panic and fear and resulted in persons leaving the town."[289] As noted above, Witnesses 6, 54 and 136 and their families lived within 200 meters of legitimate military objectives. [See Annex E]. The Trial Chamber concluded that the projectiles fired within 200 meters of these legitimate military objectives were "deliberately fired" at an "identified military target" and were therefore lawful.[290] The Trial Chamber offered no explanation for its implicit conclusion that the only reasonable explanation is that these witnesses fled Knin due to fear of "indiscriminate/unlawful" shells and not the lawful shelling in their immediate vicinity.

154. The Trial Chamber also draws an inference that because Dawes testified that he saw "15 civilians running for shelter in a state of panic in near (sic) the ECMM headquarters in Knin that day,"[291] it must have been the HV "shelling" which caused this panic.[292] This conclusion was not the only reasonable explanation of the evidence. First, as stated above, Dawes was near military objectives at the time of this fire and therefore the Chamber failed to exclude that these civilians were afraid of the shelling of the Northern Barracks and the field codenamed "Hospital."[293] Second, the evidence demonstrated that the 40 mortar shells "targeting" the UN convoy could only have been fired by Serb forces. Accordingly, the

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289 TJ, 1580,1743.
290 TJ, 1898.
291 TJ, 1580.
292 TJ, 1743.
293 Above, 1.1.5.1.

Trial Chamber wrongly attributed the "panic" among these civilians to the HV and erroneously attributed responsibility for this "crime" to Gotovina.

155. Third, Dawes testified that he saw these 15 civilians only after he had encountered an SVK special police unit in Knin town, whose members had retreated into the town "to help with the withdrawal of the SVK from the South."[294] The Appeals Chamber must note that SVK forces "from the South" of the Krajina could only withdraw to the North through Knin itself. Accordingly, based on the evidence that there was an SVK special police unit withdrawing into the town of Knin, and that other SVK forces would be withdrawing through the town, it was reasonable to conclude that HV fire, if any, in that area would have been aimed at retreating forces.

156. Finally, the fact that the SVK soldiers had retreated into Knin was itself a cause for panic.[295] Accordingly, it is clear that when SVK forces began to retreat into the town, panic resulted not because of shelling, but because of the fear that Croatian troops would then enter the town. In other areas the Trial Chamber found that this type of panic was the primary and direct cause of Serb departures and was not attributable to the HV.[296] There was no reasonable basis to draw a different inference in this instance.

157. The Trial Chamber also cites Berikoff's claim that he saw "confused and panicked Serb civilians on the street" around the Jordanian Chief of Staff's residence.[297] The Trial Chamber was unable to determine the location of this residence, or the cause of the civilian "panic." Accordingly, there is no basis to conclude that this location was not within 200 meters of a "known artillery target" or that these persons had fled because of unlawful shelling. Moreover, if the issue is simply one of explaining their fear, Berikoff testified that he saw these civilians right after his APC was targeted by a Serb soldier with a hand-held rocket,[298] which likely caused fear in nearby civilians. Accordingly, with this multitude of

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294 P980, pg.6.
295 D161, pg.5.
296 TJ, 1754,1755,1762.
297 TJ, 1292.
298 TJ, 1292,1397.

unresolved facts, no reasonable trier of fact could have concluded that these civilians had been "deported" by unlawful HV artillery fire.

b. No reasonable trier of fact could conclude that fear of shelling was the "primary and direct cause" of the departure of civilians from Benkovac

158. Not a single witness testified that they left Benkovac due to fear of indiscriminate shelling. At Paragraphs 1411 and 1541, the Trial Chamber found that people were fleeing Benkovac at 6:55A.M. and suggests that this demonstrates that they were fleeing as a result of shelling. This finding is factually erroneous and appears to be the result of a mistranslation of exhibit P-2436 (Page 7), which in the original document refers to Obrovac, not Benkovac. This is a substantial error that alters the Trial Chamber's overall reasoning about departures of civilians from Benkovac.

159. The Trial Chamber also relies on the testimony of Witnesses Sinobad, Vukasinovic, Witness 56, and Forand to support its contention that "large numbers of people . . . left Benkovac town."[299] It should be noted that Forand was never in Benkovac on 4 August, and could not accurately testify to this fact. As a practical matter, it is unclear what portion of Forand's testimony supposedly supports this proposition.

160. Sinobad's testimony also fails to support the Trial Chamber's conclusion. On cross-examination, Sinobad conceded that shelling was not the primary and direct cause of the departure of him and his family from Benkovac.[300] The Trial Chamber simply ignored this testimony.[301] Moreover, Sinobad explained that civilians departed because of fear of Croatian forces, which the Trial Chamber acknowledged as a primary motivator for Serb civilians in all areas of Krajina except Knin, Benkovac, Obrovac and Gračac.[302] Accordingly, Sinobad's testimony refutes the Trial Chamber's conclusion that fear of shelling, whether lawful or unlawful, was the primary and direct cause of the departure of Serb civilians.

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[299] TJ, 1541.
[300] T.16969.
[301] *Kvocka,* AJ, 23.
[302] TJ, 1762.

161. The Trial Chamber's reliance on Vukasinovic is likewise misplaced. Vukasinovic testified that "the people in Benkovac were already panicking due to the shelling and news of military setbacks and had around 4 p.m. started fleeing the area with any and all vehicles they were able to find."[303] Vukasinovic was never asked to describe the shelling so the Chamber could logically distinguish between fear of lawful and indiscriminate/unlawful shelling. Moreover, Vukasinovic's testimony corroborates Sinobad's in that it was fear of contact with Croatian forces, *i.e.* "fear created by news of military setbacks" which caused Benkovac civilians to leave. Vukasinovic testified that civilians did not start to leave until late in the afternoon of 4 August. This is consistent with the evidence that by approximately 3:30 p.m. the SVK defence lines had been broken by the HV and that panic in Knin had ensued.[304]

162. Witness 56 testified only that by the time he arrived in Benkovac at 1 a.m. on 5 August, his family had already left Benkovac. Witness 56 offered no testimony on the causes of their departure, nor any support for the Chamber's finding.

163. For all of the foregoing reasons, the Trial Chamber erred when it concluded that the only reasonable explanation of the evidence is that the "primary and direct cause" of the departure of civilians from Benkovac was an unlawful artillery attack.

c. No reasonable trier of fact could conclude that fear of shelling was the "primary and direct cause" of the departure of civilians from Obrovac

164. The only witness to testify concerning the events in Obrovac was witness Dopud, and the Trial Chamber relied on his testimony to conclude that civilians fled due to unlawful shelling.[305] However, Dopud testified that there were "two major waves of departure" from Obrovac, the first of which did not begin until 8 p.m.[306] This was three hours after Martic's evacuation order had been issued but thirteen hours after the shelling began. Dopud's testimony was corroborated by the contemporaneous report of the military

[303] TJ, 1733.
[304] D161, pg.5; D1493; D1494; D1519; D1258.
[305] TJ, 1591,1744.
[306] P548, 4.

commander of Obrovac, Radivoje Paravinja,[307] who informed his superiors that the evacuation of the civilian population from Obrovac began at 23:00.[308] Given its findings with respect to other areas,[309] no reasonable trier of fact could have ignored all of this evidence and concluded that two "unlawful" shells were the "primary and direct cause" of the departure of civilians from Obrovac.

165. Further, the Trial Chamber's reliance on the testimony of Dopud and Novakovic is misplaced.[310] Novakovic was never in Obrovac on 4 August, and the aspects of his testimony upon which the Trial Chamber relies is unclear. Dopud did not distinguish between the lawful shelling and the two supposedly unlawful shells to explain the alleged causes of the civilian departures. It was erroneous for the Trial Chamber to assume that persons left due to fear of two indiscriminate shells and not from the evacuation order or fear of other factors such as lawful HV military operations and fear of Croatian authorities.

d. No reasonable trier of fact could conclude that fear of shelling was the "primary and direct cause" of the departure of civilians from Gračac.

166. The Trial Chamber found that fear of shelling was the "primary and direct cause" of the departure of Serbs from Gračac.[311] The Trial Chamber did not cite any evidence that in Gračac shelling caused "panic or fear" or that Serbs left due to unlawful shelling.[312] Instead, the Trial Chamber infers that (1) because Croatian forces shelled Gračac and (2) Serbs left afterwards, one must have been the "primary and direct cause" of the other.[313] The Trial Chamber's reliance on an unproven prejudicial assumption violates the presumption of innocence and is an error of law.

167. The Trial Chamber offered no reasoned opinion for excluding other reasonable explanations for the departure of Serbs such as "information provided by local committees

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307 D928, pg.42.
308 D520, pg.1.
309 TJ, 1754,1762.
310 TJ, 1591.
311 TJ, 1744.
312 TJ, 1549-1551.
313 TJ, 1744.

or SVK units," "the departure of others and fears of what would happen when Croats arrived,"[314] "fear of violence commonly associated with armed conflict, or general fears of Croatian forces or distrust of Croatian authorities."[315] The Trial Chamber, even with HV shelling those areas, accepted these explanations for the departure of Krajina Serbs in other towns and villages.[316] Even the Trial Chamber found that witness Sovilj, one of only two Serb witnesses from Gračac, left with his family because "the HV might have entered the area," not because of shelling.[317]

168. No witness from Gračac claimed to have left as a result of shelling. Accordingly, the Trial Chamber acted unreasonably when it concluded that the only reasonable explanation is that the "primary and direct cause" of the departure of Serbs from Gračac was the fear of indiscriminate/unlawful HV shelling.

e. There is no evidence that civilians left as a result of unlawful shelling

169. As already noted, even if some civilians left because of fear of shelling, there is no evidence that any civilian left as a result of a fear of unlawful shelling.

f. There is clear evidence of civilians leaving even before, or in anticipation of, the military campaign.

170. This clearly demonstrates the lack of causal relationship between shelling and the departure of Serb civilians.[318]

(i) There is compelling evidence that civilians left because or as a result of RSK/SVK evacuation plan.[319]

(ii) The Trial Chamber itself found that in all other locations except the four relevant cities, civilians left for reasons unconnected with the shelling or fear thereof.[320]

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[314] TJ, 1754.
[315] TJ, 1762.
[316] TJ, 1754-1755,1762.
[317] TJ, 1762.
[318] P1290, pgs.17-18; P2619; D239; D240; D513, pg.35; D820, pg.3; D923, pg.6; D966, pg.1; D1512; T.938-940; T.6420; T.7136-7137; T.16458; T.18825-18826.
[319] See below, Section 2.4.
[320] TJ, 1754,1755,1762.

171. No reasonable trier of fact could have concluded that while civilians in the same operational area left other locales for reasons unrelated to unlawful artillery attacks or fear thereof, there could be "no reasonable explanation of the evidence" for civilians leaving Knin-Obrovac-Benkovac-Gračac other than that unlawful shelling was the "primary and direct cause" of their departure.

Conclusions and relief

172. In light of the foregoing, no reasonable trier of fact could have concluded that fear of HV unlawful artillery attacks was the "direct and primacy cause" of departure of Serb civilians. That finding is unreasonable, and must be quashed and reversed.

173. This, in turn, would nullify the Chamber's finding that Gotovina committed the crime of deportation. It would also further undermine the Chamber's reverse inference that Gotovina's order of attack was unlawful because it was implemented unlawfully,[321] and its reverse inference of Gotovina's shared intent to permanently remove civilians through unlawful shelling.[322]

2.3. The Trial Chamber erred in fact and law by concluding that the crime of deportation applied to displacement caused by artillery attacks prior to the placing of the "Krajina" under the actual authority of Croatian forces.[323]

174. The Judgement held that almost the entire Serbian civilian population left prior to Croatia controlling the Krajina but found (Paragraph 1750) that "occupation" was not an element of deportation under Article 5, and that there was no additional requirement that the civilian-victim be in the power of a party to the conflict. In this regard, it referred to the 19 March 2007 Decision of the Pre-Trial Chamber holding that "nothing in the jurisprudence of the Tribunal supports the Defence contention that 'occupation' is an element of the crime of deportation."[324] That Decision erred in law by failing to consider *inter alia* the *Krnojelac Appeals* Judgement concerning deportation under Article 5:

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321 TJ, 2305.
322 See above Section 4.2-4.3.
323 TJ, 1743-1746,1750,1754.
324 *Gotovina*, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, 54-56.

> "The Geneva Conventions are considered to be the expression of customary international law. Article 49 of the Fourth Geneva Convention prohibits displacement to another state, *within or from occupied territory*. It provides that: '[i]ndividual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.'"[325]

175. The Chamber further disregarded the *Krnojelac* Trial Judgement ruling that the *actus reus* "does not differ whether perpetrated as a war crime or as a crime against humanity."[326] It also offered no reason for rejecting Judge Schomburg's opinion consistent with Tribunal jurisprudence on this point that under Article 5 of the Statute, deportation requires forced displacement "from an area *under the actual control* of one belligerent party to an area under the actual control of another *de jure* or *de facto* authority."[327] Nor did it put forward evidence of a contrary rule of customary law.

176. The Judgement erroneously held (Paragraph 1750) that the Appeals Chamber, in its Interlocutory Decision of 6 June 2007, had rejected a requirement of territorial control for deportation as a crime against humanity. That Decision merely held that within the scope of a Rule 72 interlocutory appeal, Gotovina's submissions "do not demonstrate the Tribunal's lack of subject-matter jurisdiction" and thus, that he may instead "bring these arguments before the Trial Chamber to be considered on the merits at trial."[328]

177. It is the Appellant's submission therefore that the Judgement erred in law by failing to hold that during armed conflict, the requirements of territorial control of Article 49 of the Fourth Geneva Convention apply equally to war crimes and crimes against humanity. It is submitted in the alternative that any inconsistencies or ambiguities in Tribunal jurisprudence must be resolved in favour of the Appellant consistent with the *nullum crimen sine lege* and *in dubio pro reo* principles.

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[325] *Krnojelac* AJ, 220 (Emphasis added); also *Stakic* AJ, 306, holding that Article 49 of Geneva Convention IV which is "the underlying instrument prohibiting deportation."
[326] *Krnojelac* TJ, 47.
[327] *Naletilic* AJ, Separate and Partially Dissenting Opinion of Judge Schomburg, 22 (Emphasis added) (dissenting on other grounds).
[328] *Gotovina* Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, 14-15.

2.4. The Trial Chamber erred in fact and law when rejecting as unreasonable the conclusion that Serb civilians left their homes as a consequence of an evacuation ordered by the RSK and SVK authorities.[329]

178. Evidence that Serb civilians left because of RSK/SVK evacuation orders further demonstrates that no reasonable trier of fact could conclude that the direct and primary cause of their departure was unlawful/indiscriminate HV shelling.

Errors

179. The first error is the Judgement's failure to provide a reasoned opinion for its conclusion that most civilians did not leave because of the evacuation order.[330]

180. Second, in light of the evidence set forth below, no reasonable trier of fact could conclude that RSK/SVK evacuation orders were an unreasonable explanation for the departure of Serb civilians and that forcible displacement by unlawful HV attacks was the only reasonable inference on the evidence:

a. Existence of the evacuation plan and direct evidence of individuals leaving as a result of the evacuation plan

181. It was unreasonable for the Trial Chamber to assume that no civilian left because of evacuation orders despite the undisputed existence of the RSK evacuation plan and the subsequent measures taken to implement it.

182. A fundamental element of General Gotovina's Defence at trial was that the Krajina Serb leadership decided to withdraw the entire civilian population when it became clear that the HV was threatening to encircle the southern part of the Krajina,[331] and not because of any threat of shelling. The Chamber had a duty to address this issue in the Judgement.[332] The Chamber simply disregarded evidence that civilians left because of Martic's 4 August

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329 TJ, 1512-1539.
330 Regarding the right and duty to render a reasoned opinion, see above Article 23 of the Statute; *Blaškić* AJ, 722.
331 DFTB, 10, 342-372.
332 *Kvocka AJ,*23.

evacuation order,[333] and ignored the evidence of General Forand, who indicated that the mass departure of Serbs began when the RSK evacuation order was issued.[334]

183. In September 1995, Forand stated that the "critical" RSK decision was "to evacuate the civilians from Knin and all the surrounding towns, and as soon as that was done, everybody started to flee away, including the military."[335] In June 1996, Forand told the Canadian military that HV's use of artillery during *Storm* was "excellent" and that it was the RSK evacuation order that "inevitably initiated the general retreat that followed."[336] Unfortunately, the Chamber never discussed this evidence in the Judgement.

184. The Trial Chamber also ignored contemporaneous telephone intercepts and radio recordings from the evening of 4 August in which Mrksic admitted that the entire population was being evacuated. At 21:00 hours on 4 August, Mrksic told Radio Belgrade that, "we are engaged in the evacuation of the population from Dalmatia," not because of "indiscriminate shelling," but because he wanted to "prevent them from falling captive, because Knin and the communications leading from Knin are in danger."[337]

185. The Trial Chamber likewise ignored the evidence of SVK General Sekulic, who was present in Knin on 4 August 1995 and participated in the decision to evacuate the population. Sekulic acknowledged in his book that Serb civilians had left as a result of Martic's order.[338]

186. The [REDACTED], Witness AG-58, testified that, "Now, the dissemination, I don't know by what means, that an evacuation had been ordered caused Knin -- the population of Knin to move out, almost all of them moved out."[339] Given the witness's position inside the RSK authorities, AG-58's testimony was clearly essential, yet ignored by the Trial

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333 D326; D137; D254; D161, pgs.6-7; D828, pg.3; D1499, 11-15.
334 P398.
335 Id.
336 P401, pg.21.
337 D106; D713.
338 D928, pgs.22,24.
339 T.18477.

Chamber. His testimony was corroborated by the contemporaneous report of the VSK commander in Knin, which was also ignored by the Chamber.[340]

187. The military commanders of Gračac [341] and Obrovac[342] similarly reported that the civilian population left pursuant to an evacuation order. Likewise, a written report from the Serb military commander of Benkovac, dated 25 August 1995, clearly linked the evacuation order with the departure of Serb civilians.[343] In summarizing this report, the Trial Chamber made no mention that the Serb commander reported that no Serb civilians had been evacuated from Benkovac prior to the issuance of the evacuation order,[344] and made no mention at all of the reports of the VSK commanders of Knin, Obrovac and Gračac.

188. The U.S. Ambassador to Croatia, Peter Galbraith, told the Trial Chamber that it was the assessment of United States military investigators who visited Knin that *Storm* did not involve ethnic cleansing.[345] The [REDACTED] similarly testified that the Serb evacuation had nothing to do with the commission of crimes: "I say that it was in an orderly manner. I don't think anyone challenged this. I don't really see the point about having to prove such a fact, because it was a fact, it was something which was coordinated and orderly. . . and it's something that all observers got as an impression, is that it was not only orderly, it was coordinated…."[346] The Chamber ignored this testimony.

189. Without a reasoned opinion, the Trial Chamber remarkably concluded that "in general people did not leave their homes due to any evacuation planned or organized by the RSK and SVK authorities,"[347] based on its finding that "any action by municipal authorities had little or no influence" on people, because people were "already on the move."[348] This erroneous conclusion was based exclusively on the testimony of Serb military commanders including Kosta Novakovic. Ironically, Novakovic had participated in drafting of the

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340 D1516, pg.2.
341 D435, pg.2.
342 D520, pg.1.
343 D828, pg.4.
344 TJ, 1534.
345 T.4940.
346 T.18620-18621.
347 TJ, 1539.
348 TJ, 1537.

evacuation order.[349] The Defence challenged Novakovic's credibility because he had a motive to downplay the importance of the evacuation order. [350] He and other Serb leaders had been accused of treason for having issued the order.[351] The Chamber failed to address Novakovic's obvious motives.

190. The Trial Chamber also acknowledged numerous witnesses who stated that they either left because of an evacuation order, or left as a result of the consequences of the issuance of the evacuation order, *i.e.* people left because others stated that the HV or the "Ustashe" were coming, or they left because "everyone else was leaving."[352]

191. Despite the foregoing, the Trial Chamber chose to believe the testimony of Serb military officials with a motive to deflect personal responsibility for the departure of Serb civilians and to blame the HV. In doing so, the Chamber rejected the testimony of the UN forces commander in Sector South, the [REDACTED], written evidence of five SVK military commanders, and the testimony of the U.S. [REDACTED] Ambassador. At the very least, it was unreasonable of the Trial Chamber to conclude that this evidence did not create a "reasonable interpretation of the evidence other than the guilt of the Accused."

b. Absence of direct evidence that all or the vast majority of civilians left for any other reason than the evacuation order

192. Finally, the unreasonableness of the Chamber's inference is further demonstrated by the fact that but for vague hearsay evidence that an unspecified number of un-identified person(s) might have left because of HV artillery, there is no basis to infer that this would have been a significant number. Nor did this evidence suggest that this was the "direct and primary cause" of their departure. Such vague and uncorroborated hearsay evidence is a

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[349] T.11727.
[350] T.11795.
[351] D923, p.28; D1498.
[352] TJ, 1546,1548,1555,1566,1573-1575,1581-1582,1584-1585,1594-1595,1598-1600,1604,1762. See also TJ, 1596-1597 where the Trial Chamber finds that an SVK unit passed through Uzdolje and upon their suggestion people started leaving. Even with evidence of HV shelling in this area, in Paragraph 1754 the Chamber rejected the conclusion that shelling caused the departure from Uzdolje. In Obrovac municipality, Marija Vecerina testified in Paragraph 416 that her son told her Knin and Gračac had fallen, people were leaving, and that they should too. See TJ, 1590,1592.

manifestly inadequate basis to conclude that the Prosecution theory was the only reasonable inference.

Conclusions and relief

193. The Trial Chamber erred when finding that the only reasonable inference was that the "direct and primary cause" of the departure of Serb civilians was fear of "the artillery attack." No reasonable trier of fact could have reached that conclusion. This is an error of fact that resulted in a miscarriage of justice and must thus be quashed and reversed.

GROUND THREE: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN CONCLUDING THAT THERE EXISTED A JOINT CRIMINAL ENTERPRISE TO COMMIT CRIMES OF DEPORTATION, FORCIBLE TRANSFER AND PERSECUTION (DEPORTATION, FORCIBLE TRANSFER, UNLAWFUL ATTACKS AGAINST CIVILIANS AND CIVILIAN OBJECTS AND DISCRIMINATORY AND RESTRICTIVE MEASURES).

Relevant Findings

194. The Trial Chamber erred in finding that "members of the Croatian political and military leadership shared the common objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer."[353] This ground considers errors of fact and law in finding that such a JCE existed. Ground 4 considers errors pertaining to Gotovina's alleged membership in and contribution to a JCE.

195. The Trial Chamber found that the JCE "came into existence no later than at the end of July 1995."[354] It inferred a shared criminal purpose among the Croatian leadership based on the following: (1) discussions at Brioni on "the importance of the Krajina Serbs leaving as a result and part of the imminent attack;" (2) the subsequent "mass exodus" of Serbs; and

[353] TJ, 2314.
[354] TJ, 2315.

(3) efforts "to prevent the population from returning."[355] Gotovina was convicted based solely on JCE liability.[356] Thus, a finding that the Chamber erred in finding a JCE at Brioni would nullify the Judgement.[357]

196. The arguments set forth in Grounds 1 or 2 are alone sufficient to quash and reverse the finding of the existence of a JCE. There is no basis for the inference either (1) that HV artillery attacks were directed against a civilian population, or (2) that unlawful attacks were the "direct and primary cause" of the Serb "mass exodus." The Chamber ruled that the JCE common objective "did not amount to, or involve the commission of the crimes of persecution (disappearances, wanton destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions), destruction, plunder, murder, inhumane acts, and cruel treatment."[358] These crimes were held to be the "natural and foreseeable consequence" of the JCE's execution.[359] Thus, without a finding of unlawful attacks resulting in mass-deportation, *i.e.,* the core crimes of the alleged common objective, there is no basis for Gotovina's JCE conviction.

197. The present ground considers errors in finding a common criminal purpose and shared intent based on the remaining two elements: (1) references at Brioni "to civilians being shown a way out was not about the protection of civilians but about civilians being forced out;"[360] and (2) an alleged discriminatory policy "to provide the property left behind by Krajina Serbs in the liberated areas to Croats and thereby deprive the former of their housing and property."[361]

198. With respect to Brioni statements on allowing a "way out," no reasonable trier of fact could conclude that a shared criminal purpose to forcibly remove the Serb civilian population is the only reasonable inference. First, it has not been established that HV artillery attacks were directed against the civilian population or that this was the primary

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355 TJ, 2310.
356 TJ, 2375.
357 *Blaškić*, *AJ,*93.
358 TJ, 2321.
359 TJ, 2312.
360 TJ, 1995 (Emphasis added).
361 TJ, 2098.

and direct cause of their departure. Second, the mere awareness that, as in Western Slavonia, the RSK would evacuate Serb civilians if the HV liberated "Krajina" does not constitute either a shared criminal purpose or the primary and direct cause of their departure. Third, the Croatian policy of avoiding a "bloody last stand" by leaving a way out for retreating Serbs is consistent with the humanitarian law requirement of minimizing civilian death and injury.[362]

199. With respect to property laws and denial of immediate mass return, no reasonable trier of fact could conclude, and there is no reasoned finding, that these measures were a basis for JCE liability. First, there is no evidence of any discussion of those measures at Brioni. Second, insofar as they are said to constitute an expansion of criminal means, the Chamber failed to establish that JCE members had agreed to those means and intended that they become part of the common plan.[363] Third, the Trial Chamber failed to consider that because FRY-RSK citizens were enemy nationals, Croatia acted within its rights under humanitarian law in preventing their immediate mass return before conclusion of the armed conflict.[364]

200. With respect to every inference challenged below concerning the Brioni meeting, Gotovina has met the relevant standard of review, in particular that there was another "reasonable explanation of the evidence" of that meeting consistent with Gotovina's innocence.

3.1. The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to carry out unlawful attacks on civilians and civilian objects.[365]

3.1.1 The Trial Chamber erred in law when failing to provide a reasoned opinion on its finding that there existed an agreement and shared intent to carry out unlawful attacks on civilians and civilian objects.

201. Sub-grounds 3.1.1 and 3.2.1 are dealt with together here.

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[362] P698, 15.
[363] *Krajisnik* AJ, 163, 173.
[364] EECC case, 55,82.
[365] TJ, 2303-2314, in particular 2305, 2311, 2314. "Agreement" is used in Grounds 3-4 to refer to the requirement of a 'plurality of persons shar[ing] the common criminal purpose" (*Brdjanin* AJ, 430).

202. The Chamber failed to render a reasoned opinion as to why in relation to any of the alleged JCE-participants a common criminal purpose to commit the core crimes at the Brioni meeting was the only reasonable inference. The mere recitation of evidence does not constitute a reasoned opinion. The breadth of JCE liability does not absolve a Trial Chamber of providing detailed justification for its conclusions based on the law and the facts.

203. This error of law invalidates the Trial Chamber's finding that a JCE existed which should thus be quashed and reversed.

3.1.2. The Trial Chamber erred in fact and law when taking the view that there had been an agreement and shared intent in relation to the unlawful targeting of civilians.

204. At Paragraph 2311, the Trial Chamber found that "unlawful attacks against civilians and civilian objects, as the crime against humanity of persecution, were also intended and within the purpose of the joint criminal enterprise." This unreasonable finding is based on four factors:

a. Participants at the Brioni meeting were "aware of the difficult situation for Krajina Serbs, in particular in Knin"

205. Mere knowledge of "the difficult situation" does not provide any evidence of a common criminal purpose or shared culpable intent. A reasonable inference was that Serbs were in a "difficult situation" because of general wartime circumstances rather than any crimes committed by the HV.

b. Participants at the Brioni meeting knew that "it would not require much effort to force them out"

206. The evidence suggests only that Brioni participants knew that (1) Serb civilians were leaving the "Krajina" because of general war-time circumstances, and (2) continued military pressure on the VSK and fear of a successful HV attack would cause more departures. There was no suggestion that civilians "*should* be forced out" or that "it would not require much" to do so. It would be unreasonable in this context to conclude that because the departure of Serbs was foreseeable, the Croatian leadership had no right to liberate Croatian

territory through lawful warfare or that it intended this to occur and shared a common criminal purpose to achieve this through criminal means.

c. "Under these circumstances, members of the Croatian political and military leadership took the decision to treat whole towns as targets for the initial artillery attack"

207. Notwithstanding the absence of unlawful attacks from which to retrospectively infer a common objective, there is no evidence of a "decision" or common criminal purpose by "members of the Croatian political and military leadership" to treat whole towns as targets. The only "decision" taken at Brioni was to liberate occupied territories through lawful warfare.

d. "Deportation of the Krajina Serb population was to a large extent achieved through the unlawful attacks against civilians and civilian objects in Knin, Benkovac, Obrovac, and Gračac, which the Trial Chamber has found were carried out on discriminatory grounds."

208. As explained in Grounds 1-2, this proposition is without merit.[366] Furthermore, the Chamber acted unreasonably in failing to consider or evaluate evidence that was inconsistent with or directly contradicted its findings.

e. Erroneous inference connecting the alleged common criminal objective and the result of *Storm*

209. As set forth in Grounds 1 and 2, the Trial Chamber erred in finding that the HV artillery attack treated whole towns as targets or that this was the cause of the Serb exodus. There is no evidence and no finding of any civilian deaths, injury, or destruction of civilian objects, resulting from unlawful attacks. Contemporaneous United Nations investigations[367] and the United States Government[368] concluded that artillery attacks were directed at military objectives, and investigations by human rights organizations found no evidence that the Serb departure was the result of unlawful attacks.[369] Accordingly, there is

[366] The suggestion of these "crimes" having been committed with discriminatory grounds is addressed in 3.1.3.
[367] P64; P228; P111, pg.3.
[368] T.5045-5046,5055; D66, pg.1.
[369] D183.

clear evidence that the departure of Serb civilians was unrelated to HV's artillery campaign.[370]

210. In finding that at Brioni "the participants made no reference to how the military operation should be conducted as to avoid or minimize the impact on the civilian population,"[371] the Trial Chamber disregarded the following evidence: (1) participants were aware that compliance with humanitarian law was a demand of the United States Government they could not ignore;[372] (2) Tudjman emphasized that attacks should only be directed at military objectives despite Serb provocations;[373] (3) Tudjman instructed his military commanders "to enter as quickly as possible and report that you have entered…because that will have a psychological effect in such situations. *The psychological effect of the fall of a town is greater than if you shell it for two days"*;[374] (4) Tudjman was concerned with ammunition shortage and advised against extensive use of artillery "as if we were Russians or Americans;"[375] and (5) orders were repeatedly issued and measures taken after Brioni to protect civilians and civilian property and repress crimes consistent with Croatia's policy.[376]

211. Thus, a common criminal objective to remove the Serb population could not be inferred from the result of *Storm* and the Trial Chamber acted unreasonably when it drew such an inference.

f. Erroneous inference of criminal purpose from mere foreseeability of Serb withdrawal

212. The Trial Chamber erroneously conflates the Croatian leadership's foresight of the withdrawal of Serb soldiers and civilians with a shared criminal purpose to *cause* the permanent removal of Serb civilians. Neither Tudjman nor anyone else at Brioni suggested

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370 Section 2.4.
371 TJ, 1993.
372 T.5041-5042,T.18325,T.18621-18622; D1485, 17.
373 P461, 20-21.
374 P461, 18 (Emphasis added).
375 P461, 21.
376 TJ, 2312.

that civilians "should be *forced* out," as found by the Trial Chamber.[377] Brioni participants were merely aware that mass departure would be the probable result of liberating "Krajina," a view shared by many others. [378]

213. RSK leaders openly indicated that the Serb population would leave if Croatia re-captured the "Krajina."[379] Domazet reported that in the SVK ranks "the first problem now is how to flee, and not how to fight."[380] Prosecution witness Galbraith acknowledged on 15 June[381] and 2 August 1995[382] that if Croatia captured U.N. Sectors North and South, "the Krajina Serbs would leave." It was in this context that Tudjman stated: "when we undertake a general offensive in the entire area, even greater panic will break out in Knin than has to date."[383] The Prosecution acknowledges that Tudjman referred to the "general offensive" creating panic, and not artillery attacks as such.[384]

214. Like Galbraith, Tudjman knew of RSK evacuation plans[385] and that faced with military defeat, there would be a repeat of the evacuations after the fall of Bihac in November 1994, Western Slavonia in May 1995, and Grahovo in July 1995.[386] The Brioni statements were taken completely out of context by the Chamber disregarding evidence that in a similar military operation immediately prior to *Storm*, the RSK evacuated Serb civilians despite the exemplary conduct of HV soldiers.[387] It was this recent precedent that explained the Croatian leadership's prediction that Serb civilians would leave. In particular, on 1 May 1995, the HV launched Operation Flash to liberate Western Slavonia.[388] Galbraith told Tudjman that HV's conduct during Flash "earned you tremendous credit."[389] PW-AG-18

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377 TJ, 1995 (Emphasis added).
378 D966, pg.1; D1495, 4.
379 T.4933.
380 P461, 5.
381 P458, 8.
382 P448, 3.
383 P461, 10 (Emphasis added).
384 OTP,PTB, 28.
385 D441; P2619.
386 D252.
387 On the relevance of context to interpreting statements or orders, see, *e.g.*, *Blaškić* AJ, 330-335.
388 P1113, 266.
389 D408.

testified to the same effect,[390] and underlined Croatia's desire to behave well towards civilians to impress the international community.[391] The UN Secretary-General similarly reported positively about Croatia's treatment of Serbs during Flash.[392]

215. Although Croatia encouraged Serbs to stay, Martić insisted on their evacuation from Western Slavonia.[393] Despite Croatia's proper conduct,[394] the UN helped remove thousands of Serb civilians.[395] It was in this context that Brioni participants and other neutral observers like Galbraith[396] anticipated Serbs leaving "Krajina"[397] in view of its impending re-taking.

216. At trial Gotovina maintained that the Brioni conversation took place in the context of the May 1995 departure of Serb civilians from Western Slavonia.[398] The Trial Chamber was required to address this evidence.[399] The Chamber's failure to make any reference to the evidence concerning Western Slavonia to contextualize the Brioni statements, and the failure to distinguish between mere awareness of an impending evacuation rather than a shared criminal purpose that "civilians be forced out,"[400] was seriously prejudicial and constitutes an error of fact and law.[401]

g. Erroneous inference of criminal purpose from allowing civilians a way out

217. The Judgement disregards the military and humanitarian logic of leaving a way out for both retreating soldiers and civilians. Tudjman was opposed on military grounds to Domazet's proposed plan to encircle retreating VSK forces because it was "not providing them with an exit anywhere….[t]o pull out and flee; instead, you are forcing them to fight to

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390 D1505, 3.
391 [REDACTED]
392 D2020, 15.
393 D1647; D60, 28.
394 D60, 8; D1505; D1649; D1650; D1651, 8.
395 Concerning Serbs' voluntary departure: D60, 28; T.1296-1297; T.18617.[REDACTED]
396 P458, 3, 8; T.4933.
397 D966, pg.1; D1495, 3.
398 DFTB, 72-79, 160-163.
399 *Kvocka* AJ, 23.
400 TJ, 1995 (Emphasis added).
401 *Blaškić* AJ, 330-335, regarding the relevance of context when interpreting words or orders.

the bitter end…when we put pressure on them, now they are already partly moving out of Knin. Accordingly, let us take into consideration, on a military level, the possibility of leaving them a way out somewhere, so they can pull out part of their forces."[402] Tudjman clarified that "they should be given a way out here…Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other."[403]

218. Allowing retreating forces and civilians a way out is a fundamental principle of military doctrine[404] consistent with the requirement of humanitarian law to minimize civilian casualties.[405] Even General Mrksic agreed that leaving an escape route is consistent with military necessity.[406]

219. Tudjman's position that giving the Serbs a way out was preferable to a "bloody last stand" in urban areas, thus minimizing both military and civilian casualties, was shared by US Ambassador Galbraith. Moreover, both the UN Special Representative Akashi and the UN Security Council had insisted that Croatia allow Serb civilians to leave in order to minimize casualties.[407]

220. Accordingly, the Trial Chamber erred when it concluded that the only reasonable interpretation of the Brioni statements is that "civilians being shown a way out was not about the protection of civilians but about civilians being forced out."[408] The Chamber's conclusion erroneously disregarded both evidence of military necessity and principles of humanity in an effort to avoid a "bloody last stand."[409]

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402 P461, 7 (Emphasis added).
403 P461, 15.
404 Sun Tzu, The Art of War: "When you surround an army, leave an outlet free."
405 *E.g.* Article 57 API; *Isayeva v. Russia*, 195.
406 T:19139-19139.
407 D1530, pg.3, Para.2(a); D28, 3.
408 TJ, 1995(Emphasis added).
409 P698, 15.

Conclusion and relief

221. No reasonable trier of fact could conclude that a common criminal purpose and shared intent to force Serb civilians out through unlawful shelling is the only reasonable inference from the Brioni statements. The Chamber's finding that there was a JCE to that effect must be quashed and Gotovina's conviction overturned.

3.1.3. The Trial Chamber erred in fact and law when finding that there existed a shared intent to commit acts of unlawful attacks as acts of persecution against Krajina Serbs.

222. Sub-grounds 3.1.3, 3.2.3 and 3.3.3 are dealt with together here.

223. No reasonable trier of fact could conclude, and there is no reasoned opinion, that alleged JCE members had a common design and shared an intent at Brioni to attack the Serb civilian population based on one of the prohibited discriminatory grounds.

224. "Persecution" requires proof that Serb civilians were attacked because they were Serbs.[410] This requirement is not satisfied by a showing that civilians who left were Serbs because it does not show an intent to discriminate.[411] Serbs were disproportionately affected by the military operation, not because they were Serbs, but because they were the largest ethnic group in Krajina at the time.[412] Civilians from other ethnics groups including Croats also had to move from their homes as a result of the military operation.[413] The Trial Chamber failed to address the only relevant question, *i.e.*, not whether Krajina Serbs were affected by shelling, but whether they were targeted for reasons related to one of the prohibited grounds. The Trial Chamber's failure to address this fact was an error.[414]

225. A discriminatory intent cannot be inferred from the result of shelling. This reasoning would erroneously transform the special intent crime of persecution into a crime of

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410 *Tadic* AJ, 305; *Krnojelac* AJ, 184.
411 *E.g. Kordić* AJ, 101; *Stakic* AJ, 327-328.
412 TJ, 1752.
413 T.2838-2829; P186, pg.3; P30, pg.3; TJ, 1619.
414 TJ, 1752.

objective discriminatory consequences. Furthermore, there is no evidence that any of the individuals responsible for carrying out the shelling possessed the requisite *dolus specialis*.

226. Even if some of the supposed underlying crimes were committed with a discriminatory intent, this would not suffice. For the purpose of establishing a JCE to commit persecution, it had to be established that the JCE-members themselves, not the actual perpetrators, possessed and shared the requisite discriminatory intent. The Trial Chamber provided no reasoned opinion as to why this intent could reasonably be inferred in relation to each member of the alleged JCE.

227. The Chamber also failed to identify the ground – political, racial or religious –which JCE members allegedly shared and the supporting evidence.[415] The absence of a reasoned opinion on this point is a further indication of the unreasonableness of the Chamber's finding.

228. Therefore, no reasonable trier of fact could have concluded that it was proven beyond reasonable doubt that a common criminal purpose and shared intent to commit crimes based on one of the prohibited discriminatory grounds existed among supposed JCE-members. The Chamber's error constitutes a miscarriage of justice. Furthermore, it was an error of law not to render a reasoned opinion in relation to those findings, which invalidates the decision. The Appeals Chamber must quash and reverse Gotovina's conviction under Count I as well as the Chamber's finding that there was a common criminal purpose and shared intent to commit crimes based on one of the prohibited discriminatory grounds.

3.2. The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to carry out deportation and forcible transfer of civilians.[416]

3.2.1 The Trial Chamber erred in law when failing to provide a reasoned opinion on its finding that there existed an agreement and shared intent to carry out deportation and forcible transfer of civilians.

229. See above 3.1.1.

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[415] *E.g.*, TJ, 1912,1924,1936,1944.
[416] TJ, 2303-2314, in particular 2310, 2314.

3.2.2 The Trial Chamber erred in fact and law when taking the view that there had been an agreement and shared intent in relation to the deportation and forcible transfer of civilians.

230. The Chamber found that "the crimes of deportation and forcible transfer were central to the joint criminal enterprise"[417] based on the following:

a. "Discussions at the Brioni meeting, at which the participants discussed the importance of the Krajina Serbs leaving as a result and part of the imminent attack"

231. There was no discussion at Brioni of the "importance of the Krajina Serbs leaving" in terms of a shared intent to forcibly displace civilians. Tudjman's statement that it was "important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other" was related to a discussion on the impact of evacuations on the morale of SVK forces and avoidance of a "bloody last stand."[418] There was no suggestion that beyond leaving a way out, HV forces should cause a Serb departure through the commission of crimes. Even assuming *arguendo* that this was Tudjman's intent, there is no evidence that other participants, including Gotovina, shared that intent.

b. The "mass exodus of the Krajina Serb population within days of the launching of Operation Storm"

232. The fact of a subsequent "mass exodus" does not establish either a criminal intent or a proximate causal ("primary and direct") nexus with the artillery campaign.[419] It would be unreasonable to draw an inference of intent to expel from a result unrelated to HV's use of artillery.[420]

c. The "immediate efforts, on a policy and legislative level, to prevent the population from returning, that members of the Croatian military

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[417] TJ, 2310,2314.
[418] P698, 15.
[419] Less than 90 days earlier, Serbs had left Western Slavonia *en masse* despite Croatia's full compliance with the human rights of Serbs (D2020, 15; See Section 3.1.2(B), above).
[420] See Ground 2 regarding the causes for Serbs' departure.

> and political leadership intended to force the Krajina Serbs from their homes"[421]

233. There is no indication of a common criminal purpose at Brioni to adopt discriminatory/restrictive laws and measures to prevent Serbs from returning. Moreover, the Chamber found that Gotovina had no part in their adoption or implementation.[422]

234. Thus, no reasonable trier of fact could have concluded that Brioni participants had a common criminal purpose and shared intent to deport Serb civilians through unlawful/indiscriminate shelling. The Chamber's finding is erroneous and constitutes a miscarriage of justice. This finding, and Gotovina's conviction for deportation, must therefore be quashed and reversed.

3.2.3 The Trial Chamber erred in fact and law when finding that there was a shared intent to commit deportation as acts of persecution against Krajina Serbs.

235. See above 3.1.3 and 3.2.2.

3.3 The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to impose discriminatory and restrictive measures against Serb civilians.[423]

3.3.1 The Trial Chamber erred in law when failing to provide a reasoned opinion on its finding that there existed a shared intent to adopt discriminatory/restrictive measures.

236. Submissions made in 3.1. apply *mutatis mutandis* and are adopted by reference in relation to the findings at Paragraphs 2312 and 2314 regarding a supposed common criminal purpose and shared intent to adopt discriminatory/restrictive measures.

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421 TJ, 2310.
422 See 3.3.2.
423 TJ, 2303-2314, in particular 2308, 2312, 2314.

3.3.2 The Trial Chamber erred in fact and law when finding that there had been an agreement and shared intent to adopt discriminatory and restrictive measures.

237. At Paragraph 2312, the Trial Chamber found that "[i]mmediately following the forcing out of the Krajina Serbs, members of the Croatian political and military leadership took various measures, on a policy and legislative level, aimed at preventing them from returning." The Trial Chamber proceeded to find that "the joint criminal enterprise also amounted to, or involved, imposition of restrictive and discriminatory measures as the crime against humanity of persecution."[424] This finding was erroneous.

238. For a crime to constitute a JCE core crime, there must be a common criminal design among JCE-members and a shared intent to commit that crime.[425] No such design and no shared intent existed in relation to such measures. Significantly, there is no evidence regarding the adoption of such measures prior to the end of July 1995 when the JCE is supposed to have formed. If these were "expanded crimes," the Chamber was required to make findings as to (1) whether leading members of the JCE were informed of the crimes, (2) whether they did nothing to prevent their recurrence and persisted in the implementation of this expansion of the common objective, and (3) when the expanded crimes became incorporated into the common objective. [426] No such finding was made and, instead, Gotovina was found to have had no part in those measures.[427]

239. The Trial Chamber also failed to consider that Croatia was not under an obligation to allow the immediate mass return of FRY-RSK citizens who qualified as enemy nationals.[428]

240. The Chamber, therefore, erred in law and fact when it found that the JCE also amounted to, or involved, imposition of restrictive/discriminatory measures. This error must be quashed and reversed.

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424 TJ, 2312.
425 *Stakic* AJ, 65, 84.
426 *Krajisnik, AJ,*171.
427 TJ, 2326.
428 TJ, 1748.

3.3.3 The Trial Chamber erred in fact and law when it omitted to establish whether the alleged members of the JCE shared the intent to commit this crime as acts of persecution against Krajina Serbs.

241. Submissions made in 3.1. apply *mutatis mutandis* in relation to the Chamber's finding at Paragraph 2310.

3.4. The Trial Chamber erred in fact and law when concluding that the underlying core crimes qualify as acts of persecutions.[429]

3.4.1. The Trial Chamber erred in law when failing to provide a reasoned opinion on its finding that the underlying core crimes qualify as acts of persecution.

242. Submissions made in 3.1.1, 3.1.3, 3.2.3 and 3.2.3 apply *mutatis mutandis* and are adopted by reference.

3.4.2. The Trial Chamber erred in law by failing to provide a reasoned opinion explaining its finding that Serbs were attacked based on one of the recognized discriminatory grounds.

243. Submissions made in 3.1.1, 3.1.3, 3.2.3 and 3.2.3 apply *mutatis mutandis* and are adopted by reference.

3.4.3. The Trial Chamber erred in fact and law by concluding that Serbs were attacked based on one of the recognized discriminatory grounds.

244. The submissions made in 3.1.3, 3.2.3 and 3.2.3 apply here and are adopted by reference.

3.4.4. The Trial Chamber erred in fact and law when concluding that the artillery attack was discriminatory in purpose, based upon a prohibited discriminatory ground, and that it amounted to persecution.[430]

245. Submissions made in 3.1.3 apply *mutatis mutandis* and are adopted by reference.

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[429] TJ, 2310,2311,2312,2314,2316-2320.
[430] TJ, 1742-1763,1913,1924,1936,1937.

246. Furthermore, pursuant to Article 5(h), an act could qualify as "persecution" if it is comparable in gravity to other statutory offences.[431] This has not been established. First, as already noted, shelling did not cause Serb civilians to leave.[432] Secondly, the Judgement contains no finding that shelling resulted in any sort of injury or death among civilians or destruction of civilian objects,[433] nor that the HV had "spread terror" in violation of Article 51(2) of the Protocol. Accordingly, the underlying conduct, even if established, was of insufficient gravity to qualify as persecution under Article 5(h).

247. Therefore, the Trial Chamber committed errors of law and fact, which invalidate the decision and resulted in a miscarriage of justice. The Trial Chamber's finding that unlawful attacks as "persecution" under Article 5(h) had been committed should be quashed.

3.5. The Trial Chamber erred in fact and law when concluding that an agreement had been reached among the members of the alleged JCE for the "permanent" removal of the Serbian civilian population and inferring a common intent to use "force or threat of force" for that purpose.[434]

248. See above 3.1.

GROUND FOUR: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN CONCLUDING THAT GOTOVINA WAS A MEMBER OF A JCE AND MADE A SIGNIFICANT CONTRIBUTION TO THE EXECUTION OF THAT JCE.

Relevant Findings

249. The Trial Chamber found a JCE to commit the core crimes based on the following:

(i) The Brioni meeting on 31 July 1995 and preparation for *Storm* (Section 6.2.2 Judgement);

(ii) The policy of the Croatian political leadership with regard to the Serb minority and return of refugees (Section 6.2.3); and

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431 *E.g.*, *Krnojelac* AJ, 199,221; *Blaškić* AJ, 135-141,143-159.
432 See, Ground 2.
433 To constitute an offence under the Statute, violation of property rights must be "severe enough impact on the victim" caused by the unlawful act. *Kupreskic* TJ, 629-631. The Trial Chamber did not find (and could not find) that any damage to property was done as a result of any act of unlawful shelling. Instead, all but a handful of the "suspicious" shells fell in empty fields, with no or no significant material damage done.
434 TJ, 2314.

(iii) Property laws (Section 6.2.4).[435]

250. Gotovina's JCE contribution is limited to unlawful attacks against civilians and civilian objects in three towns: Knin, Obrovac and Benkovac.[436]

251. The Trial Chamber found that the alleged JCE members did not intend to commit other crimes such as murder, wanton destruction, plunder and inhumane treatment.[437] However, Gotovina was convicted for these crimes as natural and foreseeable consequences of the JCE's implementation.[438]

252. Gotovina's JCE-*mens rea* is inferred from[439]

(i) His participation at the Brioni meeting;

(ii) The Chamber's view that the artillery attacks were unlawful and that Gotovina's orders "treated whole towns as targets;" and,

(iii) Gotovina's failure to adequately address the commission of crimes.

4.2. The Trial Chamber erred in law when failing to provide a reasoned opinion in relation to its finding of a shared intent on Gotovina's part to commit the underlying core crimes.[440]

253. JCE requires proof of shared intention between JCE-participants to *"*participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group."[441]

254. The Judgement contains no reasoned findings regarding its conclusion that Gotovina shared the JCE's culpable intent, which constitutes an error of law invalidating the Judgement.[442]

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[435] The Chamber found that Croatian policy on investigation of crimes did not support the JCE allegation. See Section 6.2.5 of Judgement.
[436] TJ, 2370,2373. The Trial Chamber also apparently found that Gotovina made a substantial contribution to the JCE by failing to punish non-core crimes. For reasons set forth below, such a finding constitutes an error as Gotovina could only make a substantial contribution to core crimes.
[437] TJ, 2313.
[438] TJ, 2374,2375.
[439] TJ, 2370,2371.
[440] TJ, 2371,2373,2374.
[441] *Vasiljevic* AJ, 101; *Tadic* AJ, 228; *Krnojelac* AJ, 32.

4.3. The Trial Chamber erred in fact and law when it found that Gotovina shared the intent to commit the underlying core crimes.[443]

Findings and Errors

255. Because of the failure to render a reasoned opinion, the Appellant must guess that the Trial Chamber considered the following factors:[444]

(i) Gotovina's participation in the Brioni meeting; and

(ii) The Trial Chamber's conclusion that artillery attacks on Knin, Benkovac and Obrovac were unlawful and that Gotovina had ordered the HV to treat these whole towns as targets.

Brioni – Gotovina's statements

256. A number of Gotovina's statements at Brioni have been highlighted by the Chamber:[445]

> ***First Statement: Responding to a suggestion by Tudjman that a corridor should be left open, Gotovina accurately predicted, as did Galbraith and others[446], that, "if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving."[447]***

257. Contrary to the Trial Chamber's suggestion,[448] Gotovina made no mention of "Serb" civilians departing.[449] In fact, nothing in Gotovina's response to Tudjman could be construed as evincing any criminal intent:

(i) He correctly observed that civilians were already leaving Knin on 31 July, as confirmed in the Judgement.[450]

(ii) He correctly predicted that if the HV continued "this pressure," not many civilians would remain. "This pressure" did not refer to unlawful attacks on civilians. Rather, Gotovina conveyed the HV intelligence assessment from

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442 TJ, 2371.
443 TJ, 2371,2373,2374.
444 TJ, 2370.
445 TJ, 1977,1993,2304-2305.
446 P458, 8.
447 TJ, 1977.
448 TJ, 1992,1993,2305,2373.
449 TJ, 1993; P461.
450 TJ, 1977.

the day prior to the Brioni meeting that the threat of an HV attack was causing civilians to leave Knin,[451] and that if this threat continued civilians would leave. Given the events of Western Slavonia three months earlier,[452] Gotovina's assessment was obvious and was shared by many others including Serb officials and internationals.[453]

(iii) Ultimately, the Trial Chamber confirmed the Defence's interpretation of Gotovina's assessment at Brioni. In every place in the Krajina except Knin, Benkovac, Obrovac and Gračac, the Trial Chamber found that Serb civilians left for reasons unrelated to unlawful conduct by the HV.[454]

258. Accordingly, Gotovina's assessment was an objective and accurate prediction that civilians would leave for reasons unrelated to any unlawful HV conduct. He did not express any intent (i) to target civilians, (ii) to force them to leave, or (iii) to use artillery for that purpose, three facts which the Chamber was required to establish as the "only reasonable interpretation" of Gotovina's statement. It failed to do so.

Second Statement: To a comment by Tudjman regarding the need to demoralize enemy forces, Gotovina stated that the HV had complete military control over Knin and that should an order to that effect be given, the town could in theory be destroyed in a few hours.[455]

259. The Chamber interpreted these comments as an indication of Gotovina's criminal *mens rea*.[456] To the contrary, Gotovina's statement was an accurate evaluation of the HV's military strength including the potential of the HV's firepower given its strategic position on the high ground over Knin.

260. Further, the Chamber's reliance upon just a portion of Gotovina's statement was misleading. Gotovina concludes by making clear that he was talking about the "taking" of Knin, not its physical destruction.[457]As such, this statement reflects the mental state of an

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451 P2619, pg.1.
452 See 3.1.2(B), above.
453 See 3.1.2.
454 TJ, 1754,1762.
455 P461, 10.
456 TJ, 1993.
457 P461, 10.

operational commander focused on defeating the enemy forces including securing the enemy's center of gravity, not criminal *mens rea* to expel Serb civilians through shelling.[458]

Third Statement: Gotovina told Tudjman that the HV weaponry enabled his forces to conduct artillery shelling with precision and assuaged Tudjman's fear that UNCRO could accidentally be hit.[459]

261. This statement provides no indication of a JCE-culpable intent. Instead, it demonstrates (a) an ability to target with precision, not indiscriminately; (b) efforts to avoid hitting non-military objectives; and (c) that the "whole town of Knin" would not be treated as a target.[460]

262. Reviewing the entire Brioni transcript, Gotovina's statements do not allow the Chamber to conclude as the only reasonable inference that he shared a culpable intent to expel Serb civilians through unlawful shelling.

263. To the extent that the Trial Chamber used the comments of others to infer Gotovina's state of mind, the Chamber failed to

(i) identify those comments said to be relevant to that inference;

(ii) explain how those comments supported the Chamber's finding regarding Gotovina's state of mind;

(iii) establish that Gotovina acquiesced to those statements; and

(iv) establish that a reasonable trier of fact could conclude from these statements that the only reasonable explanation of the evidence is that Gotovina shared the intent to commit the JCE crimes.

264. The evidence contained in the Brioni transcript overwhelmingly contradicts the Chamber's unreasonable finding that anyone attending the meeting is presumed to possess a criminal *mens rea*. Such an approach assigns collective guilt rather than individual liability, reverses the burden of proof and is factually unreasonable.

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[458] In fact Knin suffered only minimal damage, and no order to destroy Knin was ever given by Tudjman or Gotovina.
[459] P461,15; TJ, 1993.
[460] See Section 1.2 *et seq.,* above.

Unlawful attacks and Gotovina's attack order

265. As noted in Ground 1, the Chamber's finding of "unlawful attacks" was unreasonable and erroneous, as is the Chamber's finding that Gotovina's attack order reflects a culpable *mens rea*.[461] Subordinates understood Gotovina's attack order as a lawful order directing artillery at military objectives.[462] There is no evidence that Gotovina intended his order to be understood in any other way. Appellant herein reincorporates all arguments from Ground 1 and 2 in support of his position.[463]

Discriminatory/restrictive measures

266. The Trial Chamber found that it could not conclude that Gotovina contributed to the JCE by creating and/or supporting discriminatory policies against Serbs.[464]

Conclusions and relief

267. Based on the foregoing, no reasonable trier of fact could have concluded that the only reasonable inference is a shared intention between Gotovina and other alleged JCE members to permanently remove the Serb population through unlawful shelling. Consequently, this finding and Gotovina's conviction must be quashed and reversed.

4.4. The Trial Chamber erred in law when it failed to provide a reasoned opinion concerning its finding that Gotovina agreed with others to commit JCE core crimes.[465]

268. The Judgement contains no reasoned finding that Gotovina possessed the requisite *mens rea* in relation to the common criminal purpose.[466] This error invalidates Gotovina's conviction.

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461 TJ, 2370 or 2373.
462 D1425, 45. And as discussed in Ground 1, even applying the Trial Chamber's arbitrarily created 200M Rule analyzing the results of the artillery order, 94.5%-99% of projectiles landed within 200m of military objectives.
463 See Sections 1.2 *et seq.*, and 4.6.1.
464 TJ, 2325.
465 "Agreed" used in Grounds 3-4 means "shared in the common criminal purpose" (*Brdjanin* AJ, 430).
466 TJ, 2369-2371. Regarding *mens rea* standard, *E.g.*: *Vasiljevic* AJ, 101 and references.

4.5. The Trial Chamber erred in fact and law when it failed to establish (beyond reasonable doubt) that Gotovina had agreed with others to commit the underlying JCE core crimes.[467]

269. Gotovina incorporates his submissions made in section 4.3. There is no basis in the Brioni transcript or in Gotovina's order to conclude that the only reasonable inference is that Gotovina and other individuals joined in a common criminal purpose at Brioni to unlawfully expel Serb civilians through unlawful and indiscriminate shelling.[468]

270. Even assuming *arguendo* the Chamber's apparent finding that Tudjman (and/or others) intended to commit the core crimes, there is insufficient evidence that Gotovina joined with them to do so. The record provides clear contrary evidence:

(i) Gotovina's measures to protect civilians;[469]

(ii) Gotovina's expression of disapproval of alleged misconduct against Serb civilians;[470]

(iii) Even employing the Chamber's arbitrarily created 200M Rule reveals that 94.5% of projectiles impacted in close proximity to pre-identified artillery targets;

(iv) The artillery had a minimal effect on civilians and civilian objects (no shelling-related death; no Serb civilian leaving as a result of an "indiscriminate" shell; and minor damage to civilian objects); and

(v) The Brioni transcript contains no discussion about directing artillery against civilians.

271. The Chamber's failure to clearly identify the basis relied upon to conclude that such a common criminal purpose existed is a powerful indication of the unreliability and unreasonableness of its conclusion.[471]

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[467] "Agreement is used in Grounds 3-4 to refer to a 'plurality of persons shar[ing] the common criminal purpose" (*Brdjanin* AJ, 430).
[468] According to the Trial Chamber, the common criminal purpose of the JCE was reached no later than the end of July 1995. See TJ, 2315.
[469] See Section 4.7.4, below.
[470] D792; D979; D201; P71, pg.83; P1126.
[471] *Blaškić* AJ, 518.

272. Accordingly, no reasonable trier of fact could have concluded as the only reasonable inference that Gotovina joined in a common criminal design at or prior to Brioni,[472] shared an intent to participate in and further a common criminal purpose, and contributed to any joint criminal enterprise. The Chamber's finding and Gotovina's conviction must therefore be set aside and reversed.

4.6. The Trial Chamber erred in fact and law when it concluded that Gotovina made a significant contribution to the supposed JCE.[473]

273. The Trial Chamber concluded that Gotovina made a significant contribution to the execution of the JCE based on the following:[474]

(i) His attack order allegedly to treat whole towns as artillery targets; and

(ii) His failure to make a more serious effort to prevent and follow-up on crimes reportedly committed by HV forces after liberation of "Krajina" and the impact thereof on "the general atmosphere towards crimes in the Split MD."

4.6.1 The Trial Chamber erred in fact and law when finding that Gotovina made a significant contribution to the JCE by ordering an unlawful attack on civilians.

274. As explained in Ground 1, Gotovina did not issue an unlawful order to treat whole towns as artillery targets. The Trial Chamber's reasoning assumed that (i) Gotovina's order was understood to demand that subordinates treat whole towns as artillery targets, (ii) they did so, and (iii) they did so as a result of Gotovina's order. Absent these assumptions, Gotovina's order could not be said to have made a "significant" contribution to the supposed JCE.[475] However, the Prosecution proved none of these facts and the Chamber rendered no reasoned opinion in relation to them.

275. Significantly, Marko Rajcic, the HV officer responsible for implementing the order and the only subordinate to testify about how the order was interpreted, understood the

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472 TJ, 2315.
473 TJ, 2370,2373,2374.
474 Ibid. Also TJ, 2365.
475 See *Blaškić* AJ, 334 ("[The Appeals Chamber has failed to find] evidence that the crimes against the Muslim civilian population in the Ahmici area were committed in response to D269"); and 335 (requiring evidence that the order "gave rise to the crimes").

order to require that artillery would target pre-identified military objectives, not whole towns.[476] Rajcic's testimony of his own interpretation of the order was corroborated by (1) the Trial Chamber's finding after applying its arbitrary standard that 94.5% of projectiles landed within 200m of a military objective; (2) subsequent U.N. and U.S. investigations into the shelling; and (3) the lack of death or injury caused to civilians or damage to civilian objects by any of the disputed shelling incidents.

276. As the Appeals Chamber made clear, it is not for a Trial Chamber to second-guess the meaning of a military order, nor to do so to the prejudice of the accused, when the context allows for a finding that the order was a lawful military order.[477] There "was a military justification for issuing"[478] the order and the trial evidence does not exclude this military justification as a reasonable explanation of the evidence.

277. There was a "reasonable interpretation of the evidence" that the order was intended and understood to require lawful compliance. Therefore, no reasonable trier of fact could have concluded beyond reasonable doubt that Gotovina made a significant contribution to the alleged JCE by ordering an unlawful attack when there is an insufficient basis to conclude beyond reasonable doubt that (i) his order was unlawful and (ii) made a "significant contribution" to the JCE's core crime of forcible departure of Serb civilians. The Trial Chamber's finding and Gotovina's conviction must accordingly be quashed and reversed.

4.6.2. The Trial Chamber erred in fact and law when finding that there existed an order to unlawfully attack civilians and civilian objects.

278. See 4.6.1.

4.7. The Trial Chamber erred in fact and law when taking the view that Gotovina made a significant contribution to the JCE by, inter alia, failing to make a serious effort to prevent and follow-up on crimes reported to

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476 D1425, 45.
477 *Blaškić* AJ, 330 *et seq*.
478 *Blaškić* AJ, 335.

have been committed, including murder, inhumane acts, unlawful detention, plunder, and destruction.[479]

4.7.1 The Trial Chamber erred in fact and law when it violated the right of the accused to adequate and timely notice of the charges, his right to be presumed innocent, his right to an adversarial hearing (including his right to be heard) and his right to a fair trial by convicting him on the basis of alleged "measures" that were never raised at trial.

Legal considerations

279. A defendant has the fundamental right to know the case against him to ensure that he is able to effectively confront the allegations.[480]

Findings and Errors

280. The Trial Chamber acknowledged that when the "natural and foreseeable crimes" were taking place post-*Storm*, Gotovina was in Bosnia conducting combat operations against Bosnian Serb forces.[481] The Trial Chamber also acknowledged that Gotovina "issued a number of orders between 2 and 18 August 1995…instructing units to prevent crimes."[482] Additionally, Gotovina berated subordinate commanders for failing to prevent HV troops from engaging in looting.[483]

281. The Trial Chamber recognized that, while Gotovina was planning for and engaged in combat in Bosnia, the civilian and military police were responsible for maintaining law and order in the liberated areas.[484] Josko Moric commanded the post-Storm security operation for the MUP, and General Mate Lausic for the Military Police.[485] General Gotovina was never given an order by his superiors to involve himself in the post-*Storm*

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479 TJ, 144-146,2370,2373,2374.
480 Art. 21(4)(a) Statute.
481 TJ, 72,85,1696,2365.
482 TJ, 2364.
483 TJ, 2337-2338; D792; D979.
484 TJ, 2100-2203.
485 TJ, 2145-2146; D1634, pg.2; D1635, pgs.2-3.

security operations, nor was Gotovina ever invited to any meeting where post-*Storm* security issues were discussed.[486]

282. The Trial Chamber extensively reviewed the post-*Storm* security operation as implemented by Moric, Lausic and others, and ultimately found that there was insufficient evidence to conclude that the Croatian authorities had a policy of non-investigation of crimes committed against Serbs or Serb property.[487]

283. The only expert witness with command experience to testify in the case concerning Gotovina's actions in response to reports of crime was retired Lt. General Jones of the United States Army. General Jones reviewed the evidence and testified that, in his expert opinion, Gotovina took all measures that could reasonably be expected of a commander in Gotovina's circumstances, and that Jones could not think of anything he would have done differently.[488]

284. After ignoring General Jones' evidence,[489] the Trial Chamber found Gotovina responsible for failing to "adjust his focus and priorities," and concluded that in addition to the many steps Gotovina did take, he should have adopted three additional measures (the "*Chamber's Measures*") to prevent or punish crimes:

(i) Contact relevant people and seek their assistance;

(ii) Make public statements; and

(iii) Use available capacities temporarily more focused on other tasks.[490]

285. Because the *Chamber's Measures* were never mentioned at trial, it was impossible for Gotovina to confront them. The Prosecution advanced completely different measures,[491] all of which were rejected by the Trial Chamber. Fundamentally, there is no evidentiary

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[486] He understood that others were in charge. TJ, 1696, 2365 ("Gotovina repeatedly stated that others (Cermak, SIS, VP or Political Affairs) were responsible for upholding law and order while he was commanding troops in Bosnia-Herzegovina.").
[487] TJ, 2202-2203.
[488] T.20968-20971; D1633.
[489] *Kvocka* AJ, 23.
[490] TJ, 2365,2330-2362.
[491] OTP,FTB, 206-208.

basis for how or why these were necessary and reasonable measures that Gotovina was permitted, required and able to adopt.

286. After Gotovina rebutted each "necessary and reasonable measure" proposed by the Prosecution, the Trial Chamber should have acquitted him of these allegations. Instead, by introducing three new "necessary and reasonable measures," the Trial Chamber denied Gotovina his right to adequate and timely notice of the charges, his right to be presumed innocent, his right to an adversarial hearing and his right to a fair trial including his right to call evidence on his behalf, his right to be heard,[492] and his right to fully litigate issues.[493]

4.7.2. The Trial Chamber erred in fact and law when it violated the right of General Gotovina to a reasoned opinion and, as a result, his right to an effective appeal, when failing to provide a clear explanation of what "follow-up measures" he should have taken and on what basis these evidentiary findings were made.

287. The Chamber found that by failing to insist on "follow-up" action against HV perpetrators of crimes, Gotovina failed to prevent future crimes and thus made a second significant contribution to the JCE.[494] The Trial Chamber also concluded that through his failure to act, Gotovina recklessly accepted the risk of "natural and foreseeable crimes," through culpable omission, *i.e.* a failure to prevent or punish his subordinates.

288. To hold Gotovina liable for a culpable omission, the Chamber was required to establish that (a) he had a duty to act, *i.e.*, a duty to adopt the *Chamber's Measures*, mandated by a rule of criminal law; (b) he had the ability to act; (c) he failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and (d) his failure to act resulted in the commission of the crime which comprise the *actus reus* of omission as "committing."[495] The Trial Chamber established none of these pre-requisites. In particular, it failed to identify any legal duty that Gotovina failed to fulfill under Croatian or customary international law, including a duty to

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[492] *Jelisic* AJ, 27-28; *Skondrianos v. Greece*, 29-31 (ECHR).
[493] *Kunarac* AJ, 62.
[494] TJ, 2365.
[495] *Brdanin* AJ, fn. 557; *Ntagerura* TJ, 659; *Ntagerura* AJ, 333.

undertake the *Chamber's Measures*, whether mandated by a rule of criminal law or otherwise.

289. The Chamber failed to explain the following:

(i) the evidence relied upon to conclude that Gotovina had the legal authority and resources to adopt the *Chamber's Measures*;

(ii) the legal duty and/or ability within Gotovina's scope of responsibility to adopt the *Chamber's Measures*;

(iii) whether Gotovina could, *de facto* and *de jure*, choose to "re-focus his priorities," or whether he could reasonably have been expected to do so while planning for and conducting combat operations in a foreign country with limited resources;

(iv) who the "relevant people" were from whom assistance could have been sought;

(v) what "available capacities" could have been used;

(vi) what other "measures" Gotovina was required to take to punish subordinates and to "insist" on follow-up measures; and

(vii) which subordinates had committed crimes that Gotovina knew about, and who had not been punished.

290. Appellant respectfully submits that the Appeals Chamber should overturn the Chamber's findings on the *Chamber's Measures*, as well as any measures that were not alleged in the Indictment and Pre-Trial Brief (see 4.7.1). This impacts sub-grounds 4.7.3-4.7.10 and would safeguard the right of the accused to a reasoned opinion, to an effective appeal and to a fair trial.

4.7.3. The Trial Chamber erred in fact and law when finding that Gotovina made a significant contribution to the JCE by failing to prevent and/or punish "natural and foreseeable" crimes.

Findings and Errors

291. The Trial Chamber found that Gotovina contributed to the JCE by, *inter alia*, failing to prevent/punish crimes that were found to be "natural and foreseeable" consequence of the

JCE (destruction, plunder, murder, inhumane acts, cruel treatment and unlawful detentions – as persecution).[496]

Legal considerations

292. Gotovina was thus found to have made a contribution to crimes that were not part of the JCE-common objective. Culpable JCE contribution must be either: (i) through the commission by the accused as a principal perpetrator of a crime forming part of the common objective; or (ii) through procuring or giving assistance to the execution of a crime forming part of the common objective.[497] For criminal means to be relevant to JCE liability they must be part of the common plan and JCE members must share an intent with respect to those criminal means.[498]

293. Gotovina therefore, could not be said to have made a significant contribution to the implementation of the JCE for contributing to crimes that did not form part of the common objective or by criminal means that were not part of the common design. By finding that Gotovina made a significant contribution to the JCE by failing to prevent/punish "natural and foreseeable" crimes, the Trial Chamber erred in law and fact.

294. Furthermore, the Judgement failed to make a specific finding that Gotovina acted with the requisite *mens rea* by failing to take the *Chamber's Measures*. Because failure to act cannot *ipso facto* give rise to JCE liability,[499] the Trial Chamber was required to find that Gotovina failed to act with the intent to further the common criminal objective[500] and that this constituted a "significant contribution" to the commission of the core crimes.[501] The Chamber's failure to make this finding is an error of law.

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496 TJ, 2365,2370,2374.
497 *Tadic* AJ, 227; *Krajisnik* AJ, 215,218,695.
498 *Krajisnik* AJ,163.
499 *Galic* AJ,175; *Mrksic* AJ, 49; *Oric* AJ, 43.
500 *Krajisnik* AJ, 173; *Tadic* AJ, 229.
501 *Krajisnik* AJ, 215.

Conclusions and relief

295. The Appeals Chamber should quash the Trial Chamber's finding that Gotovina made a significant contribution to a JCE by reason of a failure to take measures to prevent/punish "natural and foreseeable" crimes.

4.7.4. The Trial Chamber erred in fact and law in finding that Gotovina failed to make a serious effort to prevent and punish crimes.

Findings and Errors

296. The Trial Chamber found that Gotovina "failed to make a serious effort" to prevent and punish crimes.[502] This finding is not the "only reasonable interpretation of the evidence" in light of the overwhelming evidence of Gotovina's efforts to prevent and punish crimes, all in the context of Gotovina conducting combat operations in a different country while crimes are said to have been taking place.

297. The Trial Chamber itself cited much of the evidence of Gotovina's "serious effort" to prevent and punish crimes,[503] which included:

(i) Warning his superiors about a lack of trained NCO's and establishing training centers to improve their quality;[504]

(ii) Training subordinates in Military Discipline and compliance with the Laws of War;[505]

(iii) Instructing units in his operational order regarding the need to eliminate undisciplined behavior, prevent burning and destruction of property, treat civilians and POWs properly *per* the Geneva Conventions, and provide support to civilian institutions following the conclusion of combat operations;[506]

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502 TJ, 2370.
503 TJ, 2330-2367.
504 D1596; D1604; D1583, 19; T:20105-20107.
505 D1425, 17; T.20060; D1587, 8; D1583, 23; D1601.
506 D201; D810, 3.

(iv) Ordering that instruction booklets be provided to HV unit members prior to *Storm* detailing the Geneva Conventions;[507]

(v) Ordering a security plan that recognized that the MUP and the VP would be responsible for immediately controlling the liberated territory and for preventing crime;[508]

(vi) Continuing to remind his subordinates about his orders banning all unlawful conduct, including burning and looting;[509]

(vii) Ordering "maximum fairness in treatment of civilians and behavior towards UN" as his forces were about to enter Knin and other populated areas;[510]

(viii) Admonishing subordinate commanders on 6 August for disciplinary lapses among the ranks, and imploring the Political Affairs Division, the SIS and the VP to act by reminding them that they are the guarantee for military culture and for the military reputation of the HV;[511]

(ix) Issuing numerous orders relating to the need to properly handle and register war booty;[512]

(x) Ordering on 9 August that criminal acts should be videotaped and photographed for future investigation;[513]

(xi) Ordering on 10 August that resolute measures be taken against violators of military discipline, including burning and looting, and prohibiting arbitrary movement of soldiers;[514] and

(xii) Having his command, on 12 August 1995, issue a warning that the policy of the President and the Minister of Defence was to stop burning, looting, killing of livestock and improper treatment of civilians, and that

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[507] D200, 6; T.21344-45,21366-21367,21376; D533; D1602. The Trial Chamber also received evidence that pursuant to Gotovina's order, the 4th Guards Brigade commander and Homeguard Unit Commanders issued orders prior to *Storm* to protect civilians and treat them properly. P1202, 22;T:19449:3-10.

[508] P1126.

[509] An example of Gotovina's actions was evidenced by an evening briefing of commanders on 4 August 1995, at which the Political Affairs assistant reminded HV units that, "Knin must not experience the same treatment as Grahovo." P71, 83. Theunens testified that the officer was "probably" acting pursuant to Gotovina's order. T.12736:1-12737:15.

[510] P71, 84. Evidencing the effect of his order, UN personnel on 6 August remarked, "at least some soldiers have been given clear and effective instructions to treat civilians in an appropriate manner" and the ECMM reported "HV is treating civilians fairly" and "HV soldiers appear to be professional." D272; D334.

[511] D792; D979.

[512] D979; D643; D981; D208; D866; D867.

[513] P71, 95.

[514] D204. This order to cease arbitrary movement of soldiers was a "genuine effort" to address concerns that AWOL soldiers may be involved in activities such as looting and burning. T.21034; P1016.

> responsibility rested with the Political Affairs section along with the SIS and the VP to take punitive measures and launch disciplinary proceedings against violators.[515]

298. As a result of Gotovina's efforts, disciplinary measures increased 151% for the third quarter of 1995, the period of *Storm*.[516]

299. As explained above, expert witness Lt. General Jones testified that Gotovina not only made a "serious effort" to address crime, but took all measures that could be expected of a reasonable military commander. In cross-examination, the Prosecution put its case to General Jones and challenged his conclusions.[517] The Trial Chamber ultimately rejected each and every "necessary and reasonable measure" proposed by the Prosecution.

300. Instead, the Trial Chamber invoked the *Chamber's Measures* to conclude that Gotovina did not make a "serious effort" to address crime. The *Chamber's Measures,* never mentioned at trial, were likewise never put to General Jones for his comment.

301. As set forth below, the Chamber's *Measures* are unreasonable:[518]

A) To adjust his focus and priorities towards ensuring that crimes were followed up

302. Gotovina's superiors ordered him to go to Bosnia to fight an ongoing war,[519] while Lausic and Moric were to remain in charge in Croatia to ensure proper crime prevention and investigation.[520] Gotovina neither had the authority to reject this assignment and turn himself into an investigating judge or magistrate, nor did he have the authority to conduct investigations for the civilian or military police. Moreover, there was no reason for Gotovina to "adjust his focus" in light of the Trial Chamber's finding that there was no policy of non-investigation by competent Croatian authorities.[521] Gotovina knew that the

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515 P918; T.19216-19217,12775.
516 D892; T.12575-12576; D895, 5,9.
517 T.21039-21043, 21013-21014, 21019-21020.
518 TJ, 2365.
519 D1635; TJ, 72,85,1696,2365.
520 TJ, 2145-2146; D1634, 2.
521 TJ, 2203.

competent authorities were seized of the matters and there is no evidence that he was informed of any investigative problems.[522]

B) Contacting relevant people and seeking their assistance

303. There is no evidence that Gotovina had the duty and ability to contact competent authorities not already seized of the crime issues and crime prevention. Instead, the evidence establishes that competent authorities were involved, and that Gotovina knew this to be the case.[523] There is no professional assistance he could have sought that was not already being employed, nor did he have a legal requirement to do so.

304. It is clear that (1) Gotovina alerted the Military Police, SIS and Political Affairs about crime and that it was their duty to enforce the Rules of the Armed Forces;[524] **(**2) the Military Police, Political Affairs, MUP and SIS were aware of the issue of crime;[525] and (3) the senior governmental officials, including Susak, Lausic, Cervenko and Miroslav Tudjman, were aware of the crime problem.[526]

305. While maintaining that Gotovina should have contacted others and sought their assistance, the Chamber completely failed to identify those other officials whom Gotovina should have contacted, and why.

C) Making public statements

306. The Trial Chamber failed to establish that Gotovina, as a military officer bound by the Rules of the Armed Forces, had authority or competence to make public statements. He only had authority to make statements to subordinates and he did so on 6 August 1995, berating them for law and order lapses.[527] To the extent that Gotovina's position was relevant to preventing crimes and expressing his disapproval thereof, he articulated his position opposing crime clearly and consistently (i) in a series of orders that called for the

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[522] *Boskoski* AJ, 234-235, 265-268, 270. See also, *Blaškić* AJ, 72.
[523] Ibid. *See also* D1634.
[524] TJ, 2337; D792; D979.
[525] TJ, 2100-2118; P1133, 2.;P1134, 4; P918; D868; D2024; D2025; D2026; D2027.
[526] TJ, 2100-2118; P203; D506, 2.
[527] TJ, 2337-2338; D979; D793.

protection of civilians from harm, and (ii) in numerous meetings with his subordinates where he emphasized his disapproval of crime.[528] The Chamber failed to identify any basis to suggest that he had a duty to do more, let alone one that was mandated by a rule of criminal law.[529]

D) Using available capacities temporarily more focused on other tasks

307. There is no evidence to suggest that any such "capacities" existed or were available to him. All of Gotovina's assets were fully engaged in combat operations in Bosnia. Moreover, there is no evidence that any "capacities" deployed in Bosnian operations had expertise in crime investigation.

308. If the Trial Chamber was referring to VP "capacities," Lausic had command and control over the VPs, the ability to remove VPs from combat operations, and deploy them as he deemed fit. In fact, Lausic did remove VPs from Gotovina's combat operations after *Storm* and redeployed them to Croatia for regular VP tasks.[530]

E) A "serious effort"

309. The Trial Chamber's standard of "serious effort" to assess Gotovina's conduct is not a known dereliction standard which imposes criminal liability as a matter of customary international law. No precedents or any evidence of state practice/*opinio juris* are offered.[531] The Chamber's adoption of a lesser, and legally unsupported, standard was an error of law resulting in errors of fact. Again, the Chamber provided no basis from which such a duty to take these steps could be inferred.

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528 *E.g.* TJ, 2337-2347.
529 *Brdanin* AJ, footnote 557; *Ntagerura* TJ, 659; *Ntagerura* AJ, 333.
530 T.15560,15576-15580.
531 The only standard recognized under customary law to attribute penal liability to a derelict commander is that of a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. *Blaškić* AJ, 34-35; High Command case, 543-544; ICRC Commentary, API, 1010, 3547; UN Commission of Experts, 58; Cassese's International Criminal Law, *citing* Howard's Jury Instructions, 1732.

310. While acknowledging that Gotovina issued "a number of orders" and "a number of disciplinary measures" to prevent and punish crime,[532] the Chamber held however, that this was not enough because Gotovina "only rarely used his authority over the VP with regard to initiating crime investigations and processing."[533] As explained below, Gotovina had no authority over Military Police investigations. However, even assuming *arguendo* that he had such authority, the Trial Chamber concluded that while the VPs encountered difficulties in conducting investigations, there was insufficient evidence of a non-investigation policy by the Military Police.[534] In other words, they were doing their job.

311. Finally, there was no evidence that Gotovina was aware of failures by the competent authorities to investigate crimes.[535] It was therefore unreasonable to conclude that competent organs, including the Military Police, were "not carrying out their duties properly," and that Gotovina should have returned from Bosnia and requested permission to take command from Lausic.

Conclusions and relief

312. In light of the above, no reasonable trier of fact could have found that Gotovina failed to adopt measures that he was duty-bound and able to adopt at the time and that any such failure made a significant contribution to the JCE.

4.7.5. The Trial Chamber erred in fact and law regarding the alleged rebuttal of Gotovina's entitlement to assume diligent performance of duties by subordinates involved in the prevention and punishment of crimes.[536]

313. The Trial Chamber agreed that Gotovina was entitled to assume that "other, more specialized branches under his command, would carry out their duties properly" while Gotovina was conducting operations in Bosnia, but that this assumption was rebutted when

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532 TJ, 2364,2365.
533 TJ, 2365.
534 TJ, 2200,2202-2203.
535 *Boskoski* AJ, 235.
536 TJ, 2365.

Gotovina became aware of crimes and that the "specialized branches under his command were not carrying out their duties properly."

314. This conclusion is manifestly unreasonable. First, there was no finding that any specialized branches under Gotovina's command were not carrying out their duties properly.[537] Furthermore, the Trial Chamber reviewed the investigative activities of competent authorities, including the Military Police, and concluded that it could not establish a policy of non-investigation on their part.[538] The Trial Chamber did not identify which "specialized branch" was not carrying out its duties properly, or how Gotovina was put on notice of this problem. As already noted, there is no evidence that Gotovina was aware of serious failures of the competent authorities to investigate,[539] and Trial Chambers cannot draw prejudicial inferences without providing a clear basis to sustain such an inference.[540]

315. The Chamber's finding is erroneous for several other reasons. First, as a matter of law, the presumption would be rebutted only where those not fulfilling their duties were subordinates of Gotovina. The responsibility to investigate/punish crimes remained exclusively with State organs over which Gotovina had no command.[541] There is no evidence and no finding that anyone over whom Gotovina had command was failing in his duties, nor that Gotovina had knowledge of that fact. Finally, the Chamber pointed to no legal basis that would create a "duty to act" on his part to intervene into the investigative work of non-subordinate organs.[542]

316. Second, and contrary to the Judgement's holding, Gotovina did not receive information that the competent organs were failing to perform their duties. Instead, as the Chamber found, there is insufficient evidence of a policy not to investigate crimes. Obviously, Gotovina himself would have had no reason to come to a different conclusion.

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537 See 4.7.4.
538 TJ, 2203.
539 *Boskoski* AJ, 235; and, above, 4.7.4.
540 *Blaškić* AJ, 519.
541 TJ, 2100-2118.
542 *Brdanin* AJ, footnote 557.

Consistent with the Trial Chamber's finding, Gotovina knew that competent authorities were seized of investigative matters and reasonably concluded that they were carrying out their responsibilities.[543]

317. Third, even if he had a duty to intervene, the Trial Chamber failed to establish that Gotovina had the ability to do so.

318. Accordingly, no reasonable trier of fact could have concluded that Gotovina's right to rely on other organs to enforce law and order was rebutted. This finding must be quashed and reversed.

4.7.6. The Trial Chamber erred in fact and law when finding that Gotovina had command and control over the military police for the purpose of carrying out an investigation.[544]

319. The Trial Chamber suggested that Gotovina could have used military police to prevent/punish crimes. That finding is erroneous for the following reasons:

(i) The Trial Chamber never established that Gotovina had a legal duty to intervene in the investigative work of the Military Police.[545]

(ii) Mladen Bajic, the Chief Prosecutor of Croatia and the Deputy Military Prosecutor in Gotovina's zone of responsibility, and Judge Matulovic, President of the Military Court of the Split Military District, both testified that Gotovina had no legal duty to take such investigative measures, whether through the Military Police or otherwise. This was the responsibility of other governmental organs.[546] Bajic testified that a commander's duty was to "inform the Military Police" of a crime and then it up to the Military Police to investigations and file a report with the Military Prosecutor's Office.[547] Furthermore, Bajic stated that if the Military Police is already on notice of a

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543 TJ, 2145-2146,2148,2150-2154,2193-2196.
544 TJ,144-146,2363,2365,2370,2374.
545 *Brdanin* AJ, fn.557; *Ntagerura* TJ, 659, cited by *Ntagerura* AJ, 333.
546 TJ, 2145,2148; T.20737-20739,20853,20572-20573.
547 T.20737-20739.

crime, "it would be pointless" for the commander to report the same incident.[548] If a commander knows that the Military Police has been informed about a crime, he has no further obligations except to cooperate in the investigation.[549] Judge Matulovic corroborated Bajic, stating that a commander "couldn't do anything else" other than inform the VP.[550]

(iii) Accordingly, two competent witnesses rebutted the Trial Chamber's suggestion that Gotovina should have involved himself in the work of Military Police crime investigators and the Chamber offered no basis to ignore that evidence.

(iv) The Chamber failed to establish that Gotovina had the ability to use and control members of the Military Police to perform any function relevant to the prevention/punishment of crimes. Lausic, not Gotovina, was in command of the VP for purposes of ensuring discipline, and preventing and investigating crime.[551] Lausic acknowledged as much, and the Trial Chamber repeatedly referred to Lausic's command over the VP for purposes of crime investigation.[552]

(v) The evidence establishes that Gotovina was not operationally responsible for preventing/punishing crimes in the liberated territories and that other governmental organs were competent to, and in fact were, preventing/punishing crimes.[553] Moreover, the evidence was clear that Lausic, not Gotovina, had operational command and control over the VP for crime prevention and investigation:

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[548] T.20737-T.20739.
[549] T.20739,T.20853,T.20572-T.20573.
[550] T.20572-20573.
[551] T.15416,15432; D567, 2; D978, 3.
[552] TJ, 102-105,108, 111-122, 128,133, 560,791, 873,1645, 2145-2146,2148, 2151-2154, 2164-2166,2169, 2174, 2177-2179,2188, 2194,2200,2344.
[553] TJ, 2100-2203; T.1347-1349,13497-13500,13512,4125-4128,13928-13929; P-20, pg.11, ln.12; D1217, pg.40.

(a) Following the same model as *Flash*, on 2 August, the Croatian government charged Moric and Lausic, not Gotovina, with preventing and prosecuting crime during and after *Storm*.[554] Lausic appointed his own "coordinator," Ivan Juric, to exercise command over the VPs for crime prevention and prosecution, and to provide daily status report to Lausic.[555] Juric was not required to provide any information to Gotovina.[556] Both Lausic and Juric testified that Juric was not under Gotovina's command.[557]

(b) Lausic, not Gotovina, issued orders to the VPs prior to *Storm* to ensure the implementation of military police tasks, and Lausic gave Juric the power to replace Budimir, the VP commander in the Split MD, if he did not comply with Lausic's orders.[558] Gotovina had no similar powers.

(c) On 3 August, Lausic, not Gotovina, met with MUP to coordinate their joint efforts,[559] and based on that meeting Lausic issued orders to the Military Police:

(1) to coordinate its activities with MUP;

(2) to establish law and order in populated places through the establishment of joint checkpoints with the MUP;

(3) to ensure that the checkpoints move with the advancing frontline;

(4) to take over prisoners of war from the HV units and deliver them to MUP; and

(5) to hand over women, children and the elderly to MUP.[560]

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554 TJ, 2145-2146; D1484; T.18128-18129.
555 D267, 4; D2028; D844, TJ, 108,111,114,124,1649.
556 T.27431-27432,27438-27439.
557 T.27438-27439,T.15405:6-9,T.12643.
558 TJ,113; D45, 6; T:12622, 1262312624, 15413-15414, 19311-19312.
559 TJ, 113,2145-2146; D45; P-2159, 159.
560 D269.

(d) By 4 August, Budimir implemented Lausic's tasking order, without copying Gotovina.[561]

(vi) The Trial Chamber erroneously relied on the 1994 VP Rules to conclude that crime prevention and processing, depending on the circumstances, "was not excluded from the ambit of Article 9 of the VP Rules, thereby giving Gotovina authority over the VP in this regard."[562] For reasons set forth, this conclusion has no basis in the evidence, and is unreasonable:

(a) The Trial Chamber makes no finding that Gotovina was in *de facto* command of the VP for crime investigations. In fact, it found that Gotovina used this alleged authority "rarely."[563] Instead, pursuant to Article 8 Lausic had command and control over the VP, and was operationally responsible for the VP's work in establishing law and order. The Trial Chamber itself cites to Lausic's actual command over the VP for crime investigation purposes.[564]

(b) The reporting system also establishes that Gotovina was not in command of the VP in preventing and prosecuting crime. Juric testified that he did not send reports to Gotovina,[565] and per Thuenens, Gotovina did not receive any reports on the location and movement of checkpoints.[566] He likewise did not receive reports about the MUP coordination meetings.[567] Instead, special reporting about VP tasks went exclusively from Juric to Lausic.[568]

(c) Budimir was required to file a written report to Lausic, not Gotovina, when accounting for the 72nd VP's performance during and after

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561 P2200.
562 TJ, 146.
563 TJ, 2364.
564 See footnote 550, above.
565 T.27438-27439.
566 T.12692,12693.
567 D292, 8.
568 T.12695-12697; D732-D734; D737; D1295; D1298; D1378; P879; P978.

Storm.[569] Gotovina was not even copied. Lausic then prepared his own report detailing the work of the VP in *Storm*.[570] Lausic assessed that the VPs followed the HV into the liberated areas and "prevented arson and the looting of the spoils of war," that VP units had established themselves in Knin and that they were "successfully carrying out their duties in cooperation with the MUP."[571]

(d) Lausic also reported on 15 August that "in larger places and towns, 24-hour patrols and beat service are securing public peace and order, preventing arson and uncontrolled removal of the spoils of war."[572] Lausic informed Susak that the VPs are taking "action against a large number of HV members, preventing the removal of property from structures, and appropriating materiel, equipment and other items that HV members were not authorized to take out of structures."[573]

(e) The Plitvice meeting between the MUP and VPs on 15 September was convened to improve the security situation by improving their coordination.[574] Neither Gotovina nor anyone from the military chain of command was present.

(f) Finally, even if the Rules did not exclude it, the Chamber had to establish that Gotovina had *a legal duty* to act under those Rules.[575] This, clearly, was not the case.

(vii) The Trial Chamber's conclusion that Gotovina failed to take necessary and reasonable measures in deploying the VP to improve security is not the only

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569 D737.
570 D292.
571 D292, 5,8,9.
572 D292, 13.
573 D293; D400.
574 TJ, 2166; D595, 5.
575 *Brdanin* AJ, footnote 557 and references.

reasonable explanation of the evidence because there is more than one inference reasonably open to the facts.

320. Accordingly, the finding that Gotovina could have used the military police for any of the purposes identified by the Trial Chamber is erroneous and unreasonable and must be quashed and reversed.

4.7.7.2. The Trial Chamber erred in fact and law in finding that the link between General Gotovina and persons committing crimes was not too tenuous to consider his JCE liability.[576]

321. The Defence submitted at trial that because of Gotovina's position at the top of the chain of command, his control was too tenuous to result in liability.[577] The Defence's argument was based on the Appeals Chamber's holding that "it is inappropriate to impose liability on an accused where the link between him or her and those who physically perpetrated the crimes for which he or she is charged is too tenuous."[578]

322. The Chamber rejected this position, instead holding that "the link between [Gotovina] as commander and his subordinated soldiers on the ground was not too tenuous to consider his JCE liability."[579] The Appeals Chamber made it clear that for an omission to be culpable, the accused must, *inter alia*, have "the ability to act."[580] Where the omission is said to be a failure to prevent/punish crimes, the ability to prevent/punish crimes must therefore be established in the first place.[581] In this case, not only did the Trial Chamber fail to establish Gotovina's "duty to act" in this matter, but also failed to establish his "ability" to prevent/punish the crimes in question. Instead, the Chamber drew an unreasonable and unsubstantiated conclusion that Gotovina's link to the perpetrators was not too remote considering his position in the hierarchy and that this was enough to establish his ability to act and prevent/punish those crimes. The Trial Chamber erroneously

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576 TJ, 2365.
577 DFTB, 600,620, citing ICRC Commentary, Protocol I, Art. 87, 3554.
578 *Brdanin* AJ, 418.
579 TJ, 2365.
580 *Brdanin* AJ, fn. 557; *Ntagerura* AJ, 333 citing *Ntagerura* TJ, 659.
581 This is the case, for instance, under the doctrine of command responsibility.

(i) failed to establish a necessary element, *i.e.,* actual ability to act;

(ii) failed to apply the relevant legal standard. The Appeals Chamber has characterized the use of phrases such as "not too tenuous" as legally erroneous and factually unfair;[582]

(iii) reversed the burden of proof;

(iv) convicted Gotovina for culpably failing to adopt measures he had no demonstrated ability to adopt; and

(v) assumed without foundation that a failure to adopt measures, which he was not shown to have been able to adopt, could constitute a "significant contribution" to a JCE, or acquiescence to "natural and foreseeable crimes."

323. These errors of law and fact constitute a miscarriage of justice that invalidates the decision. The Chamber's finding that Gotovina was able to adopt these measures must be quashed and reversed.

4.7.7.3. The Trial Chamber erred in fact and law when it concluded that although General Gotovina was engaged in combat in Bosnia for most of the indictment period, he was required to "retain control over subordinate units" in the indictment area.[583]

324. Despite failing to establish a basis to conclude that Gotovina had both the "duty to act" and the ability to do so, the Chamber found that Gotovina had a duty to "retain control" over units in Croatia whilst operating in Bosnia. The Trial Chamber did not find that Gotovina had control, but rather held that he had a "duty to retain control." Contrary to the Appeals Chamber's jurisprudence,[584] this finding fails to identify the basis in domestic or customary law for such a "duty" after military operations, and it also constitutes a reversal of burden of proof regarding Gotovina's need to establish control over those whom he is said to have been able to influence. The Chamber therefore erred in law.

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[582] *Blaškić* AJ, 521, regarding the use of this sort of terminology for the purpose of drawing prejudicial inferences.
[583] TJ, 144-146,2365.
[584] *Brdanin* AJ, fn. 557; *Ntagerura* AJ, 333 – requiring the actual ability to control.

325. The Chamber also failed to establish (i) that Gotovina could have retained control, (ii) that he was legally permitted or obligated to do so, and (iii) that he retained any authority or ability to exercise control, effective or otherwise, over members of units back in Croatia.

326. In light of the above, the Chamber's finding on that point was an error of law and fact, which invalidates the decision and constitutes a miscarriage of justice. It should be quashed and reversed. Taken alone or together with 4.7.7.1, these errors demonstrate the unreasonableness of the Chamber's finding that Gotovina could have adopted any of the *Chamber's Measures* and that he is culpable for failing to adopt them.

4.7.8. The Trial Chamber erred in law when it failed to provide adequate and timely notice of the measures Gotovina allegedly "could have taken," and erred in law when it failed to respect Gotovina's right to be heard and his right to present evidence concerning these alleged measures.[585]

4.7.8.1. The Trial Chamber erred in law when it failed to provide a reasoned opinion in writing explaining why and how Gotovina "could have taken" these alleged measures.

327. See above 4.7.2, 4.7.4-4.7.6, 4.7.7.1.

4.7.8.2. The Trial Chamber erred in fact and law when finding that Gotovina failed to make a serious effort to follow-up on measures against crimes.

328. See above 4.7.4.

[585] TJ, 2365,2373.

4.7.9. The Trial Chamber erred in fact and law when it failed to provide a reasoned opinion explaining how "Gotovina's failures" impacted on the general atmosphere of crime, and in finding that "Gotovina's failures" had an impact on the general atmosphere towards crimes in the Split MD.[586]

329. The finding that "Gotovina's failures" had an impact on the "general atmosphere towards crimes" was the underlying basis upon which the Chamber found that Gotovina's alleged failures made a "significant" contribution to the JCE.[587] The Chamber's failure to point to any evidence supporting this finding constitutes a violation of its duty to render a reasoned opinion.

330. This error invalidates the Judgement and constitutes a miscarriage of justice. This finding must therefore be quashed and reversed. The effect of that reversal must be assessed together with the Chamber's other errors concerning Gotovina's supposed culpable contribution to a JCE.

4.7.10. The Trial Chamber erred in fact and law when concluding that Gotovina's alleged failures made a significant contribution to the commission of the core crimes.

331. For JCE liability to attach, an act must make a "significant contribution" to the implementation of the JCE.[588]Any sort of contribution or "impact," as the Trial Chamber found, is not legally sufficient, and the Trial Chamber erred when applying an erroneous legal standard. Furthermore, the only "impact" identified was on "the general atmosphere towards crimes in the Split MD." Again, this was legally irrelevant and/or legally insufficient; the impugned conduct must make a significant contribution to "the effecting of [the JCE's] common purpose" not to a "general atmosphere."[589]

332. The Trial Chamber also found that the core crimes of the JCE did not amount to, or involve, crimes such as wanton destruction, plunder, murder, inhumane acts, cruel treatment

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586 TJ, 2370,2373,2374.
587 TJ, 2370.
588 *Kvocka* AJ, 97-98; *Brdjanin* AJ, 430.
589 *Tadic* AJ, 204.

and unlawful detentions.[590] Yet the Trial Chamber found that Gotovina made a substantial contribution to the core crimes by failing to punish non-core crimes and thus "contributing to" the general atmosphere toward crimes. A substantial contribution to non-core crimes, even if established, is irrelevant to establish Gotovina's supposedly culpable contribution to the core crimes of the JCE.[591]

333. Moreover, as explained above, there is substantial evidence to support a "reasonable inference" that Gotovina did not negatively contribute to the "general atmosphere towards crimes." Instead, through deeds and words, Gotovina directed subordinates to oppose criminality, and took many steps to prevent and punish crimes.[592] Furthermore,

(i) as outlined in Ground 1, there was no unlawful shelling and there was no order to shell civilians/civilian objects;

(ii) Gotovina's conduct had no demonstrable unlawful effect on the departure of a single Serb civilian; and

(iii) the Trial Chamber found that Gotovina had no part in any of the discriminatory/restrictive measures said to form part of the core-JCE.[593]

334. In light of this evidence, no reasonable trier of fact could have concluded that Gotovina's conduct contributed to the "general atmosphere toward crimes" or made a significant contribution to the implementation of the JCE. The Chamber's finding on that point must, therefore, be quashed and reversed.

4.7.13. The Trial Chamber erred in fact and law when it failed to establish beyond reasonable doubt that these crimes were, objectively, natural and foreseeable consequences of the implementation of the alleged JCE.

335. For JCE-III, it is necessary to establish that additional crimes are foreseeable, and must objectively be the "consequence" of the JCE's execution.[594] The Trial Chamber

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590 TJ, 2321.
591 Above, 4.7.3.
592 TJ, 2330-2333,2337; P71, 69; D201; D810, 3; D200, 6; T.19449, 21344-21345, 21366-21367,21376; D533; D1602; P1202.
593 TJ, 2325-2326,2369.

apparently found a sufficient causal link between the JCE's execution and the "natural and foreseeable crimes" on the basis of its findings that: (1) Gotovina's artillery attack order "signaled his attitude toward crimes and towards Serbs to his subordinates; and (2) the JCE execution created "a situation in which few Serbs remained in the former RSK area would greatly increase the opportunity for Croatian military forces and Special Police to commit crimes against the property of Krajina Serbs."[595]

336. The evidence supports neither of these findings. First, as explained above, through his orders and his attitude to his subordinates Gotovina had signaled quite clearly that he vigorously opposed criminal conduct. Second, evidence shows Gotovina berating his subordinates on 6 August for law and order lapses.[596] Lt. General Jones testified that Gotovina had set an appropriate command climate by sending a message that crime was not to be tolerated.[597] Accordingly, it was unreasonable to conclude that the "only reasonable explanation of the evidence" was that Gotovina had signaled to his subordinates that he would tolerate criminal conduct.

337. Second, there was no reasonable basis to conclude that there was an inverse relationship between the number of Serbs present in the Krajina and the crime rate. This claim was never part of the Prosecution case, and was never put to witness Albiston, an expert on policing matters. Moreover, the Trial Chamber found that in all areas except Knin, Benkovac, Obrovac and Gračac, Serb civilians left for reasons unrelated to unlawful HV conduct. The Trial Chamber failed to explain how shelling in the four towns referenced in Gotovina's order could reasonably have caused "natural and foreseeable crimes" in areas outside those towns.

338. Furthermore, the evidence directly contradicts a finding that these crimes were the consequence of the implementation of the supposed JCE. The conclusion that "the

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[594] *Stakic* AJ, 87(b); *Haradinaj* TJ, 137 (un-appealed); *Brdjanin*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, 28-30, applying Tadic AJ(un-appealed). TJ, 1952.
[595] TJ, 2373.
[596] TJ, 2337-2338.
[597] T.20931-20938.

leadership, including Tudjman, disapproved of the destruction of property"[598] and that significant measures were adopted by Gotovina and others to prevent and punish crimes renders such a finding unreasonable.

339. The Trial Chamber's failure to provide a reasoned opinion that "natural and foreseeable" crimes were a consequence of the implementation of the JCE constitutes an error of fact and law, which calls for the quashing of the finding that Gotovina could be held responsible in relation to the "natural and foreseeable" crimes.

4.8. The Trial Chamber erred in law when suggesting that foresight of a mere "possibility" would be enough as a matter of customary international law to trigger Gotovina's liability in relation to natural and foreseeable crimes.[599]

340. The Trial Chamber found that Gotovina could be held responsible for destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions because they were all "possible" consequences of the JCE's implementation.[600] Foresight of the mere possibility of a crime is not, however, sufficient as a matter of law: the Trial Chamber also had to satisfy itself that the possibility of a crime "is sufficiently substantial as to be foreseeable to an accused."[601] The Trial Chamber failed to do so and therefore did not apply the correct legal standard to assess Gotovina's *mens rea*, thus committing an error of law, invalidating the Judgement. Gotovina's conviction for "natural and foreseeable" crimes should therefore be overturned.

4.9. The Trial Chamber erred in fact and law when concluding that Gotovina knew of the possibility of these crimes being committed and acted culpably despite or regardless of that knowledge.[602]

341. Relying on the following factors, the Trial Chamber erroneously found that Gotovina was aware that the crimes were possibly a "natural and foreseeable" consequence of the execution of the JCE:[603]

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598 TJ, 2313.
599 TJ, 2374.
600 TJ, 2374.
601 *Karadzic*, JCEIII-Foresight Decision, 18.
602 TJ, 2372-2375.

a. Gotovina's awareness of ethnic tensions and "feeling of revenge"

342. First, to be relevant to JCE-liability, foresight of crimes must be foresight that these crimes are a natural and foreseeable consequence "of the effecting of that common purpose."[604] Foresight that a crime might be committed in general or for reasons unrelated to the implementation of the JCE could not therefore form the basis of a JCE conviction. The Chamber failed to establish and to render a reasoned opinion that any of the "natural and foreseeable" crimes were the consequence of the implementation of the supposed JCE. Instead, it pointed to factors unrelated to the JCE, such as "ethnic tensions" and "feelings of revenge."[605]

343. Second, foresight of "natural and foreseeable" crimes must be established at the time when the accused supposedly joined in the common criminal design and shared in the JCE-intent *i.e.,* "no later than the end of July 1995."[606] Gotovina's comment to Forand about troops taking revenge from 1991 crimes[607] was made with hindsight long after *Storm*. Certainly this comment does not establish any sort of foresight prior to *Storm*. On the contrary, it was an entirely accurate *ex-post facto* explanation of events that fails to suggest that Gotovina was aware that subordinates would commit crimes as a result of employing artillery in support of *Storm*.

b. Gotovina's presence at a 2 August 1995 meeting at which Susak gave instructions regarding the risk of uncontrolled conduct, including torching and looting;

344. The Trial Chamber considers that when Susak issued orders to prevent non-core crimes, this amounted to notice of the possibility of crimes occurring as a result of the implementation of the JCE common purpose. Nothing in the evidence supports such reasoning. The Trial Chamber noted that Croatia had encountered security problems after *Flash* and therefore the Croatian leadership wanted to be extra vigilant in preparing for

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603 TJ, 2374.
604 *E.g. Tadic* AJ, 204, 228; *Karadzic*, JCEIII-Foresight Decision, 18.
605 TJ, 2373-2374.
606 TJ, 2315; *Krajisnik* AJ, 163 *et seq*; *Tadic* AJ, 228.
607 TJ, 2373.

Storm.[608] Accordingly, Susak's "notice" had nothing to do with "implementation of the common purpose," but was rather one of many attempts by the Croatian authorities to prevent and punish crime. This evidence, along with evidence of Gotovina's necessary and reasonable measures, contradicts the Trial Chamber's unreasoned conclusions that Gotovina knowingly took the risk that these crimes would be committed and that he "reconciled himself" with that possibility.

345. The Judgement also disregards the Appeals Chamber's holding that evidence of orders intended to prevent or punish crimes cannot be a basis for concluding an awareness of the likelihood of crimes.[609]

c. Gotovina's "failure to adequately address the commission of crimes also shows his reckless attitude towards crimes falling outside of the common purpose"[610]

346. To impute responsibility to Gotovina for "natural and foreseeable crimes," the Trial Chamber was required to find that Gotovina acted recklessly or that Gotovina was indifferent to the risk[611] and reconciled himself to it.[612] No reasonable trier of fact could conclude that Gotovina was "reckless" with respect to crimes of subordinates, or that he was indifferent or reconciled to such crimes.

347. By taking all necessary and reasonable measures to prevent and punish crime *per* General Jones, Gotovina clearly demonstrated that he was not reckless, indifferent, or reconciled to crime. Moreover, the Trial Chamber's finding that Croatian authorities did not have a policy of non-investigation of crime and were opposed to crimes such as destruction and plunder[613] rebuts the claim that any JCE member was "indifferent or reconciled to" such crimes.

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608 TJ, 2145.
609 *Blaškić* AJ, 602.
610 TJ, 2374.
611 *Tadic* AJ, 204.
612 *Stakic* AJ, 94.
613 TJ, 2313.

348. Accordingly, the Trial Chamber erred in concluding that the only reasonable inference of Gotovina's *mens rea* was that he was reckless or indifferent to the commission of non-core crimes.

d. In relation to the crime of "unlawful detention" the Trial Chamber reasoned that this crime "often constitutes a first step in the process of a deportation"[614]

349. This proposition has no basis in evidence and the Chamber failed to show that Gotovina foresaw that such a crime would be committed. There is no evidence that Gotovina knew of any unlawful detention of Serb civilians, and the Judgement contains no reasoned finding that he did. The Chamber's reliance on this factor was therefore unreasonable.

350. Finally, instead of a "sufficiently substantial" foresight that these crimes would occur,[615] Gotovina had good reasons to believe that these crimes would not be committed and the Chamber erred when it failed to consider them:

(i) He and others had taken measures to prevent crimes with no reason to think that these measures would be ineffective; instead, he could reasonably have assumed that crimes would not be committed;[616] and

(ii) There was insufficient evidence that forces under Gotovina's command, which he had led through at least four previous military operations, had committed a single crime prior to *Storm*.[617] There was, therefore, no reason to think that they would commit crimes and very good reasons to assume that they would not.

351. On the basis of the factors mentioned by the Trial Chamber as well as those it failed to consider, no reasonable trier of fact could have found that Gotovina was aware that the crimes of destruction, plunder, murder, inhumane acts, cruel treatment, and unlawful detentions were a sufficiently substantial possibility of the implementation of a JCE as to be

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614 TJ, 2374.
615 *Karadzic*, JCEIII-Foresight Decision, 18.
616 Concerning the measures, see above Section 4.7.4. The Chamber found that "the leadership, including Tudjman, disapproved of the destruction of property" (TJ, 2313).
617 TJ, 2367. All four Operations (Winter '94, Jump 1, Jump 2 and Summer 95) took place well after the crimes of Serbs in 1991.

foreseeable to Gotovina. The Chamber's finding to the contrary and Gotovina's conviction in relation to those crimes should therefore be quashed and reversed.

4.10. The Trial Chamber erred in fact and law in failing to establish or, alternatively, in unreasonably concluding, that Gotovina possessed the requisite discriminatory dolus specialis relevant to the crime of persecution and that he had ordered the attack with that mindset and failing to provide a reasoned finding in that regard.

352. Submissions made above in 3.1.3 and 3.4.4 are adopted by reference here.

353. Persecution requires a *dolus specialis*[618] to harm victims *because* they belong to one of the enumerated groups.[619] This *mens rea* must be established with respect to each and every category of crime.[620] It can "neither [be] presumed nor 'transferred' from the direct perpetrators" and thus "it is immaterial for the assessment of the intent of … [Gotovina] … whether or not … [his subordinates] … had such a discriminatory intent."[621] In particular, "[i]t is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate."[622]

354. No reasonable trier of fact could conclude that Gotovina "consciously intended" to discriminate against Serbs because they were Serbs. The Trial Chamber was required to "carefully consider evidence of the Appellant's personal discriminatory intent."[623] The Judgement fails to provide a reasoned opinion that Gotovina acted with discriminatory intent or explain which persecutory ground – political, racial or religious– he is said to have possessed.[624] The Trial Chamber merely asserts that proposition without any reference to the evidence taken into account to arrive at that conclusion.

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618 *Stakic* AJ, 328.
619 *Tadic* AJ, 305; *Krnojelac* AJ, 184; *Blagojevic* TJ, 583; *Blaškić* TJ, 235; *Popovic* TJ, 968.
620 *Popovic* TJ, 969; *Blagojevic* TJ, 584; *Simic* TJ, 51.
621 *Stakic* AJ, 329.
622 *Krnojelac AJ,*435 (Emphasis added); *Krnojelac* AJ, 185; *Vasiljevic AJ,*113; *Kordić* TJ, 217; *Vasiljevic TJ,* 248.
623 *Stakic* AJ, 329 (Emphasis added).
624 TJ, 2371-2372, 2374. The Krnojelac Trial Judgement at footnote 56 found that the ethnic groups of the former Yugoslavia are not different races for purposes of Article 5(h) of the Statute.

355. As military commander, Gotovina's sole objective was to defeat SVK forces. There is no evidence that he ever expressed animosity toward Serbs, made discriminatory statements, or encouraged discriminatory acts. To the contrary, the Judgement recognized that Gotovina (1) issued orders and adopted measures to prevent harm against Serb civilians and property;[625] (2) expressed disapproval of crimes against Serb civilians;[626] and (3) did not contribute to adopting/implementing discriminatory/restrictive measures "against persons of Serb ethnicity."[627] These findings cannot possibly be reconciled with a conclusion that he "consciously intended" to discriminate against Serbs.

356. The Trial Chamber also disregarded additional evidence concerning further measures adopted by Gotovina to prevent discriminatory conduct. This includes orders to deploy HV soldiers to protect Serbian orthodox churches against plunder and destruction, which rebuts any suggestion that Gotovina discriminated on religious grounds.[628]

357. There is also no statement at Brioni from which a *dolus specialis* to discriminate against Serbs can be inferred. The Judgement erred in finding that "Gotovina referred explicitly to *Serb civilians*" and consequently, that he was "discussing how to provide the *Serb civilians* … a way out during the military attack."[629] The evidence clearly indicates that Gotovina only referred to "civilians" and never to "Serb civilians."[630] Furthermore, the context of those discussions – to avoid a "bloody last stand" – is ignored.[631] His attack order contains no reference to Serbs, and there is no finding that it was an order to deliberately attack civilians,[632] nor to do so on the basis of their political, racial, or religious identity. The fact that the conflict was defined by "ethnic tensions" is clearly insufficient to demonstrate discriminatory intention. The Chamber failed to point to evidence that Gotovina acted with any sort of racial, religious or political prejudice towards Serbs and that he consciously intended to discriminate on one of these grounds.

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625 See Section, 4.7.4, above.
626 D792; D979; D201; P71, pg.83; P1126.
627 TJ, 2325-2326.
628 D810, pg.3, T.8273,T.21366-21367.
629 TJ, 1992 (Emphasis added).
630 P461.
631 See Section 4.3, above.
632 See Sections 1 and 4.6, above.

358. The Chamber made reference to Gotovina's supposed awareness of "ethnic tensions."[633] This does not meet the requisite *mens rea*: (i) an awareness of ethnic tensions does not suggest that the person is motivated by and consciously intends to act pursuant to a persecutory *mens rea*; (ii) "ethnicity" is not a recognized ground of persecution under Article 5(h);[634] (iii) the *mens rea* must be established in relation to each "underlying act" not in generic terms;[635] and (iv) an awareness of ethnic tension would fall far short of the requirement of persecutory intent, *i.e.*, the intentional targeting of individual because of their political views, race or religion.[636]

359. When the Trial Chamber infers the state of mind of an Accused, that inference must be the only reasonable inference available on the evidence.[637] As set forth above, there are reasonable inferences of General Gotovina's statements at Brioni that are consistent with innocence. Therefore, the Trial Chamber (i) erred in law when it failed to render a reasoned opinion; (ii) erred in law when it failed to establish the required *dolus specialis*; and (iii) erred in fact when concluding that Gotovina acted with such discriminatory intention. These errors constitute a miscarriage of justice and invalidate the decision in relevant part. Conviction under Count 1 must therefore be quashed and reversed.

OVERALL RELIEF SOUGHT

360. As set forth fully above, the Trial Chamber erred when it found General Gotovina liable as a participant in a Joint Criminal Enterprise, and his conviction on this mode of liability should be overturned. Moreover, the Trial Chamber made no factual findings with respect to any other mode of liability under Articles 7(1) and/or 7(3) of the Statute of the Tribunal. As a result, the Appeals Chamber need not consider whether the Appellant is liable under any other mode of liability.[638]

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633 TJ, 2373.
634 *Krnojelac* TJ, footnote 56; note also that the Genocide Convention distinguishes between "race" and "ethnicity" as grounds for "discrimination."
635 *Stakic* AJ, 328; *Popovic* TJ, 969; *Blagojevic* TJ, 584; *Simic* TJ, 51.
636 *E.g. Krnojelac* TJ, 435; *Vasiljevic* TJ, 248; *Kordić* TJ, 217.
637 *Kvocka* AJ, 237.
638 *Blaškić*, AJ,93.

361. Accordingly, the Appeals Chamber should quash and reverse General Gotovina's conviction and enter a Judgement of not guilty on all counts.

Word Count (including Annexes A-F): 39044

Dated: 1 August 2011

Respectfully submitted,

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Gregory W. Kehoe

Payam Akhavan

Guénaël Mettraux

ANNEXES

Annex A Table of Number of Projectiles Landing Outside 200M or 400M Radius of Known Military Objectives; Analyzed Projectiles

Annex B Map of Knin - D-857, 3rd Trip Taken by Dawes on Aug 4th

Annex C D-1446 - Page 7 - A Map of the Wider Area of the City Benkovac

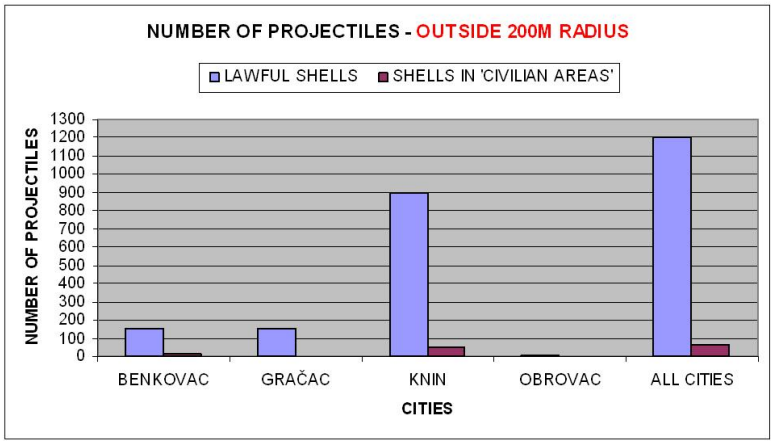
Annex D P-290 - Map of Benkovac, Witness 56; D-248 - Map of Benkovac, Witness 56

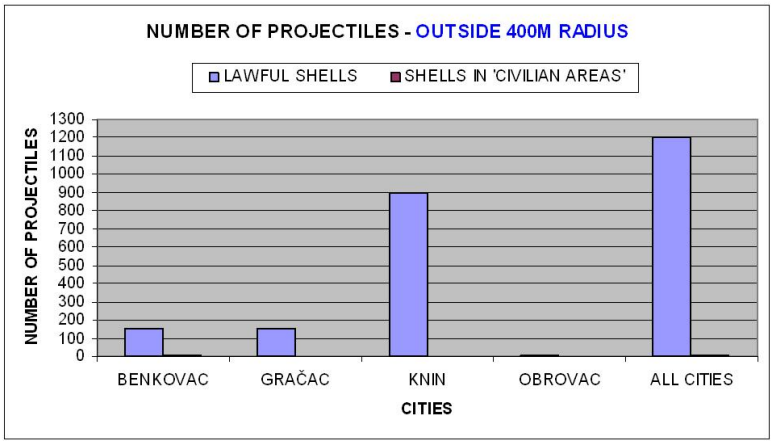
Annex E Map of the City of Knin

ANNEX A

TABLE OF NUMBER OF PROJECTILES
- LANDING OUTSIDE 200M or 400M RADIUS OF KNOWN MILITARY OBJECTIVES -

CITY	NUMBER OF PROJECTILES	NUMBER OF PROJECTILES LANDING OUTSIDE 200M RADIUS	PERCENTAGE %	NUMBER OF PROJECTILES LANDING OUTSIDE 400M RADIUS	PERCENTAGE %
BENKOVAC	AT LEAST 150	11	7,33	6	4,00
GRAČAC	AT LEAST 150	2	1,33	1	0,67
KNIN	AT LEAST 900	50	5,56	1	0,11
OBROVAC	AT LEAST 5	2	40,00	1	20,00
ALL CITIES	AT LEAST 1205	65	5,39	9	0,75



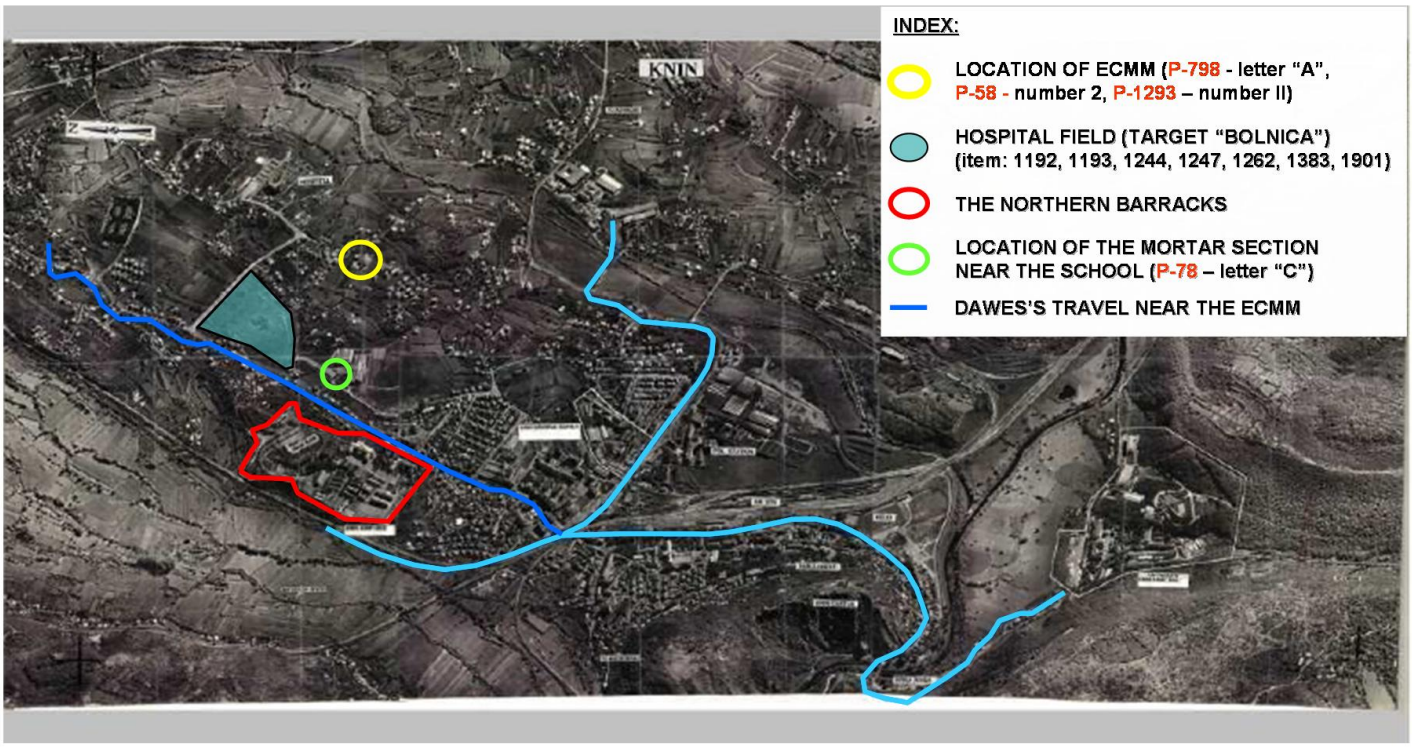


ANALYZED PROJECTILES

CITY	NUMBER OF PROJECTILES	LOCATION	DISTANCE (METRE)	NUMBER OF PROJECTILES OUTSIDE 200M RADIUS	NUMBER OF PROJECTILES OUTSIDE 400M RADIUS	ITEMS OF JUDGMENT
BENKOVAC	AT LEAST 150	BENKOVAČKO SELO, RISTIĆI HAMLET, PINE WOODS IN RISTICI	500	3	3	1414, 1920
		BARICE	250 or 400	4	0	1412, 1427, 1920
		HOUSE - WITNESS 56	250-300	1	0	1417, 1428, 1920
		FACTORIES BAGAT & KEPOL AND COOL STORAGE	700	3	3	1403, 1414, 1423, 1426, 1429, 1920, 1921
GRAČAC	AT LEAST 150	NEAR TO THE HOUSE OF WITNESS STEENBERGEN	800 or 450	1	1	1447, 1448, 1456, 1932, 1933
		NEAR TO THE HOUSE OF WITNESS GAĆEŠA	300	1	0	1446, 1451, 1456, 1932, 1933
KNIN	AT LEAST 900	NEAR THE ECMM	300	40	0	1388, 1903
		NEAR THE HOSPITAL	450	4	0	1389, 1905
		IN THE VICINITY OF KNIN CEMETERY	700	1	1	1389, 1905
		NEAR THE RAILWAY FUEL STORAGE	350	1	0	1391, 1905
		IN A FIELD IN FRONT OF THE BARRACKS UN	200	3	0	1392, 1904
		THE BUILDING MARKED "L" ON P-681	300 or 350	1	0	1387, 1903
OBROVAC	AT LEAST 5	AMBULANTA	200 to 300	1	0	1476, 1940
		TVORNICA TRIO	450	1	1	1473, 1940
ALL CITIES	AT LEAST 1205			65	9	

ANNEX B

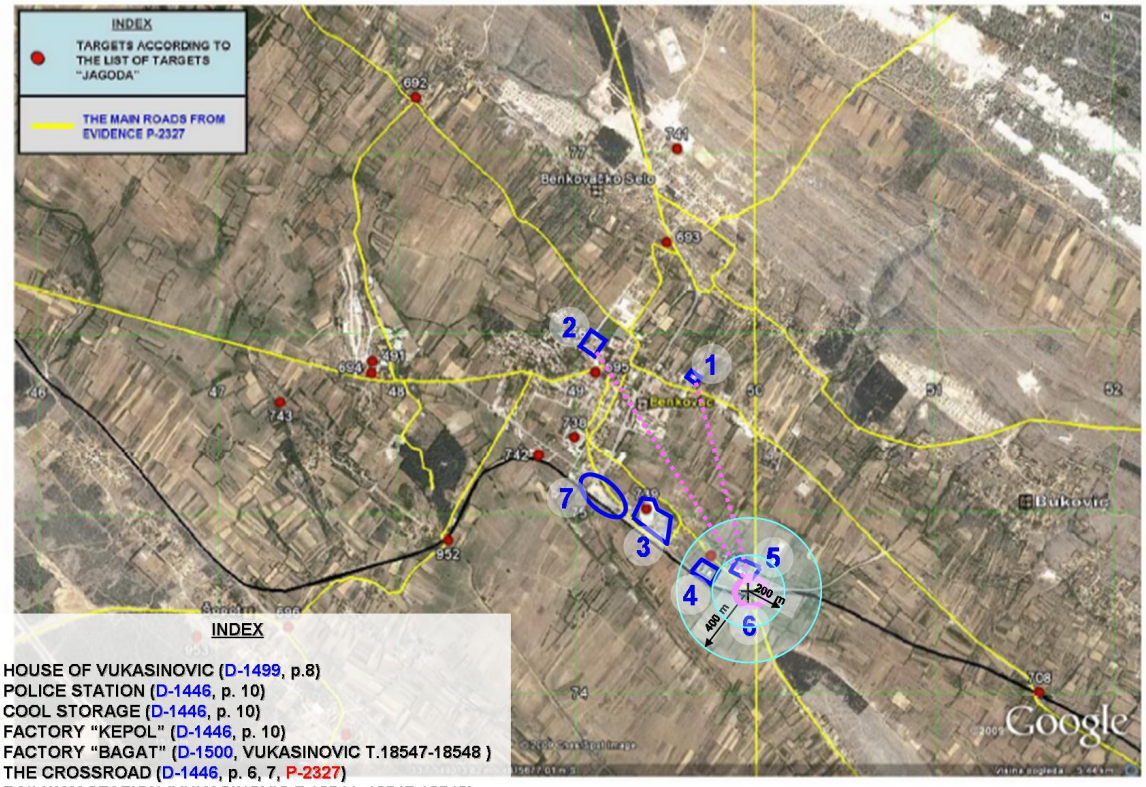
MAP OF KNIN – D-857, 3rd trip taken by Dawes on Aug 4th



ANNEX C

D-1446 – page 7

A MAP OF THE WIDER AREA OF THE CITY BENKOVAC



INDEX

1 – HOUSE OF VUKASINOVIC (D-1499, p.8)
2 – POLICE STATION (D-1446, p. 10)
3 – COOL STORAGE (D-1446, p. 10)
4 – FACTORY "KEPOL" (D-1446, p. 10)
5 – FACTORY "BAGAT" (D-1500, VUKASINOVIC T.18547-18548)
6 – THE CROSSROAD (D-1446, p. 6, 7, P-2327)
7 – RAILWAY STATION (VUKASINOVIC T.18544, 18547-18548)

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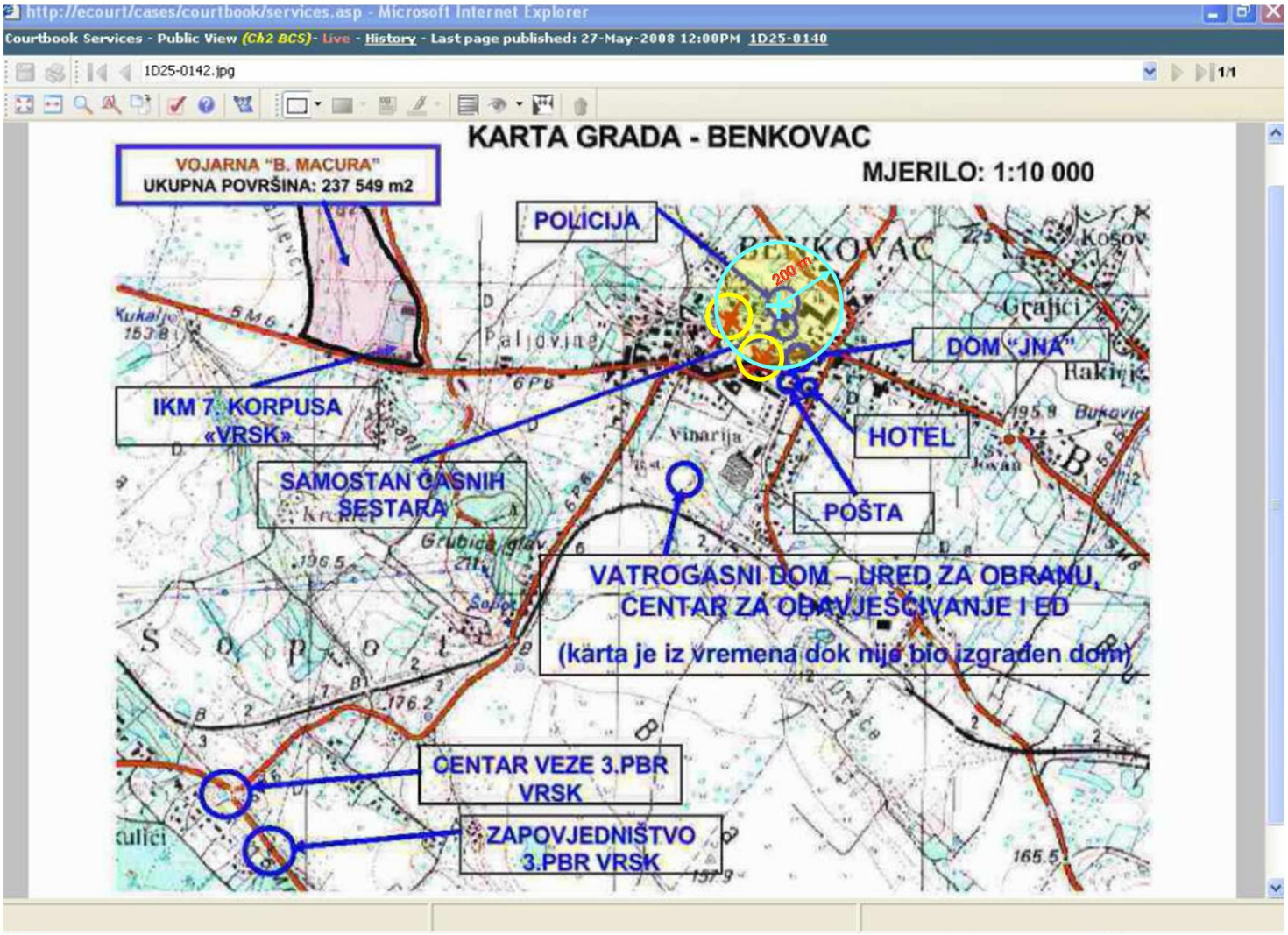
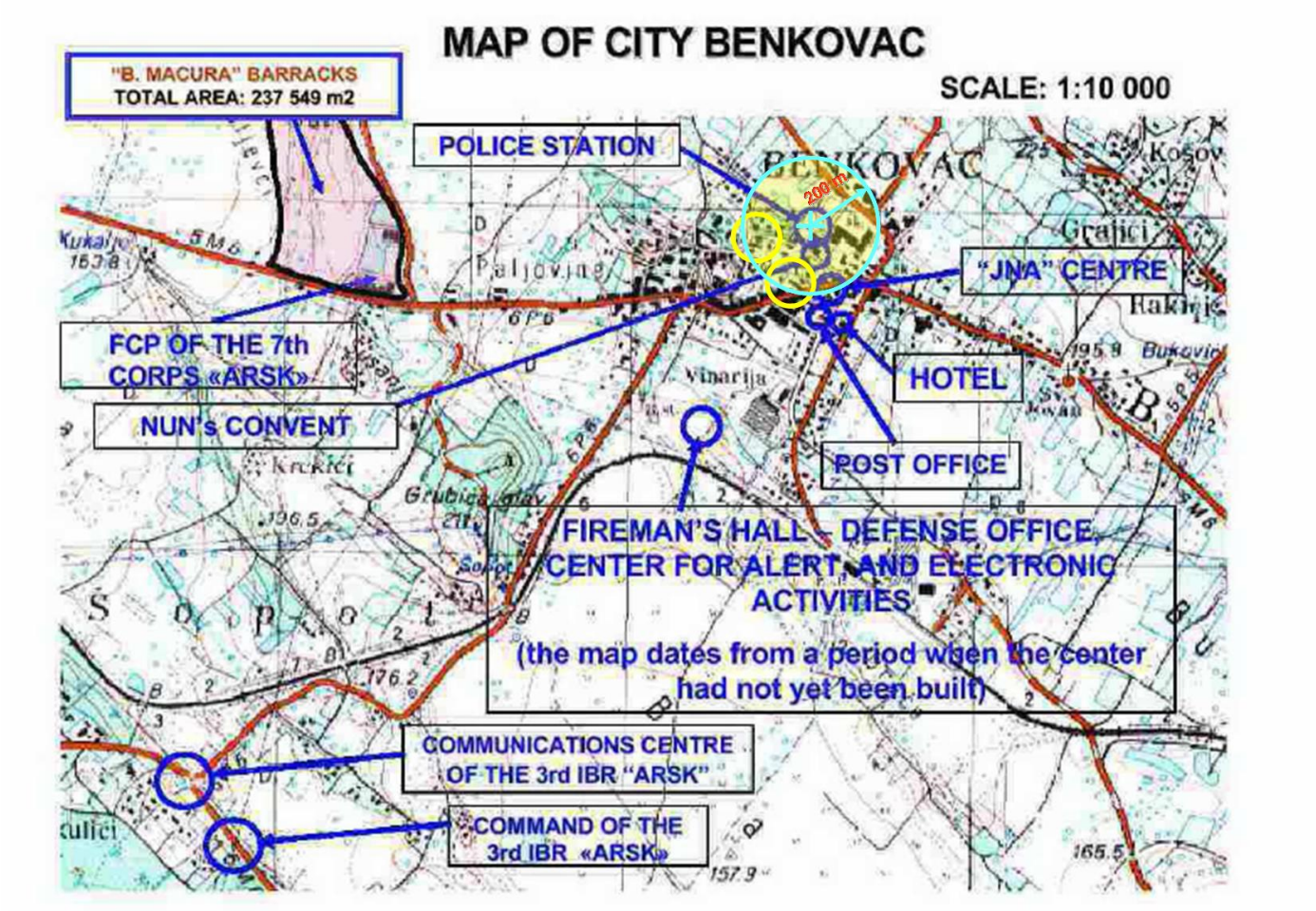
ANNEX D

P-290 – MAP OF BENKOVAC, WITNEES 56



D-248 – MAP OF BENKOVAC, WITNEES 56



ANNEX E

REDACTED