

**UNITED  
NATIONS**

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International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-06-90-A  
Date: 28 September 2011

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**IN THE APPEALS CHAMBER**

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

**Registrar:** Mr. John Hocking

**THE PROSECUTOR**

v.

**ANTE GOTOVINA  
MLADEN MARKAČ**

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**PUBLIC**

**NOTICE OF FILING OF REDACTED PUBLIC VERSION OF  
PROSECUTION RESPONSE TO ANTE GOTOVINA'S APPEAL  
BRIEF**

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

**Case No. IT-06-90-A**

**THE PROSECUTOR**

**v.**

**ANTE GOTOVINA  
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**PUBLIC**

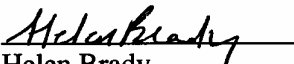
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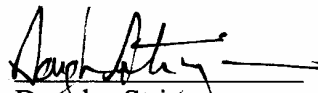
**NOTICE OF FILING OF REDACTED PUBLIC VERSION OF  
PROSECUTION RESPONSE TO ANTE GOTOVINA'S APPEAL BRIEF**

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1. The Prosecution hereby files the redacted public version of its response to Ante Gotovina's Appeal Brief. This redacted public version already incorporates the minor corrections made in the corrigendum to the confidential response filed on 28 September 2011.

Word Count: 55

  
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Dated this 28th day of September 2011  
At The Hague, The Netherlands

**UNITED  
NATIONS**

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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-06-90-A
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## I. OVERVIEW

1. When Croatia declared its independence in June 1991, Serb forces rapidly gained control of approximately one-third of the territory of Croatia, ethnically cleansing the areas in their control. They managed to hold on to these areas until the spring of 1995. By then, the Croatian armed forces had gained strength and started re-taking the territories lost to the Serbs. In July 1995, the Croatian leadership saw its chance to re-take all of the Croatian territories still held by the Serbs, and to “pay him [the Serb] back.”<sup>1</sup>

2. On 31 July 1995, President Tuđman and his most trusted political and military advisers—including Gotovina and Markač—met at Brioni Island. They not only agreed on a military strategy to defeat the Serb forces, but also on a criminal plan to expel the Serb civilian population from the Krajina by force or threat of force. The participants at the Brioni meeting decided to direct a shelling attack at the major towns of the Krajina to cause their inhabitants to flee in panic, factoring into their plan the already demoralised state of the Serb civilians.

3. This unlawful attack occurred on 4-5 August 1995, as ordered by Gotovina and Markač. During Operation Storm, at least 1200 shells were fired indiscriminately at the towns of Knin, Benkovac, Gračac and Obrovac. As anticipated, this resulted in the flight of tens of thousands of Serb civilians from these towns. On completion of the shelling attack and for the next two months, Gotovina and Markač’s units moved into the Krajina, committing crimes including murder, wanton destruction and plunder against the remaining Serb population, triggering further forcible displacements. Gotovina and Markač took no serious measures to end this criminal activity. The Croatian leadership adopted laws to prevent the Serb civilians from returning to their homes in the Krajina.

4. The Chamber properly concluded that Tuđman, Gotovina, Markač and other Croatian political and military leaders acted together in a joint criminal enterprise (JCE) to permanently remove as many Serb civilians as possible from the Krajina.<sup>2</sup> It

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<sup>1</sup> Exh.P461, p.11 (*per* Tuđman).

<sup>2</sup> Judgement, paras.2310-2320, 2370-2375, 2580-2587.



appropriately convicted Gotovina of the crimes committed by the Croatian armed units in the execution of this JCE.<sup>3</sup>

5. Gotovina fails to demonstrate any error in the Chamber's findings. His appeal should be dismissed in its entirety.<sup>4</sup> Gotovina's challenges to the Chamber's findings on the unlawful attack display a fundamental misunderstanding of the Judgement.<sup>5</sup> The Chamber found that the attack as a whole was unlawful. There is no basis for Gotovina's assertions that the Chamber found parts of the attack to be "lawful" or "unlawful", or that 95 percent of the shells fired were aimed at military targets.<sup>6</sup>

6. Gotovina's mischaracterization of the Chamber's shelling findings also permeates his arguments on the underlying cause of deportations.<sup>7</sup> His factual challenges to the cause of civilian departures mischaracterize the findings, fail to consider the totality of evidence and simply seek to re-evaluate the facts. His argument that "occupation" is an element of deportation misapplies the jurisprudence and is without merit.<sup>8</sup>

7. Gotovina's challenges to the Chamber's findings on the existence of the JCE,<sup>9</sup> and his contribution to it,<sup>10</sup> fail to demonstrate any error. He advances arguments that ignore the Chamber's factual findings and de-contextualize the evidence. He repeatedly advances his own interpretation of the evidence, re-asserting arguments that were rejected at trial. A number of Gotovina's challenges to his JCE liability demonstrate a misunderstanding of the correct application of the burden of proof and the standard of review on appeal.<sup>11</sup>

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<sup>3</sup> Judgement, paras.2368-2374.

<sup>4</sup> Although this response follows the order of the grounds in Gotovina's Brief, at times it deviates from the order of the arguments within each of Gotovina's grounds or sub-grounds, in order to respond efficiently, logically and to minimise repetition. The Prosecution has simultaneously filed its Motion to Strike. Should this be denied, the grounds specified therein should be summarily dismissed based on Gotovina's failure to develop his arguments. *E.g. Krajišnik* AJ, para.26; *Strugar* AJ, para.265.

<sup>5</sup> Gotovina Brief, Ground One.

<sup>6</sup> *See below*, II.

<sup>7</sup> Gotovina Brief, Ground Two.

<sup>8</sup> *See below*, III.

<sup>9</sup> Gotovina Brief, Ground Three.

<sup>10</sup> Gotovina Brief, Ground Four.

<sup>11</sup> *See below*, IV, V.

## II. THE CHAMBER CORRECTLY FOUND THERE WAS AN UNLAWFUL ATTACK (GROUND ONE)

### A. Overview

8. The unlawful attack unleashed on 4-5 August 1995 “formed an important element in the execution of the JCE”<sup>12</sup> to permanently remove “the Serb civilian population from the Krajina by force or threat of force”.<sup>13</sup> JCE members from the Croatian political and military leadership, including Gotovina and Markač, “took the decision to treat whole towns as targets for the initial artillery attack”,<sup>14</sup> despite their overwhelmingly civilian character.<sup>15</sup> This decision manifested itself in the indiscriminate HV shelling campaign directed at Knin, Benkovac, Gračac and Obrovac (the “four towns”) which forced the displacement of at least 20,000 civilians from the Krajina.<sup>16</sup>

9. The Chamber’s conclusion that the HV unlawfully attacked the four towns is amply supported by several mutually-reinforcing sources of evidence. The discussion between Tudman, Gotovina and the others present at Brioni explicitly refers to forcing the flight of the Serb civilian population out of the Krajina through the unlawful attack. This in turn is reflected in the plain text of the attack orders issued by Gotovina and his subordinates.<sup>17</sup> The Chamber also considered the evidence of expert witnesses who interpreted these attack orders,<sup>18</sup> the available HV artillery records and the evidence of eyewitnesses to the shelling attacks (including international/military eyewitnesses).<sup>19</sup> The disproportionate attack targeting RSK leader Milan Martić’s supposed location and the fact that the unlawful attack was spread across four different towns further indicated that civilians were the object of attack. Based on all the evidence, the Chamber properly found that Gotovina ordered a direct attack on civilians and civilian objects that encompassed the indiscriminate shelling of the four towns. Treating the four towns as targets with the intent to discriminate against

<sup>12</sup> Judgement, para.2370.

<sup>13</sup> Judgement, para.2600.

<sup>14</sup> Judgement, para.2311.

<sup>15</sup> Judgement, paras.1233, 1430, 1463, 1475.

<sup>16</sup> Judgement, para.2305.

<sup>17</sup> See e.g. Exh.P1125, p.14 (“put [...] [the four towns] under artillery fire”).

<sup>18</sup> Judgement, paras.1172, 1173, 1893.

<sup>19</sup> See e.g. Judgement, paras.1476, 1911, 1923, 1935, 1943.

Krajina Serbs rendered the artillery attack persecutory and unlawful, notwithstanding the presence of designated military objects within the towns.

10. Ground One of Gotovina's appeal rests on a fundamental misinterpretation; he claims that parts of the artillery attack were found by the Chamber to be "lawful" and the remaining parts were found by the Chamber to be "unlawful." In fact, by targeting the four towns as such, the Chamber found that the attack as a whole was directed against civilians and civilian objects.<sup>20</sup>

11. Gotovina's misinterpretation and his subsidiary arguments (*e.g.*, "95 percent of the shells were lawful") pervade Ground One. Section B addresses Gotovina's "lawful/unlawful" attack argument, and shows that the Chamber reasonably relied on numerous factors and sources of evidence to conclude that the shelling targeted civilians. Section C explains how the Chamber reasonably derived a 200-metre margin of error for the HV artillery and then used this margin as part of its determination that Marko Rajčić (Chief of Artillery for the Split MD during Operation Storm and a direct subordinate of Gotovina) was not credible when he claimed that Gotovina's order was understood by subordinates only to target designated military objectives. Sections D to I show that Gotovina's challenges to particular shelling incidents in the four towns are unfounded, as are his arguments on targets of opportunity, proportionality, the burden of proof and *mens rea*.

12. Gotovina fails to show that no reasonable Chamber could have found that the artillery attack on the four towns was unlawful, occasioning a miscarriage of justice, or that the Chamber erred in law, invalidating the judgement. Ground One should be dismissed.

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<sup>20</sup> *Below*, II.B.3-5.

## **B. The four towns were unlawfully targeted (1.2, 1.2.1, 1.2.2)**

### 1. Overview

13. The Chamber correctly applied the law in determining that Gotovina ordered a direct attack<sup>21</sup> on the four towns, which encompassed indiscriminate shelling.<sup>22</sup>

### 2. The Chamber correctly found the existence of a direct attack based, *inter alia*, on indiscriminate shelling of the four towns

#### (a) The attack was directed against civilians

14. Contrary to IHL,<sup>23</sup> the Serb civilian population in the four towns was made the object of attack. The unlawful attack occurred as an integral part of a JCE whose members intended to target civilians to force them out of the Krajina.<sup>24</sup> In furtherance of this goal, whole towns were treated as targets,<sup>25</sup> despite having overwhelmingly civilian populations.<sup>26</sup> The shelling achieved its intended effect; at least 20,000 Serb civilians were forcibly displaced as a result of the shelling.<sup>27</sup> The Chamber's finding of a direct attack flows from the Indictment, which made clear that the unlawful attack in this case was directed against civilians.<sup>28</sup>

#### (b) The indiscriminate or disproportionate nature of an attack can be evidence that the attack is directed against civilians

15. Gotovina claims that, “[b]ecause the Prosecution charged ‘unlawful attacks on civilians and civilian objects,’ it must be deemed to have charged the specific crime of ‘direct attack’ to the exclusion of indiscriminate or disproportionate attack.”<sup>29</sup> This assertion reveals a fundamental misunderstanding of the nature of unlawful attacks as provided for in API and elaborated in Tribunal jurisprudence.

<sup>21</sup> In his Brief Gotovina refers to “direct attack” and “deliberate attack.” See *e.g.* paras.91, 92. The Prosecution understands both terms to refer to an attack intended to target civilians. The Prosecution uses “direct attack” in this Brief.

<sup>22</sup> *Contra* Gotovina Brief, paras.89-102.

<sup>23</sup> *Kordić* AJ, para.48.

<sup>24</sup> Judgement, paras.1992-1995.

<sup>25</sup> Judgement, paras.2304-2305, 2311.

<sup>26</sup> Judgement, paras.1233, 1430, 1463, 1475.

<sup>27</sup> Judgement, paras.1710, 2305.

<sup>28</sup> Indictment, paras.28, 34. See also Decision on Rule 73, paras.25, 28.

<sup>29</sup> Gotovina Brief, para.91 (citations omitted).

16. In *Galić*, the Appeals Chamber clarified the overlapping nature of various forms of unlawful attack, approving the *Galić* Trial Chamber's holding that the existence of a direct attack may be inferred from the indiscriminate nature of the weapon used, or from the disproportionate nature of an attack.<sup>30</sup> This holding was extended to indiscriminate shelling attacks in *Strugar*.<sup>31</sup>

17. Moreover, the existence of an indiscriminate attack is not only relevant to whether the *actus reus* of an unlawful attack has been proven. The fact that an indiscriminate attack was carried out may also be considered in determining the *mens rea* of the accused.<sup>32</sup>

18. The strict compartmentalization which Gotovina advances (direct attacks to the exclusion of indiscriminate or disproportionate attacks) is not supported in the jurisprudence and should be rejected.<sup>33</sup>

(c) The Chamber considered the relevant factors to infer a direct attack

19. The Appeals Chamber has consistently observed that, in addition to the existence of an indiscriminate or disproportionate attack, the intent to target civilians may be inferred from other factors. These include the means and method used in the attack, the distance between the victims and source of fire, ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity, the status and appearance of victims and the nature of the crimes committed in the course of the attack.<sup>34</sup>

20. Gotovina asserts that the Chamber did not take such factors into account in determining whether civilians and civilian objects were directly attacked.<sup>35</sup> This is incorrect.

<sup>30</sup> *Galić* AJ, paras.132-133.

<sup>31</sup> *Strugar* AJ, para.275.

<sup>32</sup> *Cf. Milošević* AJ, para.37.

<sup>33</sup> Gotovina relies in part on *Kordić* AJ (para.416) and *Strugar* TJ (para.281) to support the assertion that an attack is either direct, indiscriminate or disproportionate. However, the subsequent Appeals Chamber Judgements in *Galić* (paras.132, 133), *Strugar* (para.275) and *Milošević* (paras.66-67) make clear that such an "either/or" proposition is incorrect.

<sup>34</sup> *Milošević* AJ, para.66 and fn.176; *Strugar* AJ, para.271; *Galić* AJ, para.132.

<sup>35</sup> Gotovina Brief, para.101.

21. Gotovina advances “factors” that are not supported by the jurisprudence. The *Blaškić* AJ did not hold that the widespread/systematic nature of an attack or the number of incidents relative to a location’s size are factors for inferring an intent to target civilians.<sup>36</sup> In any event, such “factors” were met here.<sup>37</sup> Meanwhile, a lack of evidence that civilians were intentionally targeted is not a stand-alone factor,<sup>38</sup> but rather goes to the overall question of whether the perpetrators intended to target civilians, which was the case here (*e.g.*, the Brioni meeting).

22. With regard to the factors Gotovina correctly identifies, as well as the other factors noted above,<sup>39</sup> the Chamber clearly considered these factors to conclude there was a direct attack against civilians and civilian objects, as the following table shows.<sup>40</sup>

Factor for Inferring Intent	Findings
Means and method <sup>41</sup>	The Chamber “has considered the amounts of shells fired, the types of artillery weapons used, [...] the manner in which they were used [...], the accuracy of artillery weapons and the effects of artillery fire.” <sup>42</sup>
Distance between victim and source of fire	The Chamber noted the distances in kilometres for each artillery unit that shelled Knin, Benkovac and Gračac. <sup>43</sup>
Ongoing combat activity at the time and location of the incident	The Chamber found that there was minimal SVK and police presence in the four towns; the nearest combat units were several kilometres away. <sup>44</sup>
Presence of military facilities	The Chamber extensively analysed whether military objectives were present. <sup>45</sup>

<sup>36</sup> *Blaškić* AJ, paras.156, 464. *See also* *Martić* AJ, para.254. *Contra* Gotovina Brief, para.100, fns.195, 197.

<sup>37</sup> The unlawful attack was part of a widespread and systematic attack: Judgement, paras.1913, 1925, 1937, 1945. Also, the HV fired at least 1200 shells into four small towns, so the size of the Krajina or Sector South is irrelevant. *Contra* Gotovina Brief, para.101, fn.202.

<sup>38</sup> *Contra* Gotovina Brief, paras.101-102. His argument that civilian *areas* were targeted instead of civilians is addressed elsewhere; *below*, II.B.4.

<sup>39</sup> Gotovina’s “fierce fighting” factor is equivalent to ongoing combat activity at the time and location of the incident. *Compare* *Blaškić* AJ, para.464 *with* *Milošević* AJ, para.66. *Contra* Gotovina Brief, para.100-101, fn.196.

<sup>40</sup> *Cf.* *Milošević* AJ, para.68.

<sup>41</sup> Gotovina’s 95-percent argument is addressed elsewhere. *Below* II.C.3. *Contra* Gotovina Brief, para.101.

<sup>42</sup> Judgement, para.1892. *See also* para.1897.

<sup>43</sup> Judgement, paras.1241, 1452, 1898, 1916, 1928.

<sup>44</sup> Judgement, paras.556, 1222-1225, 1408-1409, 1414, 1430, 1443-1445, 1448-1449, 1463, 1467, 1470-1471, 1475, 1908, 1921, 1933, 1941.

Factor for Inferring Intent	Findings
Status and appearance of victims	The Chamber repeatedly noted the civilian nature of objects that were shelled. <sup>46</sup>
Nature of crimes committed in the course of the attack	The Chamber found that murder, deportation, wanton destruction, plunder, inhumane acts, and unlawful detention as persecution were also committed against Serb civilians on 4 and 5 August. <sup>47</sup>
Scale of casualties and destruction	The Chamber found that shelling resulted in the deportation of at least 20,000 Serbs, as well as damage to civilian objects. <sup>48</sup>

23. Because the Chamber found the shelling as a whole was unlawful, it was not required to assess these factors “on an incident-by-incident basis.”<sup>49</sup> As for the scale of casualties and destruction, Gotovina ignores the fact that a particular result is not required when, as here, unlawful attacks were charged as persecution.<sup>50</sup>

(d) The Chamber reasonably evaluated the evidence to find that the four towns were directly attacked

24. The Appeals Chamber has emphasized that the list of factors addressed above is “non-exhaustive” and consideration of the question of direct attack must take place on a case-by-case basis.<sup>51</sup> The list of factors discussed in *Galić, Strugar and Milošević* relates to *circumstantial evidence* from which one may infer an unlawful attack.

25. This case presents the unique situation whereby, in addition to the *circumstantial* evidence, the Chamber was presented with *direct* evidence that civilians and civilian objects were the intended target of the attack. Indeed, some of the most compelling evidence supporting the Chamber’s finding that there was a direct attack against civilians and civilian objects relates to events which occurred

<sup>45</sup> Judgement, paras.1373-1397, 1427-1430, 1456-1463, 1473-1476, 1898-1905, 1920-1921, 1932, 1940.

<sup>46</sup> Judgement, paras.1903-1905, 1920-1921, 1932, 1940.

<sup>47</sup> Judgement, paras.328-331, 350-351, 396, 430, 434, 476, 504, 570, 697, 768-770, 993, 1726, 1731, 1736, 1751, 1772, 1775, 1785, 1789, 1792, 1795, 1800, 1872.

<sup>48</sup> Judgement, paras.1710, 1903, 1920, 1940, 2305.

<sup>49</sup> *Contra* Gotovina Brief, para.100. *See also* para.101.

<sup>50</sup> *Kordić* AJ, para.105. *Contra* Gotovina Brief, fn.198.

before the first shell was fired. In addition to the factors identified above, the Chamber made findings on the following seven points, properly concluding that the only reasonable inference was that a direct attack was intended and executed.

(i) At Brioni the JCE members agreed to carry out an unlawful attack to remove the Serb civilian population from the Krajina

26. On 31 July 1995 Tuđman convened a meeting at Brioni with high-ranking HV officials to discuss “whether, how and when a military operation against the SVK should be launched.”<sup>52</sup> Gotovina and Markač were present.<sup>53</sup> Having been briefed on an outline of Operation Storm, Tuđman stated:

[P]articularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that’s still not the situation in Knin today[...] Therefore, we will have to resolve this with UNCRO, this matter as well, and so forth. But their counterattack from Knin and so forth, it would provide very good justification for this action and accordingly, we have the pretext to strike, if we can with artillery, you can[...] for complete demoralisation[...] not just this[...].<sup>54</sup>

27. Gotovina replied confidently: “Mr. President, at this moment we completely control Knin with our hardware. That’s not a problem, if there is an order to strike at Knin, we will destroy it in its entirety in a few hours.”<sup>55</sup>

28. Additional exchanges at Brioni between Tuđman and Gotovina confirm their interest in bringing about the departure of the civilian population and demonstrate the targeting capability of the HV artillery that Gotovina deployed in the subsequent attack.<sup>56</sup>

29. The Chamber concluded that the discussion at Brioni was about “civilians being forced out.”<sup>57</sup> This was “to a large extent achieved through the unlawful attacks

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<sup>51</sup> Milošević AJ, para.67.

<sup>52</sup> Judgement, paras.1989-1990.

<sup>53</sup> Judgement, para.1989.

<sup>54</sup> Exh.P461, p.10. See Judgement, para.1975.

<sup>55</sup> Exh.P461, p.10. See Judgement, para.1975.

<sup>56</sup> Exh.P461(1D76-0001), p.7, 1D76-0110, p.15. See Judgement, para.1977.

<sup>57</sup> Judgement, para.1995.



against civilians and civilian objects in [the four towns].”<sup>58</sup> The Chamber thus linked Gotovina’s assurances at Brioni with the “reality” of the unlawful artillery attacks that he then ordered.<sup>59</sup> It found that the decision to “treat whole towns as targets” for the artillery attack was part and parcel of the common criminal plan.<sup>60</sup>

(ii) Gotovina ordered an unlawful artillery attack targeting the four towns

30. On 2 August 1995, two days after the Brioni meeting, Gotovina issued his Offensive Operation Order for Operation Storm. The text clearly indicates that the four towns themselves were among the approved targets:

focus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy’s front line, command posts, communications centres, artillery firing positions *and by putting the towns of Drvar, Knin, Benkovac, Obrovac and Gračac under artillery fire.*<sup>61</sup>

31. Inclusion of the towns as targets was a change in policy from the HV Main Staff directive on Operation Storm of 26 June 1995.<sup>62</sup>

(iii) Gotovina’s order to target the four towns was repeated down the chain of command

32. Gotovina’s order to target the four towns, confirmed by an attachment drafted by Rajčić,<sup>63</sup> was repeated down the chain of command. Colonel Mladen Fuzul, OG Zadar commander, and Marijan Firšt, OG Zadar chief of artillery, both issued orders repeating verbatim the command to put some or all of the four towns under artillery fire.<sup>64</sup>

(iv) Gotovina’s order did not sufficiently identify designated targets

33. Experts testified that Gotovina’s order did not sufficiently identify designated military targets.

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<sup>58</sup> Judgement, para.2311.

<sup>59</sup> Judgement, para.2305 (“Within days of the discussion at Brioni, Gotovina’s words became a reality.”).

<sup>60</sup> See Judgement, para.2311.

<sup>61</sup> Exh.P1125, p.14 (emphasis added).

<sup>62</sup> Judgement, para.1179. See also Exh.D956, p.6.

<sup>63</sup> Exh.D970, pp.2-3.

<sup>64</sup> Judgement, paras.1187, 1402, 1405. See also Exhs.P1201, p.4; P1263, p.8.

34. Konings testified that Gotovina's order did not provide clear guidance on what should be targeted. He noted that when an order to shell a city does not include precise military targets, commanders might randomly fire into the city as a result. It would also mean deliberately taking the risk that shells would fall in civilian areas only.<sup>65</sup>

35. Even Defence expert witness Corn conceded that Gotovina and Rajčić's orders were open to varying interpretations, and one such interpretation could be to shell the entire town of Knin.<sup>66</sup> Corn's other interpretation, of itself, was insufficient to undermine the Chamber's findings when considered against the other evidence in the case.<sup>67</sup>

(v) The coordinated artillery attack on the four towns was executed on 4 August 1995 in accordance with Gotovina's order

36. Operation Storm was launched with coordinated artillery attacks on 4 August 1995. Artillery units opened fire on Knin,<sup>68</sup> Benkovac<sup>69</sup> and Gračac<sup>70</sup> at 5:00 a.m.<sup>71</sup> and on Obrovac soon after (approximately 7:00 a.m.<sup>72</sup>). The Chamber took this coordination into account in finding that it was an unlawful attack.<sup>73</sup>

37. As the Chamber correctly noted, the HV's own documentation showed that the towns themselves were targeted.

- Regarding Knin, a report from TS-4 dated 4 August 1995 indicated that eight 130-mm projectiles were directed "at Knin" and an additional eighteen 130-mm projectiles were fired "at the general area of Knin at irregular intervals."<sup>74</sup>

<sup>65</sup> Judgement, para.1172. *See also* Exh.P1259, p.14.

<sup>66</sup> Judgement, para.1173.

<sup>67</sup> *Contra* Gotovina Brief, para.105.

<sup>68</sup> Judgement, para.1367. *See also* Judgement, paras.1245, 1247, 1262, 1270-1271, 1274-1275, 1277-1278, 1281, 1287, 1290, 1292, 1294-1299, 1301-1307, 1310-1312.

<sup>69</sup> Judgement, para.1420. *See also* Judgement, paras.1410, 1414. *But see* Judgement, para.1412.

<sup>70</sup> Judgement, para.1451. *See also* Judgement, paras.1439, 1441-1442, 1445-1447. *But see* Judgement, para.1440.

<sup>71</sup> Exh.P1125, p.6.

<sup>72</sup> Judgement, para.1473. *See also* Judgement, para.1469.

<sup>73</sup> Judgement, paras.1911, 1923, 1935, 1943.

<sup>74</sup> Judgement, para.1249, citing Exh.P1268. This report records numerous projectiles fired "at the area of" several other villages and locations. *See also* Judgement, para.1262.

Another report from TS-4 indicated that at least one of the targets it engaged on 5 August 1995 was simply identified as “Knin”.<sup>75</sup>

- Also regarding Knin, the Chamber observed that the 7<sup>th</sup> Guards Brigade reported firing MBRL (rockets) by reference to 300-metre diameter S-numbered circles marked on the Ivančića map.<sup>76</sup> This map was an infantry map of a type plainly unsuitable for the targeting of artillery. Contrary to Gotovina’s suggestion,<sup>77</sup> the Chamber found that the HV fired both shells and rockets at Knin on 4-5 August 1995.<sup>78</sup>
- Regarding Benkovac, a report by the 134<sup>th</sup> Home Guard Regiment stated that, in the first few hours of the operation, “we had no support from the Zadar OG except for shelling of the general area of Benkovac without monitoring, and the message at 0530 hrs of the following contents: ‘is anything falling on Benkovac?’”<sup>79</sup> The Chamber noted that the report “indicates that the HV were shelling Benkovac without artillery observers” and that “the language of the report could indicate that the HV treated the town of Benkovac as a target”.<sup>80</sup>
- Regarding Gračac, two reports indicated that the relevant artillery units “treated the town of Gračac itself as a target when firing artillery projectiles on at least five occasions”.<sup>81</sup> An Operations Diary recorded firing 17 130-mm projectiles “at Gračac” during the course of 4 August 1995.<sup>82</sup> A Special Police Log recorded “artillery fire targeting Gračac” twice on 4 August.<sup>83</sup>

38. Gotovina fails to show that the Chamber unreasonably considered this HV documentation in the context of all the evidence in the record.<sup>84</sup> The Chamber did not consider any single HV document determinative of the question whether whole towns were treated as targets. Rather, it reasonably determined in light of all the evidence

<sup>75</sup> Judgement, para.1264.

<sup>76</sup> Judgement, paras.1263, 1896; Exh.P2338.

<sup>77</sup> Gotovina Brief, para.113.

<sup>78</sup> See e.g. Judgement, paras.1241, 1252-1254, 1257, 1260-1261, 1263, 1265, 1367-1368, 1898-1899.

<sup>79</sup> Exh.P1200, p.2.

<sup>80</sup> Judgement, para.1915.

<sup>81</sup> Judgement, para.1927. See also paras.1439-1440; Exh.P2436, pp.5-8. (Para.1927 of the Judgement erroneously cites P2346. Cf. Judgement, Vol.I, fns.5518-5520.)

<sup>82</sup> Exh.P2436, pp.5-8 (entries for 0955, 1120 and 1920 hrs).

<sup>83</sup> Exh.P2385, pp.2-3 (entries for 0855 and 1130).

<sup>84</sup> *Contra* Gotovina Brief, para.112.

that these documents were consistent with its interpretation of Gotovina's order that the four towns should be targeted as such.<sup>85</sup> A brief on appeal is not the proper forum to challenge the official translation of a trial exhibit.<sup>86</sup>

39. As Drvar is outside the indictment area,<sup>87</sup> the Prosecution did not pursue this aspect of the case. The Chamber was not obliged to make findings about Drvar since it did not form part of the Indictment. Nor was this demanded by the case as articulated by the parties.<sup>88</sup>

(vi) Eyewitness testimony supports the conclusion that it was an unlawful attack

40. The Chamber received extensive evidence from eyewitnesses in the four towns who experienced the shelling attack and saw the damage sustained. This evidence also permitted the Chamber to determine the precise impact locations of a number of rounds that impacted the four towns. Although the Chamber correctly exercised caution in the weight it attributed to the eyewitness testimony,<sup>89</sup> its conclusion as to the overall indiscriminate nature of the attacks was fully supported by and consistent with this evidence.<sup>90</sup>

41. The opening salvos were especially intense in Knin.<sup>91</sup> In several towns, the initial artillery fire was followed by a day of unpredictable, sudden and sporadic attacks.<sup>92</sup>

42. Witnesses present in Knin during the attack consistently testified that it was their impression the shelling was indiscriminate.<sup>93</sup> They described shells falling "everywhere, without an apparent target"<sup>94</sup> and "shellfire hitting the entire town."<sup>95</sup> Alain Forand, UNCRO Sector South Commander, concluded that the shelling of Knin was "indiscriminate and directed against the civilian population to create mass

<sup>85</sup> Judgement, paras.1895-1896, 1911, 1915, 1923, 1927, 1935.

<sup>86</sup> *Contra* Gotovina Brief, para.110.

<sup>87</sup> Indictment, paras.13, 22, 48.

<sup>88</sup> *Contra* Gotovina Brief, para.102(v).

<sup>89</sup> *E.g.* Judgement, para.1366.

<sup>90</sup> *E.g.* Judgement, paras.1372, 1911.

<sup>91</sup> Judgement, paras.1365, 1367.

<sup>92</sup> *See* Judgement, paras.1365, 1367, 1369, 1420, 1427, 1429, 1451. *See also* para.1897.

<sup>93</sup> Judgement, paras.1269-1270, 1278, 1284, 1288, 1295-1296, 1301, 1309, 1311.

<sup>94</sup> Judgement, para.1277.

<sup>95</sup> Judgement, para.1287.

panic.”<sup>96</sup> The Chamber expressly referred to witness evidence of shells impacting in dozens of areas of Knin spread across the entire town. These areas included civilian residential areas.<sup>97</sup>

43. Gotovina’s argument as to the “spread of disputed shells” is misdirected.<sup>98</sup> The Chamber reasonably drew inferences from the location of particular projectile impacts around Knin town, given Rajčić’s claim that only certain military objects in certain areas were targeted. For example, the presence of a significant number of impacts in the north-east quadrant of Knin—where there were little or no military objects—is inconsistent with the claim that the HV only fired at designated targets.

44. Gotovina’s subjective criticism of the consistent eyewitness testimony that artillery projectiles appeared to land all over Knin does not demonstrate that it was unreasonable for the Chamber to take such evidence into account.<sup>99</sup> Indeed, the Chamber correctly took a cautious approach, recognising that such evidence alone may be insufficient to contradict Rajčić’s evidence that only designated targets were attacked.<sup>100</sup> The Chamber nonetheless reasonably relied in part on this evidence to find that Knin was targeted as such. Contrary to Gotovina’s assertion,<sup>101</sup> this evidence was corroborated by other evidence including the orders to attack the towns, the evidence of the particular impact locations, the evidence of damage, and so on. Insofar as the general evidence of indiscriminate shelling in Knin formed part of the consistent body of evidence demonstrating that the town was targeted as such, it also supported the evidence that Benkovac, Gračac and Obrovac were also targeted as such.<sup>102</sup>

45. Further contradicting the Defence claim that the HV concentrated its fire on designated targets, the Chamber cited witness accounts of Knin in the aftermath of the shelling which suggested that the damage was generally spread across the town.<sup>103</sup>

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<sup>96</sup> Judgement, para.1336.

<sup>97</sup> Judgement, paras.1276, 1278, 1281-1282, 1284-1285, 1287-1288, 1290-1292, 1295-1300, 1302-1305, 1307, 1309, 1325-1330, 1336, 1339-1340.

<sup>98</sup> Gotovina Brief, paras.122-124.

<sup>99</sup> Gotovina Brief, para.114.

<sup>100</sup> *E.g.* Judgement, paras.1372, 1893, 1911.

<sup>101</sup> *Contra* Gotovina Brief, para.114.

<sup>102</sup> *Contra* Gotovina Brief, para.116.

<sup>103</sup> Judgement, paras.1276-1278, 1292, 1306, 1325, 1343, 1345, 1347-1349, 1354-1359. *But see* paras.1340, 1344, 1350.

46. Gotovina's claim that the Chamber failed to consider damage assessments made after the cessation of Operation Storm lacks merit.<sup>104</sup> Not only did the Chamber make extensive reference to the four UN reports which Gotovina now cites,<sup>105</sup> it also heard and considered testimony from witnesses (Ermolaev,<sup>106</sup> Akashi,<sup>107</sup> Flynn,<sup>108</sup> Anttila,<sup>109</sup> Munkelien,<sup>110</sup> Elleby<sup>111</sup>) who could speak about the circumstances in which those reports were made and/or their contents. Where the Chamber found aspects of these reports unreliable, it said so.<sup>112</sup> Similarly, given the parties' limited reliance upon the Human Rights Watch report<sup>113</sup> and its extensive reliance on "indirect sources", the Chamber expressly decided to treat it with caution.<sup>114</sup>

47. Gotovina mischaracterises the content of some of the UN reports as providing "no evidence of indiscriminate shelling"<sup>115</sup> or indicating "minimal" damage.<sup>116</sup> Exhibit P111, which refers to the "the main" artillery impacts in Gračac falling around the "main junction" is consistent with the Chamber's findings.<sup>117</sup> Akashi's observation of Knin, in exhibit D29, likewise corroborates the effects of the indiscriminate attack as found by the Chamber.<sup>118</sup> The reference to "concentrated" shelling in the Secretary-General's report to the UN Security Council and in a preparatory document is not incompatible with the Chamber's finding that the four towns were targeted as such.<sup>119</sup>

48. The Chamber heard evidence that exhibit P64, an 18 August 1995 UNMO report of a preliminary damage assessment in Knin, was partial and inaccurate.<sup>120</sup>

<sup>104</sup> Gotovina Brief, paras.102(i), 115.

<sup>105</sup> Compare Gotovina Brief, fns.203-204 (citing Exh.D29), with Judgement, paras.895, 1345, 1607, 1611, 2512. Compare Gotovina Brief, fns.203-204 (citing Exh.P64), with Judgement, paras.1354-1356. Compare Gotovina Brief, fns.203-204 (citing Exh.P228), with Judgement, paras.917, 1350, 1376, 1378, 1384, 1389. Compare Gotovina Brief, fn.206 (citing Exh.P111), with Judgement, paras.684, 692, 894, 1448, 1459, 1486, 2511-2512, 2516.

<sup>106</sup> See e.g. Judgement, para.1305.

<sup>107</sup> See e.g. Judgement, para.895.

<sup>108</sup> See e.g. Judgement, paras.1345, 1389.

<sup>109</sup> See e.g. Judgement, paras.1351, 1353, 1355.

<sup>110</sup> See e.g. Judgement, paras.1352-1353, 1356.

<sup>111</sup> See e.g. Judgement, paras.1312, 1332, 1350.

<sup>112</sup> Judgement, paras.1354-1356, 1389.

<sup>113</sup> Exh.D183. See Gotovina Brief, fn.204.

<sup>114</sup> Judgement, paras.48-49, 55.

<sup>115</sup> Gotovina Brief, para.102(i).

<sup>116</sup> Gotovina Brief, para.3.

<sup>117</sup> Compare Exh.P111, p.3, with Judgement, paras.1931-1932.

<sup>118</sup> Compare Exh.D29, pp.1-2, with Judgement, paras.1366, 1389.

<sup>119</sup> Contra Gotovina Brief, para.3 (citing Exhs.D90, D1666).

<sup>120</sup> Judgement, paras.1354-1356. But see Roberts, T.7081-7082.

Since UNCIVPOL personnel did not necessarily have military training,<sup>121</sup> it was reasonable to treat the UNCIVPOL preliminary damage assessment of the same day<sup>122</sup> with similar caution.

49. The description of Knin conveyed in exhibit D66, a US government document—and the only exhibit to which Gotovina refers which was not cited in the Judgement—is generally consistent with the Chamber’s summary that the damage “observed in Knin after 5 August 1995 was less than [witnesses] had expected based on the number of artillery projectiles [...]”.<sup>123</sup> In any event, failure to specifically cite each piece of evidence does not demonstrate that the Chamber failed to consider it.<sup>124</sup>

50. Gotovina misinterprets the Chamber’s observation that even relatively small numbers of shells may significantly harm the civilian population.<sup>125</sup> This point was not made in order to support the Chamber’s general conclusion that the HV deliberately targeted civilians. Rather, it recognised that although its findings related to the attack as a whole, it could only determine the precise impact locations of a sample of shells. Out of an abundance of caution, it expressed that even this sample would have sufficed to harm the civilian population of Knin. There is no statistical improbability in the Chamber’s findings.<sup>126</sup>

(vii) Disregard for safety of civilians shown by the disproportionate Martić attacks

51. The Chamber found that the HV fired a total of 12 130-mm projectiles from a distance of 25 kilometres at Martić’s apartment, located in a residential building in Knin, in two salvos between 7:30 a.m. and 8:00 a.m. on 4 August. A further attempt was made to hit Martić later that day, at the Old Hospital complex. The Chamber found that the artillery shelling targeting Martić was a disproportionate attack, during which the HV paid “little or no regard to the risk of civilian casualties and injuries and

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<sup>121</sup> Elleby, T.3370-3371.

<sup>122</sup> Exh.P228.

<sup>123</sup> Judgement, para.1366.

<sup>124</sup> *Brđanin* AJ, para.11; *Gacumbitsi* AJ, para.115; *Kvočka* AJ, para.23.

<sup>125</sup> Gotovina Brief, para.125 (citing Judgement, paras.1909, 1922, 1934, 1942).

<sup>126</sup> *Contra* Gotovina Brief, para.125. *Below*, II.C.3; Annex A.

damage to civilian objects [...]."<sup>127</sup> The Chamber correctly considered this as indicative of its disregard for the safety of civilians and civilian objects generally.<sup>128</sup>

3. Designated military objects in the four towns do not undermine the Chamber's characterisation of the attack as unlawful

52. Gotovina erroneously characterises the Chamber's interpretation of his attack order.<sup>129</sup> He claims that there are "only three mutually exclusive ways" to interpret Gotovina's order: "As an order to 1) put the towns under lawful artillery attack; 2) deliberately attack both military objects and "civilian areas"; or 3) indiscriminately attack the whole towns." Gotovina then inexplicably asserts that the Chamber concluded that he ordered all three alternatives in the same sentence of his attack order.<sup>130</sup>

53. To the extent Gotovina concedes that a reasonable interpretation of his attack order is to "indiscriminately attack the whole towns", the Prosecution agrees with this interpretation. Gotovina ordered an attack against the four towns as such, treating the towns themselves as a single military objective.<sup>131</sup> This is indeed how the Chamber interpreted the order, and reasonably so.<sup>132</sup> As set out previously,<sup>133</sup> Gotovina's order to treat the towns as a single military objective, considered with all the other evidence, justifies the Chamber's finding that he intended that civilians and civilian objects be targeted (direct attack).

54. Operation Storm was a single attack operation, provided for in a single Offensive Operations Order issued by Gotovina. The attack was initiated with a coordinated shelling campaign that began in nearly simultaneous fashion at approximately 5:00 a.m. on 4 August 1995. Although it may be appropriate to consider the attacks against the towns separately for purposes of analysing their unlawfulness,<sup>134</sup> there is no basis, as Gotovina suggests, for dividing a single attack

<sup>127</sup> Judgement, para.1910.

<sup>128</sup> Judgement, para.1911; *see also* paras.1244, 1910, fn.935.

<sup>129</sup> Gotovina Brief, para.94; *see also* para.90 ("two types of attacks").

<sup>130</sup> Gotovina Brief, para.90.

<sup>131</sup> *Cf.* API, Art.51(5).

<sup>132</sup> Judgement, paras.1911, 2370.

<sup>133</sup> *Above*, II.B.2.

<sup>134</sup> *Cf.* Judgement, para.2305 ("[I]n at least some of these attacks the entire towns were treated as targets for the artillery.").



into multiple attacks (“lawful” and “unlawful”) simply because military objects were present.

55. The fact that the Chamber found RSK/SVK military objects present in the four towns does not mean the attack was lawful.<sup>135</sup> Relevant provisions of IHL clearly contemplate that an attack may be unlawful regardless of the presence of military targets in the area. By their very nature indiscriminate attacks and disproportionate attacks as prohibited under API Arts.51(4) and (5) suppose that lawful targets are among those attacked. An indiscriminate attack does not become two separate attacks (lawful and unlawful) simply because, as here, towns containing a number of clearly separated and distinct military objectives were treated as a single objective.<sup>136</sup>

56. Moreover, the presence of RSK military targets does not distinguish this case from other unlawful attack cases. Indeed, the presence of lawful targets is a regular feature of the Tribunal’s unlawful attack cases and jurisprudence.<sup>137</sup>

#### 4. The Chamber considered whether civilians and civilian objects were directly targeted

57. The Chamber properly focused on whether civilians and civilian objects had been targeted. It did not assess whether “civilian areas” were the object of attack,<sup>138</sup> but rather made the factual determination that areas which were “devoid of military targets”<sup>139</sup> (thus, civilian areas<sup>140</sup>) were nonetheless struck by HV artillery. This discredited the testimony of Rajčić, whose role as Gotovina’s chief of artillery meant that no artillery target could be engaged without his knowledge.<sup>141</sup> He identified all targets in the four towns of which he could recall being aware.<sup>142</sup>

58. When analysing shell impact locations, the Chamber repeatedly noted that shells impacted near “civilian objects.”<sup>143</sup> Examples of such objects included several

<sup>135</sup> *Contra* Gotovina Brief, paras.89-90, 94-95, 102(iv)(a).

<sup>136</sup> *See* API, Art. 51(5)(a).

<sup>137</sup> *See* Milošević TJ, paras.426, 428, 444, 479, 564, 583; Martić TJ, para.461; Strugar TJ, para.211; Galić TJ, paras.336, 382, 386, 395, 405, 456, 504-509.

<sup>138</sup> *Contra* Gotovina Brief, paras.92, 96, 98, 101.

<sup>139</sup> Judgement, paras.1911-1912, 1923-1924, 1935-1936, 1943-1944.

<sup>140</sup> *See* Kordić AJ, para.53; API, Art.52(1)-(2).

<sup>141</sup> *E.g.* Rajčić, T.16258-16259, 16576-16578; Exh.D1425, paras.18-19, 29, 36-37, 40, 44.

<sup>142</sup> Rajčić, T.16311-16312, 16326-16333, 16362-16365, 16395. *See also* Rajčić, T.16361-16362.

<sup>143</sup> Judgement, paras.1909-1911, 1922-1923, 1934-1935, 1942-1943.

houses,<sup>144</sup> a hospital,<sup>145</sup> a cemetery,<sup>146</sup> international organisations,<sup>147</sup> factories<sup>148</sup> and a health clinic.<sup>149</sup> The Chamber then summarised the locations of these civilian objects by referring to them as “areas” or “civilian areas.”<sup>150</sup> In the context of the Chamber’s entire discussion, it is clear that this terminology referred to the locations of the civilian objects listed above.

##### 5. The Chamber properly applied the principle of distinction

59. Gotovina wrongly claims that the Chamber failed to find that he intended to strike civilians and military targets without distinction and did not find that the towns as a whole were attacked so as to strike civilians and civilian objects without distinction.<sup>151</sup>

60. Rather, the Chamber found that Gotovina ordered an unlawful attack on civilians and civilian objects.<sup>152</sup> Having given scrupulous consideration to the possibility that the HV observed the principle of distinction by firing only on designated targets,<sup>153</sup> it found that this was not a reasonable conclusion. Instead, the evidence demonstrated that his attack order treated the four towns themselves as artillery targets.<sup>154</sup> That the HV identified military targets prior to the operation<sup>155</sup> does not make the operation lawful when, during the operation itself, civilian and military objectives were fired on without distinction.<sup>156</sup>

61. Moreover, by finding that the shelling of the four towns was indiscriminate, the Chamber necessarily found that the attack was carried out without regard to the principle of distinction. In asserting that the Chamber made no reference to the

<sup>144</sup> Judgement, paras.1903, 1920, 1932.

<sup>145</sup> Judgement, para.1905.

<sup>146</sup> Judgement, para.1905.

<sup>147</sup> Judgement, paras.1903-1904.

<sup>148</sup> Judgement, para.1920, 1940.

<sup>149</sup> Judgement, para.1940.

<sup>150</sup> Judgement, paras.1743, 1746, 1906-1909, 1911-1912, 1922-1923, 1934-1935, 1942-1943.

<sup>151</sup> Gotovina Brief, para.95.

<sup>152</sup> Judgement, paras.2324, 2373.

<sup>153</sup> See e.g. Judgement paras.1165, 1168-1169, 1172, 1189-1193, 1423-1426, 1453-1454, 1474, 1897.

<sup>154</sup> Judgement, paras.1911, 2311, 2370.

<sup>155</sup> Rajčić’s target lists were compiled in June, 1995 for training purposes. See Judgement, paras.1177-1178, 1894.

<sup>156</sup> Gotovina’s erroneous assertion that 95-percent of shells were aimed at military targets is addressed elsewhere. *Below*, II.C.3; Annex A. *Contra* Gotovina Brief, para.95.

principle of distinction,<sup>157</sup> Gotovina overlooks the Chamber’s observation that the failure to distinguish between the Serb civilians and military in Operation Storm went “to the very core of this case.”<sup>158</sup>

6. Gotovina had ample notice of the Prosecution case on indiscriminate shelling

62. Gotovina was convicted for persecution through, *inter alia*, unlawful attacks on civilians and civilian objects,<sup>159</sup> which was clearly set forth in Count 1 of the Indictment.<sup>160</sup> The underlying acts of this crime, including shelling of civilian areas, were specified elsewhere in the Indictment.<sup>161</sup> Gotovina has not shown that a material element of the crime was not pled in the Indictment.<sup>162</sup>

**C. Gotovina misapprehends and exaggerates the significance of the so-called “200-metre rule” (1.1, 1.1.3, 1.1.4)**

1. The finding of an unlawful attack is based on far more than the so-called “200-metre rule”

63. Gotovina focuses primarily on what he calls the Chamber’s “200-metre rule,” suggesting that it forms “the linchpin for the Chamber’s indiscriminate shelling findings.”<sup>163</sup> This distorts the role and relevance of the 200-metre margin of error employed by the Chamber. The Chamber relied on a wide range of evidence, and not just the 200-metre margin, to conclude that the attack targeted civilians. The 200-metre margin’s primary function was as a tool to assess Rajčić’s claim that Gotovina’s attack order was understood as directing subordinates to target only designated military objectives.

64. Extensive evidence showed that an unlawful attack targeting the four towns as such was agreed in advance and ordered by Gotovina. These findings, discussed in greater detail above, include: 1) the Brioni meeting; 2) Gotovina and his subordinates’

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<sup>157</sup> Gotovina Brief, para.95.

<sup>158</sup> Judgement, para.2309.

<sup>159</sup> Judgement, paras.2369-2371.

<sup>160</sup> Indictment, para.48.

<sup>161</sup> Indictment, paras.28, 34. *See also* Decision on Rule 73, para.25.

<sup>162</sup> *Contra* Gotovina Brief, para.93; *see also* para.11.

<sup>163</sup> Gotovina Brief, para.118; *see also* paras.19(i), 22.

orders to put the towns under fire; 3) HV artillery reports; 4) eyewitness observations of the shelling; and 5) the disproportionate attack on Martić.<sup>164</sup>

65. Even if the Chamber had not employed the 200-metre margin of error in its analysis of specific shell impact locations, other evidence fully justified the Chamber's rejection of Rajčić's claim that the attack orders were understood by subordinates only to provide for shelling of designated targets.

2. The 200-metre margin of error demonstrated that Rajčić was not credible

66. According to Rajčić, Gotovina's order to "put the towns under fire" actually meant that the HV should shell previously designated military targets.<sup>165</sup> The Chamber did not "ignor[e]" this evidence,<sup>166</sup> despite the fact that it was contrary to the weight of the evidence on this point.<sup>167</sup> Rajčić was Gotovina's chief of artillery who himself drafted an order directing the indiscriminate shelling of the four towns.<sup>168</sup> The Chamber engaged in a detailed, methodical analysis and determined that Rajčić's evidence was not credible on this point.

67. To assess Rajčić's evidence, the Chamber: 1) took a very broad view of what could be considered designated targets by Croatian forces;<sup>169</sup> 2) derived the 200-metre margin of error, giving Gotovina the benefit of the doubt that any projectile impacting within 200 metres of a military target was lawfully intended to hit that target;<sup>170</sup> 3) identified locations where Rajčić claimed the shells were supposed to impact;<sup>171</sup> and 4) noted the distances between these locations and where shells had actually impacted.<sup>172</sup>

68. The Chamber found that approximately 75 projectiles<sup>173</sup> struck well beyond 200 metres from any identified target, *i.e.*, between 300 and 800 metres.<sup>174</sup> Additional shells struck between 200-300 metres from military targets.<sup>175</sup>

<sup>164</sup> Above, II.B.2.

<sup>165</sup> Judgement, paras.1188, 1893.

<sup>166</sup> Gotovina Brief, para.105.

<sup>167</sup> *Contra* Gotovina Brief, para.108.

<sup>168</sup> See Judgement, para.1187, fn.4324, para.1893; Exh.D970.

<sup>169</sup> Judgement, paras.1899-1902, 1917-1919, 1929-1931, 1939.

<sup>170</sup> Judgement, para.1898.

<sup>171</sup> Judgement, paras.1189-1193, 1403, 1423, 1432, 1453-1454, 1466, 1474.

<sup>172</sup> Judgement, paras.1373-1392, 1427-1429, 1456-1459, 1476.

<sup>173</sup> See Annex A.

69. In the end, even after applying its generous 200-metre margin of error, the Chamber found that “too many projectiles impacted in areas which were too far away from identified military targets” for them to have struck those locations as a result of errors or inaccuracies.<sup>176</sup> The Chamber concluded that “the deliberate firing at areas [...] which were devoid of military targets is inconsistent with Rajčić’s explanation of the HV artillery orders.”<sup>177</sup> It thus determined that Rajčić’s alternative interpretation of Gotovina’s order was not a reasonable one.<sup>178</sup>

70. Gotovina’s claim that the Chamber had no factual basis to determine what was “too far” and “too many”<sup>179</sup> is simply a recapitulation of his evidentiary challenge to the 200-metre margin of error. This assertion is addressed below.<sup>180</sup>

### 3. 95-percent of the shelling was not aimed at designated targets

71. Gotovina mischaracterises the results of the Chamber’s assessment of Rajčić’s evidence when he claims that 95-percent of shells were found to have been aimed at previously identified military targets.<sup>181</sup>

72. After considering all of the evidence (not only shell impacts and Rajčić’s evidence *vis-à-vis* the 200-metre margin of error), the Chamber concluded that Gotovina ordered an artillery attack that targeted the four towns as such. As discussed in greater detail above, the entire attack—not just those shells that landed more than 200 metres from a designated target—was unlawful.<sup>182</sup> Just because some shells impacted within 200 metres of a designated target does not change the fact that there was a single unlawful attack on the towns as a whole.

73. Gotovina also misstates the Chamber’s finding on the number of known impact locations. Not surprisingly, the Chamber “was able to conclusively determine

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<sup>174</sup> Judgement, paras.1903, 1905, 1920, 1932, 1940.

<sup>175</sup> Judgement, paras.1920, 1940.

<sup>176</sup> Judgement, para.1906.

<sup>177</sup> Judgement, para.1911.

<sup>178</sup> Judgement, para.1911.

<sup>179</sup> Gotovina Brief, para.121.

<sup>180</sup> *Below*, II.C.4.

<sup>181</sup> Gotovina Brief, paras.3, 102(ii), 108, 147(ii), 270(iii), 275, fn.462.

<sup>182</sup> *Above*, II.C.1.

the precise locations of impact for only some [...] projectiles.”<sup>183</sup> Of the approximately 1200 shells fired on the four towns, the Chamber determined the impact locations for approximately 154 shells.<sup>184</sup> Within these known impact locations, some 77 projectiles (50-percent) impacted more than 200 metres from a designated target.<sup>185</sup> These findings cannot be reconciled with Rajčić’s assertions that the HV directed its precise targeting capabilities only at designated military targets.

74. Gotovina’s 95-percent “statistic” rests not on these figures but on his presumption that all shells whose impact locations were not established must have landed within 200 metres of an identified target.<sup>186</sup> The Chamber was not required to accept Gotovina’s presumption, given the other compelling evidence that the shelling was intended to target whole towns. The fact that 50-percent of the known impact locations lie outside the Chamber’s 200-metre margin of error cautions against any assumption that all shells whose impact locations were not established struck within 200 metres of a military target.

75. In any event, the Tribunal’s jurisprudence does not require the Chamber to determine the impact location of each projectile. Prior trial chambers have found that shelling targeted civilians by considering, *inter alia*, scheduled incidents that represented a fraction of the shells fired on Sarajevo during a 1- or 2-year time span.<sup>187</sup> The Appeals Chamber noted such evidence could help demonstrate a broader campaign of unlawful shelling.<sup>188</sup> It is not feasible to expect that, in a large-scale shelling case such as this, impact locations will be determined for all shells. The Chamber’s reliance on a significant number of impact locations, in combination with other corroborating evidence was reasonable.

4. The 200-metre margin of error was a reasonable measure based on the evidence (1.1.4)

76. The Chamber derived its 200-metre margin of error from several sources of evidence (including expert evidence) addressing the accuracy of the artillery weapons

<sup>183</sup> Judgement, paras.1909, 1922, 1934, 1942. *See also* paras.1899, 1916, 1928, 1934.

<sup>184</sup> *Below*, Annex A.

<sup>185</sup> The Chamber did not find that only 65 shells impacted more than 200 metres away. *Compare* Annex A with Gotovina Brief, Annex A.

<sup>186</sup> Gotovina Brief, fn.1.

<sup>187</sup> *Milošević* TJ, paras.1, 415, 439-724, 907; *Galić* TJ, paras.3, 188-189, 207-208, 587.

<sup>188</sup> *Galić* AJ, paras.221-224.

Gotovina deployed in Operation Storm.<sup>189</sup> Gotovina's assertion that the "Chamber assumed with no evidence in support that the range of error of HV weapon systems was 200 [metres] or less"<sup>190</sup> is incorrect.

77. The Chamber expressly referred to the evidence on margins of error when it derived the 200-metre margin. It noted Rajčić's testimony that the range of error for the 130-mm guns shelling Knin was 70-75 metres in distance and 15 metres along the axis.<sup>191</sup> Elsewhere, the Chamber noted Rajčić's testimony that he never fired a single projectile without knowing the exact coordinates, nor did his subordinate units.<sup>192</sup>

78. The Chamber considered Konings' evidence that artillery weapons similar to those used during Operation Storm had margins of error between 18-60 metres based on internal or external factors.<sup>193</sup> As an artillery expert,<sup>194</sup> Konings' evidence carried special weight.

79. Finally, the Chamber reasonably rejected Leslie's testimony that it was acceptable for HV artillery projectiles to strike within 400 metres of a target on the first shot.<sup>195</sup>

80. Taken together, the above evidence indicated that the margin of error for HV artillery was as low as 55-75 metres. Noting the lack of detailed evidence of certain factors identified by Konings as affecting accuracy,<sup>196</sup> the Chamber applied a 200-metre margin of error. In light of evidence confirming the precise targeting capability of the HV's artillery weapons and personnel,<sup>197</sup> the Chamber's use of this figure to assess Rajčić's evidence was wholly reasonable.

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<sup>189</sup> See e.g. Judgement, paras.1163-1175.

<sup>190</sup> Gotovina Brief, para.16 (emphasis in original); see also paras.17, 20, 120, 136, fn.1. Gotovina also erroneously asserts that Leslie's testimony was the only evidence on margins of error: Gotovina Brief, para.16.

<sup>191</sup> Judgement, para.1898; see also para.1237.

<sup>192</sup> Judgement, para.1243.

<sup>193</sup> Judgement, para.1898; see also para.1165. Konings gave evidence on 155-mm guns, which were comparable to 130-mm howitzers: Judgement, para.1164.

<sup>194</sup> Judgement, para.1163. See also T.15804.

<sup>195</sup> Judgement, para.1898; see also para.1167.

<sup>196</sup> Judgement, para.1898.

<sup>197</sup> See e.g. Judgement, paras.1183, 1977, 1993.

81. The Chamber did not “creat[e] an evidential presumption of unlawfulness.”<sup>198</sup> The 200-metre margin of error was, in essence, a presumption applied against the Prosecution that was generous and favourable to Gotovina.

82. Gotovina’s other challenges to the “200-metre rule” should also be rejected. First, he speculates that the HV fired at military targets other than those identified by the Chamber. However, he cites no evidence to show the Chamber’s findings were unreasonable.<sup>199</sup> Next, he claims that it was acceptable for HV artillery to deviate more than 200 metres from an identified target because the range of error was as high as 700 metres<sup>200</sup> or because of errors, inaccuracies, etc.<sup>201</sup> However, he fails to identify any evidence on these points that would justify overturning the Chamber’s findings.

5. Gotovina had sufficient notice (1.1.3)

(a) Gotovina knew that margins of error and other issues were contested

83. Gotovina was not surprised by the three issues he highlights: 1) The artillery margin of error; 2) the analysis of shell impact locations; and 3) the (in)ability of the HV to strike targets of opportunity.<sup>202</sup> Indeed, he was well aware of these issues during trial. They were all contested as a result of his defence strategy.

84. From the beginning of the trial, Gotovina claimed that the HV only shelled designated targets.<sup>203</sup> This necessarily raised a question as to the precision of HV artillery and appropriate ranges of error. Evidence was led on this issue<sup>204</sup> and the Prosecution made arguments in this regard.<sup>205</sup> In a case involving at least 1200 projectiles fired into towns from up to 26 kilometres away, Gotovina could not be surprised that the Chamber considered margins of error for the weaponry involved.

<sup>198</sup> *Contra* Gotovina Brief, para.20; *see also* paras.11, 19, 85, 118, 136.

<sup>199</sup> *Contra* Gotovina Brief, para.18(ii)-(iii). Gotovina’s argument that other targets may have been present is addressed elsewhere. *Below*, II.E, H. *Contra* Gotovina Brief, fn.42.

<sup>200</sup> *See* Gotovina Brief, paras.16, 18(i), fn.40 (citing, *inter alia*, Judgement, Vol.II, fn.932).

<sup>201</sup> Gotovina Brief, paras.18(iv)-(v).

<sup>202</sup> *Contra* Gotovina Brief, para.11.

<sup>203</sup> T.514, 575, 579.

<sup>204</sup> *Above*, II.C.4.

<sup>205</sup> Prosecution Closing Brief, para.555.



85. Similarly, Gotovina's claim as to where shells were aimed led the Chamber to do a "projectile by projectile assessment" of shell impacts *vis-à-vis* the nearest designated target.<sup>206</sup> Extensive evidence was heard or admitted on this point, much of it from Gotovina,<sup>207</sup> and from the submissions by the parties.<sup>208</sup> In the Judgement, the Chamber considered the evidence of dozens of witnesses on this issue alone.<sup>209</sup>

86. Gotovina himself raised the issue of targets of opportunity when cross-examining witnesses,<sup>210</sup> which resulted in the parties bringing evidence and making arguments on this point.<sup>211</sup>

87. Gotovina had full notice of and the ability to litigate the issues for which he now claims to have lacked notice.

(b) The Chamber was entitled to weigh the evidence in the manner it chose

88. There was no "Chamber's case" that diverged significantly from the Prosecution's shelling case.<sup>212</sup> The Chamber was free to analyse and weigh the evidence of both parties as it saw fit. Moreover, Gotovina does not accurately describe the Prosecution's position at trial.

89. The Prosecution argued from the start of trial that "the shelling of Knin [and the other towns was] an attack on the town[s] as a whole and [their] civilian inhabitants."<sup>213</sup> It additionally noted the indiscriminate aspects of the attack.<sup>214</sup> Its shelling case did not solely entail the allegation that the shelling was indiscriminate.<sup>215</sup> The Chamber accepted that the attack targeted civilians.<sup>216</sup>

<sup>206</sup> Gotovina Brief, para.11.

<sup>207</sup> Exhs.D131; D248; D439; D864; D955; D1261; D1446; D1460; D1500; D1501.

<sup>208</sup> T.17392-17394; T.17502-17503; T.29064-29072; T.29228-29229. *See also* Prosecution Closing Brief, paras.525, 528, 572, 581, 601; Gotovina Closing Brief, para.306, fn.543.

<sup>209</sup> Judgement, paras.1189-1193, 1373-1395, 1423-1429, 1454-1462, 1473-1476.

<sup>210</sup> T.2589-2590; T.3269; T.5931-5934; T.7690; T.9594-9595.

<sup>211</sup> T.7884-7885; T.14344; Prosecution Closing Brief, paras.564-566; Gotovina Closing Brief, fn.543.

<sup>212</sup> Gotovina Brief, paras.9-14, 107.

<sup>213</sup> T.438. *See also* T.442-443; Prosecution Pre-Trial Brief, paras.16-17, 30, 32, 110; Prosecution Closing Brief, paras.484, 491-492, 522.

<sup>214</sup> T.445; Prosecution Pre-Trial Brief, para.31; Prosecution Closing Brief, para.521.

<sup>215</sup> *Contra* Gotovina Brief, paras.9-11.

<sup>216</sup> *Above*, II.B.4.

90. Moreover, the Prosecution relied on other evidence in addition to arguing the indiscriminate nature of some HV weaponry and the scarcity of military targets.<sup>217</sup> The Prosecution's case was comprehensive, based on the same key evidence that the Chamber focused on: Brioni, orders of Gotovina and his subordinates, HV artillery reports, the disproportionate targeting of Martić and the records and observations of eyewitnesses.<sup>218</sup>

91. The Chamber's findings were not "fundamentally at odds" with the Prosecution's position at trial.<sup>219</sup> Like the Chamber, the Prosecution acknowledged the presence of military targets in the towns while noting that shelling was not limited to these targets.<sup>220</sup> Also, like the Chamber, the Prosecution acknowledged that HV artillery had a range of error.<sup>221</sup> The Prosecution's argument that certain types of HV artillery were inherently indiscriminate<sup>222</sup> did not preclude an analysis of shell impact locations based on this established range of error.<sup>223</sup>

**D. The Chamber reasonably assessed the evidence of particular shelling incidents (1.1.5, 1.1.6, 1.1.7)**

92. Gotovina has not shown that the Chamber's findings on specific incidents were unreasonable, or that they undermine its assessment of Rajčić's evidence or its overall finding of unlawful attack.<sup>224</sup>

1. Knin shelling incidents (1.1.5.1)

93. The Chamber considered six specific incidents in which HV artillery impacted approximately 300 to at least 600 metres from designated targets.

<sup>217</sup> *Contra* Gotovina Brief, para.9, fns.25-26.

<sup>218</sup> T.418-419, 423-426, 435-444; Prosecution Pre-Trial Brief, paras.16-17, 27-34; Prosecution Closing Brief, paras.493-614.

<sup>219</sup> *Contra* Gotovina Brief, para.10(ii).

<sup>220</sup> T.439, 445; Prosecution Pre-Trial Brief, para.31; Prosecution Closing Brief, paras.492, 538-566, 570-572, 574-575, 578-581. *Contra* Gotovina Brief, paras.9(ii), 10(i).

<sup>221</sup> Prosecution Closing Brief, para.555.

<sup>222</sup> T.442-443; Prosecution Pre-Trial Brief, para.31; Prosecution Closing Brief, para.587-589, 606-607, 612-613.

<sup>223</sup> *Contra* Gotovina Brief, para.10(ii).

<sup>224</sup> Judgement, paras.1911, 1923, 1935, 1943.

(a) ECMM headquarters

94. The Chamber reasonably<sup>225</sup> found that “on 4 and/or 5 August 1995, the HV fired approximately 40 artillery projectiles which impacted near the ECMM building”,<sup>226</sup> located “approximately 300 metres from the nearest artillery target identified by Rajčić”.<sup>227</sup> Contrary to Gotovina’s claim,<sup>228</sup> the Chamber expressly relied on the evidence of “Marker Hansen, Liborius, Dawes, and Hendriks”, with “particular” reference to Dawes only in respect of the approximate number of impacts on 4 August.<sup>229</sup> The Chamber must also have taken into account Liborius’ crater analysis, conducted some days after the bombardment,<sup>230</sup> in order to conclude that some of the impacts found near the ECMM headquarters may have been created by the further artillery fire of 5 August.<sup>231</sup>

95. Gotovina generally overlooks the nature of the evidence regarding the shelling near the ECMM headquarters. Before the heavy shelling, as Dawes’ APC arrived at the ECMM building around midday, ECMM monitors (all serving military officers) had also witnessed shell impacts in close proximity during the preceding morning. All three monitors, Marker Hansen, Liborius and Hendriks, were either in the headquarters or at their nearby lodgings in this period.<sup>232</sup>

96. Gotovina misstates the evidence when he claims that these witnesses said that “no more than two projectiles had landed near ECMM headquarters”.<sup>233</sup> To the contrary, their evidence is consistent with sustained heavy shelling through the morning of 4 August 1995, even before Dawes arrived around lunchtime.<sup>234</sup> Indeed, when Liborius returned to the ECMM headquarters some days later, he found evidence of “many, many, many impacts” in the vicinity.<sup>235</sup>

<sup>225</sup> *Contra* Gotovina Brief, para.24.

<sup>226</sup> Judgement, para.1903.

<sup>227</sup> Judgement, para.1388.

<sup>228</sup> Gotovina Brief, para.25.

<sup>229</sup> Judgement, para.1388.

<sup>230</sup> *See* Exh.P802, para.5; Liborius, T.8241-8242, 8250. *See also* Judgement, para.1346.

<sup>231</sup> *Compare* Judgement, para.1903, *with* para.1388.

<sup>232</sup> Judgement, paras.1295, 1297, 1309. *See also* Exhs.P1283, pp.2-3; P1285, para.18; P1292, pp.1-2; P1293; D820, p.2; P931, para.14; P799, pp.2-3; P802, para.4; D741, p.7; Marker Hansen, T.14900-14901, 14904, 15066; Hendriks, T.9700.

<sup>233</sup> Gotovina Brief, para.25.

<sup>234</sup> Judgement, para.1285.

<sup>235</sup> Liborius, T.8241-8242.

97. Dawes recalled that the shelling in the area was “really heavy and intensive”.<sup>236</sup> Once his APC had stopped outside the ECMM building, a projectile impacted very close by,<sup>237</sup> perforating his eardrum.<sup>238</sup> He later estimated that “approximately 40 rounds” had landed in the vicinity.<sup>239</sup> In light of the substantial corroborative evidence as to the heavy shelling near the ECMM headquarters, and Dawes’ clearly expressed view, the Chamber reasonably adopted this estimate for the number of impacts.

98. The Chamber found Dawes to be a reliable witness,<sup>240</sup> even though he was mistaken on certain minor details principally relating to military technicalities<sup>241</sup> about which he did not profess expertise.<sup>242</sup> While Dreyer did not directly corroborate Dawes’ account of their arrival at the ECMM headquarters,<sup>243</sup> their accounts agree on the material point that the area of the ECMM headquarters was shelled on 4 August. Dreyer marked exhibits P78 and P79 to indicate that he had personally observed at least one projectile impact in the area of ECMM headquarters.<sup>244</sup>

99. Dawes’ arrival at the ECMM headquarters was not reasonably in doubt,<sup>245</sup> and the key points of his explanation were expressly set out in the Judgement.<sup>246</sup> Dawes admitted that he was unable to locate the headquarters on the map,<sup>247</sup> a tool which he said he did not find easy to use,<sup>248</sup> but explained that the headquarters were located towards the hospital.<sup>249</sup> He consistently refused the suggestion that this was somewhere near the Northern barracks.<sup>250</sup>

100. Gotovina exaggerates the mortar capability used by the SVK in and around Knin.<sup>251</sup> Of the two mortars which may have been present, the one near the “hospital

<sup>236</sup> Exhs.P980, p.6; P981, para.22. *See* Judgement, para.1285.

<sup>237</sup> Dawes, T.10391; Exh.P981, para.22. *See* Judgement, para.1285.

<sup>238</sup> Exhs.P980, pp.6, 11; P981, para.22; Dawes, T.10391. *See* Judgement, para.1285.

<sup>239</sup> Exh.P980, p.6. *See* Judgement, para.1285.

<sup>240</sup> *Contra* Gotovina Brief, para.25. For instances where the Chamber relied on Dawes, *see* Judgement, paras.1369, 1373-1375, 1384, 1388, 1391-1393.

<sup>241</sup> *E.g.* Judgement, paras.1371, 1388, 1395.

<sup>242</sup> Exh.P981, para.1. *See also* Dawes, T.10459.

<sup>243</sup> *See* Gotovina Brief, para.25.

<sup>244</sup> Dreyer, T.1727. *See also* Exhs.P78, P79. *See* Judgement, para.1287.

<sup>245</sup> *Contra* Gotovina Brief, para.26.

<sup>246</sup> Judgement, para.1285.

<sup>247</sup> Dawes, T.10427-10428.

<sup>248</sup> Dawes, T.10428. *See also* T.10424-10426.

<sup>249</sup> Exh.P981, para.22.

<sup>250</sup> Dawes, T.10427-10428.

<sup>251</sup> *E.g.* Gotovina Brief, paras.27, 29, 30.

field”<sup>252</sup> was not seen to fire at all.<sup>253</sup> The other, which may have been in the SVK facility east of the UN compound,<sup>254</sup> was considered to have fired its parting shot early on the morning of 4 August 1995.<sup>255</sup> By contrast, the Chamber reasonably considered the mass of evidence that Knin was subject to heavy shelling on 4 August 1995<sup>256</sup> to conclude that SVK mortar fire did not sufficiently explain the impacts at the ECMM headquarters<sup>257</sup> or elsewhere. Dreyer, the only witness who had expertise in the use of mortars,<sup>258</sup> was clear that mortar fire was only included in the barrage on 5 August 1995.<sup>259</sup> At that point, HV mortars were in range of Knin.<sup>260</sup>

101. The Chamber’s cautious approach to the fatal mortar attack of 5 August 1995 must be seen in the context of the location of the incident (very near the possible SVK mortar strike of 4 August).<sup>261</sup> It does not raise a reasonable doubt with regard to all the other shelling incidents.<sup>262</sup>

102. The Chamber reasonably concluded that the projectiles impacting near the ECMM headquarters were in fact HV artillery rounds.<sup>263</sup> Not only did Dawes himself primarily identify them as “not rockets”,<sup>264</sup> he made clear that he had no professional military expertise and had never been subjected to artillery fire before.<sup>265</sup> His characterisation of the projectiles as “mortar” rounds thus carried little weight. The Chamber reasonably concluded that his evidence on this point was only reliable as a reference “to artillery or mortar shells, to the exclusion of rockets.”<sup>266</sup> Dawes’ prior statements did not characterise the rounds as mortar fire.<sup>267</sup>

<sup>252</sup> Judgement, paras.1192, 1210, 1213, 1223, 1383.

<sup>253</sup> E.g. Judgement, paras.1223, 1300 (Dreyer and Bellerose saw no outgoing fire from Knin town).

<sup>254</sup> Judgement, para.1294. *But see* Judgement, paras.1300-1301; Exh.D271.

<sup>255</sup> Exh.P291, p.4.

<sup>256</sup> *Compare* Judgement, paras.1296-1297, 1299, 1303 *with* Judgement, paras.1293-1294. *But see* Exh.P748, p.5.

<sup>257</sup> *Contra* Gotovina Brief, para.27.

<sup>258</sup> Exh.P72, para.2.

<sup>259</sup> Judgement, paras.1289, 1327; *see also* paras.1325, 1336.

<sup>260</sup> Judgement, para.1395.

<sup>261</sup> Judgement, para.1396; *see also* paras.1325–1330, 1332.

<sup>262</sup> *Contra* Gotovina Brief, paras.27, 33, 36, 44, 46.

<sup>263</sup> Judgement, para.1388, fn.5360; *see also* para.47. *Contra* Gotovina Brief, para.30(iv) (erroneously citing *Blaškić* AJ, para.722).

<sup>264</sup> Dawes, T.10391-10392.

<sup>265</sup> Dawes, T.10459.

<sup>266</sup> Judgement, para.1388, fn.5360.

<sup>267</sup> Exhs.P980, p.6; P981, paras.21-22.

103. There is no evidence that Dawes or the ECMM headquarters were targeted by the SVK as an attempt to implicate the HV in targeting international organisations.<sup>268</sup> Instead, the evidence showed that shells fell in the area of the ECMM headquarters as part of the targeting of the town as a whole. Dawes did not assert that his APC was in fact “targeted” but rather that the intensity of the artillery fire around him was such that he “almost [...] would call” it targeted.<sup>269</sup> Similarly, although his APC was “bracketed” in the sense that projectiles fell in front of, behind and around it,<sup>270</sup> this does not demonstrate that it was in fact the deliberate target of HV fire. Liborius’ crater analysis further indicates that at least some of the rounds which impacted in the vicinity of the ECMM headquarters emanated from the north-east,<sup>271</sup> in the general direction of HV artillery units from TS-3, 4gbr and 7gbr.<sup>272</sup> Gotovina attaches undue weight to Dawes’ belief that the projectiles which impacted near his APC at the ECMM headquarters were mortar rounds.<sup>273</sup> His arguments based on this faulty premise are hypothetical and should be rejected.

104. Other isolated incidents (the flagrant deployment of a small number of anti-tank mines at the gate to the UN compound,<sup>274</sup> threatening behaviour to individual UN staff,<sup>275</sup> an errant round from a hand-held rocket launcher<sup>276</sup>) consistent with panic and apprehension among the meagre SVK forces remaining in Knin do not raise a reasonable doubt as to the origin of the projectiles which impacted near the ECMM headquarters. None of the incidents to which Gotovina refers equates in quality or quantity to the substantial bombardment of the area around the ECMM building.<sup>277</sup>

105. The assertion that Croatian forces would not deliberately target the area of the ECMM headquarters confuses argument—described as “logic”<sup>278</sup>—for “evidence”.<sup>279</sup> Tuđman’s concern about the UN compound, located to the south of Knin, has no

<sup>268</sup> *Contra* Gotovina Brief, paras.29, 36.

<sup>269</sup> Dawes, T.10391. *See* Judgement, para.1285. *See also* Exhs.P980, p.6; P981, para.22. *Contra* Gotovina Brief, para.29.

<sup>270</sup> Judgement, para.1285; Dawes, T.10391-10392.

<sup>271</sup> Exh.P802, para.7. *See also* P799, p.4.

<sup>272</sup> Judgement, para.1241.

<sup>273</sup> Gotovina Brief, paras.27, 29-31, 136, 154.

<sup>274</sup> Judgement, paras.1284, 1300, 1306, 1393.

<sup>275</sup> *Compare* Dawes, T10504, *with* Dawes, T.10551. *See also* Dawes, T.10465–10466. *See further* Dreyer, T.1737. *See also* Judgement, para.1281.

<sup>276</sup> Judgement, para.1292.

<sup>277</sup> *Contra* Gotovina Brief, para.28.

<sup>278</sup> Gotovina Brief, para.30(iii).

<sup>279</sup> *Contra* Gotovina Brief, para.30.

necessary application to an EC facility in the north of Knin. Moreover, it is irrelevant in light of the ultimate finding of the Chamber that the town of Knin as a whole was treated as a target, not the ECMM headquarters as such.<sup>280</sup>

(b) Field north of the UN compound

106. The Chamber reasonably found that, “[o]n the morning of 4 August 1995, the HV fired at least three artillery projectiles at three separate times which impacted in the empty field in front of the UN compound.”<sup>281</sup> The fatal mortar attack at this intersection on 5 August, discussed below, was not the only shelling incident reported by witnesses on that day. Dijkstra gave evidence, cited by the Chamber,<sup>282</sup> that projectiles impacted in the field on both 4 and 5 August.<sup>283</sup> Berikoff corroborated the 5 August impacts.<sup>284</sup> The field, itself approximately 400 metres long, is at least 400-500 metres from the nearest designated target.

107. Gotovina inaccurately asserts that “the 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.”<sup>285</sup> Neither of the passages he cites supports his proposition.

- In paragraph 1353 of the Judgement, the Chamber found that Munkelien and Anttila’s analysis of a crater on the other side of town from the UN field was not reliable evidence that a particular rocket was fired by the HV. This finding has no relevance to the impacts near the UN compound, nor to the bombardment of 5 August as a whole.
- In paragraph 1396, the Chamber concluded that it was “unable to conclusively determine which forces fired the mortar which impacted outside the UN compound between 8 and 10 a.m. on 5 August”. This determination was based in part on the similarity with a single SVK mortar impact on the previous day. However, in light of the broad evidence that the HV fired at least 300 rounds at Knin on 5 August<sup>286</sup>—which Gotovina does not address—the Chamber’s

<sup>280</sup> Judgement, para.1911.

<sup>281</sup> Judgement, para.1904; *see also* para.1392.

<sup>282</sup> Judgement, para.1303, fn.5049. *Contra* Gotovina Brief, para.32.

<sup>283</sup> Exhs.P429, paras.21, 25-26; P430; Dijkstra, T.4770, 4774.

<sup>284</sup> Judgement, para.1325.

<sup>285</sup> Gotovina Brief para.32 (citing Judgement, paras.1353, 1396).

<sup>286</sup> Judgement, para.1899.

cautious finding as to one particular incident does not affect its findings as to the other impacts in Knin on that day.

108. As discussed above,<sup>287</sup> isolated examples of SVK weapon discharges directed towards the UN do not raise a reasonable doubt that the HV fired the projectiles which impacted in the field north of the UN compound. The four incidents which Gotovina cites are distinct in nature and effect from the repeated impacts in the field.<sup>288</sup> Whereas the Chamber was careful to consider that a reasonable doubt might be raised as to the 5 August mortar impact just outside the gate to the UN compound,<sup>289</sup> it was reasonable to reach a different conclusion in the different circumstances of the field to the north. This field, which extends approximately 400 metres from the UN compound perimeter to the Krka river and the town of Knin proper,<sup>290</sup> saw multiple impacts which were characteristic of the general HV bombardment of the town, rather than single rounds discharged by panicked SVK personnel.<sup>291</sup>

109. Since the field was *outside* the UN compound, Tudman's espoused concern not to hit the UN compound—about which, in this regard, the Chamber made no finding<sup>292</sup>—remains undisturbed by the Chamber's finding.<sup>293</sup> Moreover, it is irrelevant in light of the Chamber's ultimate finding that the town of Knin as a whole was treated as a target, not the field as such.<sup>294</sup>

(c) Hospital

103. The Chamber reasonably<sup>295</sup> found that “the HV fired at least four artillery projectiles which impacted in the immediate vicinity of the hospital, one of which was

<sup>287</sup> *Above*, para.104.

<sup>288</sup> Gotovina Brief, para.33, fn.81 (citing Judgement, paras.1284, 1300, 1306, 1393, 1396).

<sup>289</sup> *See* Judgement, para.1396.

<sup>290</sup> *See* Judgement, para.1392 (noting that the north-western edge of the field is approximately 200 metres south of the St. Ante monastery).

<sup>291</sup> *E.g.* Exh.P429, paras.18, 21, 25-27 (Dijkstra distinguishing between the proximity of the impacts in the field and the impact at the gate); Dijkstra, T.4774 (suggesting that the impacts in the field were in the “swampy kind of area just next to the Krka River”).

<sup>292</sup> The passage apparently cited by Gotovina (Judgement, para.1993, cited in Gotovina Brief, para.30(iii) to which Gotovina cross-refers at Gotovina Brief, para.33, fn.81) only concludes that “[t]he above statements do not lend support to an interpretation that the discussions at the meeting were about the protection of civilians.”

<sup>293</sup> *Contra* Gotovina Brief, para.33.

<sup>294</sup> Judgement, para.1911.

<sup>295</sup> *Contra* Gotovina Brief, paras.34, 40.



close enough to cause blast damage”<sup>296</sup> on “4 and/or 5 August”.<sup>297</sup> The hospital is approximately 450 metres from the nearest target identified by Rajčić.<sup>298</sup> The Chamber relied on three witnesses who directly observed impacts on 4 August: Novaković, Marker Hansen and Grubor.<sup>299</sup>

110. Novaković visited the hospital sometime after 10:00 a.m.<sup>300</sup> He found that “buildings around the hospital were being shelled”.<sup>301</sup> Gotovina appears to concede that impacts were in fact occurring around this hospital at this time, even though he disputes their origin.<sup>302</sup>

111. The Chamber also relied on corroborative evidence of damage or signs of impact around the hospital observed by witnesses such as Bellerose, Berikoff, Leslie, Flynn and Hill.<sup>303</sup> This evidence alone was sufficient to sustain the finding that the area of the hospital was hit.<sup>304</sup> The Chamber reasonably declined to attach significant weight to the evidence of Elleby and the UNCIVPOL report (P228) that the hospital and area to the south were completely unharmed.<sup>305</sup> The Chamber’s acknowledgement of the possibility that the hospital area was struck by HV projectiles on 5 August does not demonstrate error.<sup>306</sup>

112. Gotovina attempts to substitute his own evaluation of the evidence on the impacts in the hospital area for that of the Chamber.<sup>307</sup> He repeats unsuccessful trial arguments concerning SVK propaganda claims about the shelling of the hospital.<sup>308</sup> These should be summarily dismissed.<sup>309</sup> The Chamber heard evidence that the SVK mortar team believed to be based at the high school was inactive on 4 August.<sup>310</sup> Even accepting *arguendo* that an SVK member had fired a single mortar round at the UN

<sup>296</sup> Judgement, para.1389.

<sup>297</sup> Judgement, para.1905.

<sup>298</sup> Judgement, para.1389.

<sup>299</sup> Judgement, paras.1270-1272, 1295, 1307.

<sup>300</sup> Judgement, paras.1270-1271; Novaković, T.11787-11788. *See also* Exh.D331.

<sup>301</sup> Exh.P1092, p.10. *See* Judgement, para.1272.

<sup>302</sup> Gotovina Brief, para.37.

<sup>303</sup> Judgement, para.1389.

<sup>304</sup> *See* Judgement, para.1905 (referring to impacts on “4 and/or 5 August”).

<sup>305</sup> Judgement, para.1389.

<sup>306</sup> *Contra* Gotovina Brief, para.35.

<sup>307</sup> *See Martić* AJ, para.19.

<sup>308</sup> Gotovina Brief, para.38.

<sup>309</sup> *Compare* Gotovina Closing Brief, paras.289-290, 292, 297, 309, 317, *with* Gotovina Brief, paras.36-38. *See Galić* AJ, paras.10, 303.

<sup>310</sup> *Above*, para.100.

compound that day,<sup>311</sup> this does not raise a reasonable doubt about the origin of the multiple shelling impacts at the hospital in the context of the general HV bombardment of the town.<sup>312</sup>

113. The Chamber was not unreasonable to reject the evidence that an unidentified nurse told Flynn on 7 August that at one point an SVK tank was positioned near the hospital and received return fire.<sup>313</sup> The Chamber elected to give this hearsay evidence no weight, noting to the contrary that Grubor, who had been at the hospital on both 4 and 5 August, saw no SVK military vehicles.<sup>314</sup> This sound exercise of discretion by the Chamber should not be disturbed.

114. Gotovina is incorrect to assert that the alleged presence of an SVK tank was corroborated.<sup>315</sup> Indeed, Hill's evidence—which appears to report a rumour about which Hill was sceptical—tends to support the Chamber's view that there was no such tank.<sup>316</sup> Although Leslie did recall seeing a tank some 400 metres north and east of the hospital on 5 August, the Chamber reasonably considered that it was not an SVK tank since it fired a round *into* Knin at that time.<sup>317</sup>

115. Gotovina presents no authority to show an SVK military presence at the hospital.<sup>318</sup> To the extent that Grubor, who saw no military vehicles at the hospital, suggests that wounded SVK soldiers received medical treatment,<sup>319</sup> these soldiers were either *hors de combat* and immune from attack or of such negligible value to Operation Storm as a whole that it would have been grossly disproportionate to target them.<sup>320</sup> Moreover, the Chamber found that the HV lacked the means to identify such targets of opportunity.<sup>321</sup>

<sup>311</sup> Gotovina Brief, para.36 (citing Judgement, para.1396).

<sup>312</sup> *Above*, II.B.2(vi).

<sup>313</sup> Judgement, para.1389. *Contra* Gotovina Brief, para.39.

<sup>314</sup> Judgement, para.1389. *See also* para.1307 (citing Exh.P55, para.10; Grubor, T.1391, 1408).

<sup>315</sup> Gotovina Brief, para.39.

<sup>316</sup> Exh.P292, p.98.

<sup>317</sup> Leslie, T.1966, 1969.

<sup>318</sup> *See* Gotovina Brief, para.39, fn.93 (citing Judgement, para.1303). The cited passage is not apparently relevant to his argument.

<sup>319</sup> *See* Gotovina Brief, para.39, fn.96 (citing Judgement paras.1284, 1307, 1385).

<sup>320</sup> *Cf., below*, II.F.

<sup>321</sup> *Below*, II.E.

(d) Building marked “L” on P681

116. The Chamber reasonably<sup>322</sup> found that, “on 4 or 5 August”, the HV fired “an artillery projectile [which] damaged a house located in a residential area approximately 300 metres east of the Northern barracks and approximately 350 metres north-east of the police station (marked L on P681)” (“House L”).<sup>323</sup> Roberts observed a hole in the roof of the house in late August 1995, once Croatian forces had taken over Knin, which he considered representative of the general effects of the bombardment upon the town.<sup>324</sup> There is no necessary contradiction in the Chamber’s reliance upon an HV artillery report<sup>325</sup> and the coded Ivančića map<sup>326</sup> to infer that HV forces were responsible for artillery fire on the area which included House L.<sup>327</sup> As the Chamber itself confirmed, the areas marked on the map, corresponding to the report, are “large [...] circles with a diameter of approximately 300 metres.”<sup>328</sup>

117. The Chamber reasonably concluded that the shelling of House L (and the other locations throughout Knin more than 200 metres from a designated target) could not be reconciled with Rajčić’s interpretation of the relevant attack orders.<sup>329</sup> The Chamber’s acknowledgement of the possibility that House L was struck by an HV projectile on 5 August rather than 4 August demonstrates no error.<sup>330</sup>

(e) Cemetery

118. The Chamber reasonably found that the HV fired at least one projectile “which impacted near the Knin cemetery approximately 700 metres north of the nearest artillery target identified by Rajčić”.<sup>331</sup> Although the Chamber subsequently recalled the finding in the context of shelling near the hospital of “4 and/or 5 August,”<sup>332</sup> Bellerose’s evidence—to which the Chamber referred<sup>333</sup>—makes clear that the

<sup>322</sup> *Contra* Gotovina Brief, paras.41, 45.

<sup>323</sup> Judgement, para.1387; *see also* para.1903.

<sup>324</sup> Roberts, T.6819 (referring to Exh.P681); Exh.P676, p.4.

<sup>325</sup> *See* Judgement, paras.1252 (citing P2455, p.16), 1263.

<sup>326</sup> Exh.P2338.

<sup>327</sup> Judgement, para.1387. *Contra* Gotovina Brief, para.43.

<sup>328</sup> Judgement, para.1896.

<sup>329</sup> *Contra* Gotovina Brief, para.43.

<sup>330</sup> *Contra* Gotovina Brief, para.44.

<sup>331</sup> Judgement, para.1389.

<sup>332</sup> Judgement, para.1905; *see also* para.1389.

<sup>333</sup> Judgement, para.1300.

incident occurred on 4 August.<sup>334</sup> Dreyer likewise confirmed that he “personally observed or saw signs of” one or more projectiles falling in that area on 4 August.<sup>335</sup>

(f) Railway depot

119. The Chamber reasonably found that on 4 August “the HV [...] fired at least one artillery projectile which struck an area east of Knin (see marking J on P984),” approximately 300 metres from the nearest target identified by Rajčić.<sup>336</sup> Dawes had described the area of the railway depot as being “totally devastated by the shelling”; on arrival at the specific location marked J on P984, he found it “was totally destroyed by the shelling.”<sup>337</sup> Dreyer similarly indicated that on 4 August he had personally observed projectile impacts in the area.<sup>338</sup>

120. The Chamber did not reverse the burden of proof<sup>339</sup> in stating, “[t]here is no evidence indicating that the HV considered the railway fuel storage located in this area to have been an artillery target, nor that it was used by the SVK.”<sup>340</sup> This was an accurate factual summary of the evidence. Gotovina offers no support for his suggestion that the railway fuel storage was in fact considered by the HV as a military target.<sup>341</sup> The Chamber did not find that “because the Accused did not submit written records, the railway fuel storage could not have been considered a military target”.<sup>342</sup>

121. Gotovina’s theory that the fuel storage area could support the “railway system”<sup>343</sup> and thus potentially be considered a target is speculative and should be rejected. It overlooks the fact that the Chamber found only that striking the railway *station* could have been seen in good faith to confer a definite military advantage (through disrupting the possible transport of ammunition).<sup>344</sup>

<sup>334</sup> Bellerose, T.5866-5869 (referring to Exh.P547 (“B”)).

<sup>335</sup> Dreyer, T.1727. *See also* Exhs.P78, P79.

<sup>336</sup> Judgement, para.1905; *see also* para.1391.

<sup>337</sup> Exh.P980, p.7. *See* Judgement, para.1286.

<sup>338</sup> Dreyer, T.1727. *See also* Exhs.P78, P79.

<sup>339</sup> *Contra* Gotovina Brief, para.48.

<sup>340</sup> Judgement, para.1905.

<sup>341</sup> Gotovina Brief, para.49.

<sup>342</sup> Gotovina Brief, para.50.

<sup>343</sup> Gotovina Brief, para.48.

<sup>344</sup> Judgement, para.1899.

2. The Chamber reasonably found that a considerable number of projectiles which impacted in Benkovac could not have been aimed at designated targets (1.1.5.2)

(a) Ristić, Benkovačko Selo

122. The Chamber reasonably found, based on Đuro Vukašinić's evidence, that shells impacted on the Ristić pine woods and the hamlets of Ristić and Benkovačko Selo, which were 500 metres from the nearest military target.<sup>345</sup> The Chamber did not overlook three military targets near these locations.<sup>346</sup>

123. Gotovina's first purported target is not, as he describes it, "a barracks in Benkovacko selo"<sup>347</sup> but rather a barracks north of Benkovačko Selo.<sup>348</sup> It was so far north that its location was off the map used to identify targets in Benkovac.<sup>349</sup> Because its exact location was not established, the Chamber reasonably disregarded this purported target.<sup>350</sup>

124. Far from ignoring Gotovina's second purported target, a crossroad near Benkovačko Selo,<sup>351</sup> the Chamber recognised that this was a designated target<sup>352</sup> and found that it was 500 metres from the impact location in the Ristić pine woods.<sup>353</sup>

125. Likewise, the Chamber was aware of Gotovina's third purported target, an SVK artillery position in Benkovačko Selo.<sup>354</sup> The Chamber noted that this was listed on the "Poskok-93" map as a target.<sup>355</sup> It further noted the lack of evidence as to whether and/or how this map was used during the shelling of Benkovac.<sup>356</sup> Given this uncertainty, the Chamber reasonably declined to find that this was a designated target.<sup>357</sup>

<sup>345</sup> Judgement, paras.1414-1415, 1429, 1920.

<sup>346</sup> *Contra* Gotovina Brief, paras.52-54.

<sup>347</sup> Gotovina Brief, para.52 (emphasis added).

<sup>348</sup> *See* Judgement, para.1403, fn.5372; T.16307-16308; Exh.P2327.

<sup>349</sup> T.16307-16308; Exh.P2327. *See also* Exh.D1446, pp.12-14.

<sup>350</sup> *Cf.* Judgement, paras.1933, 1939.

<sup>351</sup> *Contra* Gotovina Brief, para.52.

<sup>352</sup> Judgement, para.1424.

<sup>353</sup> Judgement, para.1429.

<sup>354</sup> *Contra* Gotovina Brief, para.53.

<sup>355</sup> Judgement, para.1423. The Chamber identified this location as "Benkovac village – north of the city, combat position."

<sup>356</sup> Judgement, para.1423; *see also* paras.1454, 1474, 1914, 1926, 1938.

<sup>357</sup> *Cf.* Judgement, para.1474.

(b) Barice

126. The Chamber reasonably found, based on Dušan Sinobad's evidence, that shells landed in front of apartment buildings in Barice, 250 metres away from the nearest military target.<sup>358</sup> Gotovina claims that the Chamber "had no evidentiary basis to identify the precise location of impact of [the] shells."<sup>359</sup> However, Sinobad, who testified about this incident, explained that the shells "landed right in front of" the apartment buildings and marked on a map where the buildings were located.<sup>360</sup>

(c) Bagat and Kepol factories, cool storage

127. The Chamber reasonably found, based on Đuro Vukašinić's evidence, that the HV could not have determined in good faith that firing on the Bagat and Kepol factories and the cool storage would offer a definite military advantage.<sup>361</sup>

128. The inclusion of these locations on the "Jagoda" list does not render the Chamber's finding unreasonable.<sup>362</sup> Given the lack of evidence as to if and how this list was used during the shelling of Benkovac,<sup>363</sup> the Chamber reasonably declined to find that the list was, by itself, sufficient to establish that firing on these locations offered a definite military advantage.<sup>364</sup>

129. The Chamber's treatment of these targets was not inconsistent with its approach to the firemen's hall.<sup>365</sup> Contrary to Gotovina's suggestion, the Chamber did not find the firemen's hall to be a designated target simply because it was on the "Jagoda" list. The Chamber relied on other evidence that the hall contained the offices of the TO and the Secretariat of National Defence.<sup>366</sup> The Chamber's treatment of the Jagoda list was thus consistent with other HV documentation such as artillery logs and reports, which were not accepted on their own as conclusive evidence of targeting, but were instead considered together with other evidence.<sup>367</sup> By contrast,

<sup>358</sup> Judgement, paras.1412, 1427, 1920.

<sup>359</sup> Gotovina Brief, para.56.

<sup>360</sup> Judgement, para.1412; T.16942-16943; Exh.P2363.

<sup>361</sup> Judgement, paras.1414, 1921. *Contra* Gotovina Brief, paras.57-61.

<sup>362</sup> *Contra* Gotovina Brief, paras.57-58.

<sup>363</sup> Judgement, para.1423; *see also* paras.1454, 1474, 1914, 1926, 1938.

<sup>364</sup> *Cf.* Judgement, para.1474.

<sup>365</sup> *Contra* Gotovina Brief, para.58.

<sup>366</sup> Judgement, para.1919; *see also* para.1414.

<sup>367</sup> Judgement, paras.1895-1896, 1915, 1927.

there was affirmative evidence from Đuro Vukašinić that the factories and cool storage were not involved in military production.<sup>368</sup>

130. Given the detailed nature of Vukašinić's testimony,<sup>369</sup> Gotovina is incorrect to assert Vukašinić's evidence was unfounded.<sup>370</sup> Gotovina also cites no evidence as to what the HV believed was produced at these locations.<sup>371</sup>

131. Finally, Gotovina wrongly argues that the HV targeted a crossroad near the Kepol factory.<sup>372</sup> The evidence cited in support<sup>373</sup> is too vague to overturn the Chamber's findings.

132. Gotovina's argument that the Chamber reversed the burden of proof is addressed elsewhere.<sup>374</sup>

(d) House marked X on P290

133. The Chamber reasonably found that the HV shelled a house marked X on Exhibit P290,<sup>375</sup> given Witness 56's testimony<sup>376</sup> and the fact that the HV shelled Benkovac during the relevant time period.<sup>377</sup> Gotovina's speculations as to other possible causes for the damage are insufficient to show the Chamber erred.<sup>378</sup>

134. Gotovina further asserts that the house was within 200 metres of a military target.<sup>379</sup> Even if correct, this would not undermine the Chamber's findings, based on a much broader array of evidence, that Rajčić's evidence was not credible. The finding that the HV unlawfully targeted the four towns is not affected by the impact location of a single projectile.<sup>380</sup>

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<sup>368</sup> Judgement, para.1414.

<sup>369</sup> T.18574-18575.

<sup>370</sup> *Contra* Gotovina Brief, para.59.

<sup>371</sup> Gotovina Brief, para.59.

<sup>372</sup> *Contra* Gotovina Brief, para.61.

<sup>373</sup> T.16312. *See* Gotovina Brief, para.61, fn.125.

<sup>374</sup> *Contra* Gotovina Brief, paras.58, 60. *Below*, II.H.

<sup>375</sup> Judgement, paras.1428, 1920.

<sup>376</sup> Judgement, para.1531.

<sup>377</sup> Judgement, para.1420.

<sup>378</sup> *Contra* Gotovina Brief, para.63, fn.128.

<sup>379</sup> Gotovina Brief, para.64.

<sup>380</sup> *Above*, II.C.2.

3. The Chamber reasonably found that a considerable number of projectiles which impacted in Gračac could not have been aimed at designated targets (1.1.5.3)

135. As discussed above, Gotovina misstates the nature of the Chamber's finding of unlawful attack *vis-à-vis* Gračac by suggesting that only 2 out of 150 projectiles "violated its 200M Rule."<sup>381</sup>

136. The Chamber reasonably found, based on Hermann Steenberg's evidence, that shells impacted near his house, which was 800 metres from the nearest military target.<sup>382</sup>

137. Steenberg's misidentification of the location of the police station does not affect the outcome.<sup>383</sup> Both the location indicated by Steenberg and the location as found by the Chamber were more than 200 metres from Steenberg's house.<sup>384</sup> The Chamber reasonably accepted Mile Sovilj's identification of the police station's whereabouts instead of Steenberg's.<sup>385</sup> Nonetheless, the Chamber's decision to accept Steenberg's evidence on the location of his own house but not the police station<sup>386</sup> is consistent with jurisprudence that a trial chamber may accept some parts of a witness' testimony while rejecting others.<sup>387</sup>

138. The Chamber also reasonably found, based on Vida Gačeša's evidence, that shells impacted near Gačeša's house, which was 300 metres from the nearest military target.<sup>388</sup>

139. Gotovina incorrectly argues that Gačeša "never identified the precise location of her house"<sup>389</sup> and that her identification was an "approximation."<sup>390</sup> When Gačeša was asked to locate her house on a map, she circled a specific building.<sup>391</sup> She did not

<sup>381</sup> Above, II.C.3; Annex A. *Contra* Gotovina Brief, para.65; Errata, p.3.

<sup>382</sup> Judgement, paras.1447, 1456, 1932.

<sup>383</sup> *Contra* Gotovina Brief, paras.67-68.

<sup>384</sup> See Exh.P538 (station marked as "F" and house marked as "G"); Exh.P88 (station marked as "E"). See also Judgement, Vol.I, fns.5550, 5577. *Contra* Gotovina Brief, para.67.

<sup>385</sup> Judgement, para.1455.

<sup>386</sup> See Gotovina Brief, para.68.

<sup>387</sup> *Haradinaj* AJ, para.201.

<sup>388</sup> Judgement, paras.1446, 1456, 1932.

<sup>389</sup> *Contra* Gotovina Brief, para.69(i).

<sup>390</sup> *Contra* Gotovina Brief, para.69(ii)-(iii).

<sup>391</sup> Exh.P192 ("A"). See also T.2886.



mark a general area.<sup>392</sup> Gotovina's assertion that she "was off by 2 mm" when marking her house is without merit.<sup>393</sup>

140. Similarly, Gotovina is wrong when arguing that the Chamber "never identified the precise location of shell impacts."<sup>394</sup> The Chamber reasonably relied on Gačeša's evidence that one shell "landed close to her house"<sup>395</sup> and that other shells landed nearby, including one between her house and that of her neighbour.<sup>396</sup>

141. Finally, the Chamber correctly determined that the HV was not targeting the SVK Gračac Brigade command post when shelling Gačeša and Steenberg's houses.<sup>397</sup> The command post's location was not established.<sup>398</sup> These two houses were too far away from each other for the HV to have targeted the command post and hit the houses by error.<sup>399</sup> Gotovina's speculation as to where the command post might have been is insufficient to overturn the Chamber's findings, particularly when his preferred location, a warehouse, was more than 200 metres from both houses.<sup>400</sup>

142. Gotovina's argument that the Chamber reversed the burden of proof is addressed elsewhere.<sup>401</sup>

4. The Chamber reasonably found that a considerable number of projectiles which impacted in Obrovac could not have been aimed at designated targets (1.1.5.4)

143. The Chamber reasonably found, based on Jovan Dopud's evidence, that shells impacted at a health clinic and the Trio factory, which were 200-300 and 450 metres away from the nearest military target, respectively.<sup>402</sup>

144. The Chamber reasonably declined to accept as designated targets two cross-roads identified by Rajčić.<sup>403</sup> While the Chamber did accept another cross-road

<sup>392</sup> *Contra* Gotovina Brief, para.69(i).

<sup>393</sup> *Contra* Gotovina Brief, para.69(ii).

<sup>394</sup> *Contra* Gotovina Brief, para.69(i).

<sup>395</sup> Judgement, para.1446. The witness actually said that the shell landed "very close to [her] house." Exh.P191, para.5.

<sup>396</sup> Judgement, para.1446.

<sup>397</sup> Judgement, para.1933.

<sup>398</sup> Judgement, para.1933.

<sup>399</sup> Judgement, para.1933.

<sup>400</sup> *Contra* Gotovina Brief, para.70. *See* Exh.P192 (warehouse marked as "D" and house marked as "A"); Exh.P538 (house marked as "G"). *See also* Judgement, Vol.I, fns.5556, 5562, 5577.

<sup>401</sup> *Contra* Gotovina Brief, para.69(iv). *Below* II.H.

<sup>402</sup> Judgement, paras.1470, 1476, 1940.

identified by Rajčić,<sup>404</sup> this cross-road was corroborated by other evidence.<sup>405</sup> No corroborating evidence was presented for the other cross-roads. Given Rajčić's uncertainty in the first place when identifying the cross-roads as potential targets,<sup>406</sup> the Chamber's individualised approach to the potential targeting of cross-roads was reasonable.

#### **E. The Chamber did not err in its treatment of targets of opportunity (1.1.6)**

145. The Chamber reasonably declined to find that shells impacting more than 200 metres from an identified military target were aimed at targets of opportunity,<sup>407</sup> *i.e.*, targets that were not identified prior to Operation Storm.<sup>408</sup> Gotovina has not shown the Chamber's determination was unreasonable.

146. Gotovina first claims that the Chamber erred in concluding that the HV could not strike targets of opportunity.<sup>409</sup> This mischaracterises the Chamber's treatment of this issue. The Chamber did not reject the possibility that HV artillery could strike opportunistic targets. It considered whether the HV had the capability, such as forward observers, to identify and strike targets of opportunity, noting the HV did not appear to have this capability at certain times and places.<sup>410</sup>

147. Gotovina's challenge to this finding should be summarily dismissed. He merely cites the same evidence that the Chamber considered and rejected, *i.e.*, Mrkšić and Rajčić's testimonies and a police car struck by artillery.<sup>411</sup> The Chamber did not "misinterpret [...] Rajčić's testimony"<sup>412</sup> that the HV did not have a clear line of sight on Knin prior to Operation Storm.<sup>413</sup> This is what Rajčić said.<sup>414</sup> He did not limit his

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<sup>403</sup> *Contra* Gotovina Brief, paras.73-75.

<sup>404</sup> Judgement, paras.1466, 1474, fn.5606.

<sup>405</sup> Judgement, para.1466; Exh.D1460, p.3.

<sup>406</sup> T.16330.

<sup>407</sup> *Contra* Gotovina Brief, paras.77-85.

<sup>408</sup> Judgement, para.1907.

<sup>409</sup> Gotovina Brief, paras.78-79, 85.

<sup>410</sup> Specifically, it was not established that the HV had artillery observers in Knin on 4 August 1995, in Gračac during the start of the shelling, or in Benkovac. Judgement, paras.1907, 1915, 1921, 1933.

<sup>411</sup> Gotovina Brief, paras.78, 81. *See Haradinaj* AJ, para.13; Judgement, para.1907.

<sup>412</sup> *Contra* Gotovina Brief, para.80.

<sup>413</sup> Judgement, paras.1191, 1907.

<sup>414</sup> T.16446 ("Visually there was no clear line of sight of the settlement of Knin before the operation started.").

evidence in the manner suggested by Gotovina. The other evidence Gotovina cites also does not show the Chamber unreasonably relied upon this statement.<sup>415</sup>

148. Gotovina's reliance on Dawes's evidence is misplaced; as discussed above, Dawes did not in fact testify that he had been targeted.<sup>416</sup> As for evidence by Leslie that suggested the possibility of HV artillery observers, Gotovina ignores Leslie's contrary evidence that the HV engaged in random shelling,<sup>417</sup> which was supported by other eyewitnesses.<sup>418</sup>

149. Gotovina further argues that the Chamber erred regarding the number of opportunistic targets available in the four towns.<sup>419</sup> His arguments should be rejected.

150. The Chamber considered whether, assuming the HV could strike opportunistic targets, there was any evidence that such targets were present at or near those impact locations that were far removed (i.e. more than 200 metres) from a designated target. In concluding that there was either no evidence or very little evidence of the presence of such targets in these various locations, the Chamber ruled out the likelihood that shelling impacts so distant from designated targets were directed at targets of opportunity.<sup>420</sup>

151. Contrary to Gotovina's suggestion, the Chamber did identify the impact locations in Knin for the seven shells he highlights.<sup>421</sup> There is no basis for his speculation that these shells were aimed at mobile targets instead.

#### **F. The "Martić attacks" were disproportionate (1.1.7)**

152. The Chamber reasonably found that the attacks directed at Milan Martić's supposed location were disproportionate,<sup>422</sup> based on a correct application of the

<sup>415</sup> *Contra* Gotovina Brief, para.80.

<sup>416</sup> *Above*, II.D.1(a). *Contra* Gotovina Brief, para.81.

<sup>417</sup> Judgement, para.1278.

<sup>418</sup> Judgement, paras.1284, 1295, 1337. *Contra* Gotovina Brief, para.81. His erroneous argument that 850 shells in Knin landed within 200 metres of a military target is addressed elsewhere. *Above*, II.C.3.

<sup>419</sup> Gotovina Brief, paras.82-84.

<sup>420</sup> Judgement, paras.1908, 1921, 1933, 1941. *See also* paras.556, 1222-1225, 1408-1409, 1414, 1430, 1443-1445, 1448-1449, 1463, 1467, 1470-1471, 1475.

<sup>421</sup> The seven shell locations are: 1) One shell at a house marked L on P681; 2) one shell in an area east of Knin; 3) four shells near the hospital, and 4) one shell near the cemetery. Judgement, paras.1903-1905. *Contra* Gotovina Brief, para.83.

<sup>422</sup> Judgement, para.1910; *see also* fn.935 (leaving open the question of the proportionality of the strikes on the other targets identified).

relevant law.<sup>423</sup> Gotovina mistakes the key point of the Chamber's reasoning,<sup>424</sup> which was not the disproportionality of an attack on Martić as such but rather the disproportionality of an attack which had only a "very slight"<sup>425</sup> chance of hitting Martić.

153. The Chamber's reasoning reflects a correct application of the law.<sup>426</sup> Contrary to Gotovina's assertion,<sup>427</sup> evidence that civilians were or were not actually present in Martić's vicinity at the relevant times was immaterial: compliance with the law of proportionality is measured "not by the results of an attack but rather by what the attacker reasonably expected before launching it."<sup>428</sup> It was not necessary to show either prior or subsequent "death, injury or damage,"<sup>429</sup> given the risk presented by i) the HV's knowledge of the civilian character of the area<sup>430</sup> and ii) its minimal intelligence regarding the actual situation of the population.<sup>431</sup> The Chamber properly weighed the fact that Rajčić could only reasonably anticipate a "possible"<sup>432</sup> advantage by targeting Martić against the reasonable expectation of a "significant risk"<sup>433</sup> of civilian casualties and damage in shelling Martić from a distance of more than 25 kilometres.<sup>434</sup> The Chamber reasonably determined that the degree of harm predicted was "excessive" in light of the minimal advantage anticipated.<sup>435</sup> Hindsight formed no part of its consideration.<sup>436</sup>

154. Gotovina's claim that targeting Martić was of "great importance"<sup>437</sup> confuses the Chamber's *prima facie* determination that he could be a lawful target<sup>438</sup> with its subsequent analysis of whether engaging that target was in fact proportionate in the

<sup>423</sup> Judgement, para.1910.

<sup>424</sup> Gotovina Brief, paras.86-87.

<sup>425</sup> Judgement, paras.1244 (citing Rajčić, T.16446, 16448, 16612-16614), 1910.

<sup>426</sup> See *Galić* TJ, para.58. *Contra* Gotovina Brief, para.86(iv)-(v).

<sup>427</sup> Gotovina Brief, para.86(i).

<sup>428</sup> Schmitt (2006), p.294. See also Dinstein (2010), p.132; Oeter (2008), pp.204-205.

<sup>429</sup> *Contra* Gotovina Brief, paras.86(ii), 117.

<sup>430</sup> E.g. Rajčić, T.16451.

<sup>431</sup> Rajčić, T.16445-16446.

<sup>432</sup> Rajčić, T.16448.

<sup>433</sup> Judgement, para.1910.

<sup>434</sup> Judgement, paras.1174, 1910, fn.934.

<sup>435</sup> Judgement, para.1910.

<sup>436</sup> *Contra* Gotovina Brief, para.86(v).

<sup>437</sup> Gotovina Brief, para.86(iii).

<sup>438</sup> See Judgement, para.1899.

circumstances.<sup>439</sup> These two issues must be distinct since otherwise would render the concept of a proportionality analysis pointless.

155. The Chamber’s finding that the “Martić” attacks were disproportionate, evidencing “little or no regard” to the risk of civilian harm,<sup>440</sup> supported its finding that Gotovina ordered the targeting of the four towns as such.<sup>441</sup> Since Gotovina had intentionally ordered this broader unlawful attack on the four towns,<sup>442</sup> there was no need for the Chamber to determine that Gotovina himself possessed the *mens rea* for the specific disproportionate attack.<sup>443</sup>

#### **G. Information available to Gotovina when he issued his order did not make the order lawful (1.2.2.4)**

156. Gotovina’s order to put the four towns under fire was illegal, regardless of the information available to him at the time Operation Storm was executed.<sup>444</sup>

157. Well before the time Gotovina issued this order, the prohibition on attacks on civilians had been clearly established in customary international law.<sup>445</sup> Despite this prohibition, Gotovina ordered his subordinates to unlawfully attack civilians and civilian objects by treating the four towns as targets.<sup>446</sup> Notwithstanding the other circumstances Gotovina highlights, his order was illegal.<sup>447</sup>

158. Gotovina’s arguments—1) the plain text of his order was not illegal, and 2) international investigations found that the attack was not unlawful—are addressed elsewhere.<sup>448</sup>

#### **H. The Chamber did not reverse the burden of proof (1.3)**

159. Gotovina incorrectly claims that the Chamber reversed the burden of proof for several shelling issues.<sup>449</sup> As discussed above, the Chamber’s findings on these issues,

<sup>439</sup> *Galić* TJ, para.58.

<sup>440</sup> Judgement, para.1910.

<sup>441</sup> Judgement, para.1911. *Contra* Gotovina Brief, para.117.

<sup>442</sup> Judgement, para.2324. *Below* II.I.

<sup>443</sup> *Contra* Gotovina Brief, para.86(vi).

<sup>444</sup> *Contra* Gotovina Brief, paras.129-135.

<sup>445</sup> *See Galić* AJ, para.87.

<sup>446</sup> Judgement, paras.1893, 1911, 2324, 2370, 2373.

<sup>447</sup> *Contra* Gotovina Brief, para.133.

<sup>448</sup> *Above*, II.B.2.(d)(ii); II.B.2.(d)(vi). *Contra* Gotovina Brief, paras.131, 133-134.

<sup>449</sup> *Contra* Gotovina Brief, para.136.

based on the totality of the record, were reasonable.<sup>450</sup> Gotovina disagrees with the Chamber's assessment of the evidence; however, this does not amount to a reversal of the burden of proof.<sup>451</sup>

160. The Chamber's rejection of Gotovina's argument that certain objects were military targets did not violate the presumption of innocence.<sup>452</sup> Like any other factual assertion by a party, a claim that a location was a military objective must be sufficiently raised by the evidence.<sup>453</sup> Contrary to his assertion, unidentified targets in unspecified locations in unknown artillery logs do not constitute such evidence.<sup>454</sup>

161. The Chamber's treatment of opportunistic targets was also based on the record as a whole.<sup>455</sup> Gotovina now essentially claims there is the hypothetical possibility that a target of opportunity *may have* presented itself at a location more than 200 metres from a designated target, and that it was the Prosecution's burden to present evidence excluding this possibility.<sup>456</sup> The Prosecution is not required to rule out every hypothetically possible explanation of an event found to have constituted a crime.<sup>457</sup>

162. Finally, the Prosecution satisfied the burden of proof in establishing the civilian nature of the object of attack.<sup>458</sup> The four towns that were subjected to the unlawful attack were overwhelmingly composed of civilians.<sup>459</sup>

#### **I. The Chamber properly assessed the *mens rea* for unlawful attacks (1.4)**

163. Gotovina's arguments on *mens rea* misapprehend the Judgement.<sup>460</sup> As discussed above, the Chamber found that the shelling of the four towns as a whole

<sup>450</sup> *Above*, II.C.4 (range of error), II.D.1(a) (Dawes' testimony), II.D.1(c) (Knin hospital), II.D.1(f) (railway fuel storage), II.D.2(c) ("Jagoda" list), II.D.2(d) (houses in Benkovac).

<sup>451</sup> *See Hartmann* AJ, paras.70-73; *Krajišnik* AJ, para.206; *Limaj* AJ, paras.23-24.

<sup>452</sup> *Contra* Gotovina Brief, para.136. Most of Gotovina's alleged military targets have already been addressed. *Above*, II.D.1(f) (railway fuel storage), II.D.2(a) (Ristić pine woods), II.D.2(c) (Benkovac factories). *Contra* Gotovina Brief, para.136. As for the remainder (empty fields in Knin and factories in Obrovac), his unsupported assertions are insufficient to show the Chamber was unreasonable. *Contra* Gotovina Brief, para.136.

<sup>453</sup> *See Strugar* TJ, para.284.

<sup>454</sup> *Contra* Gotovina Brief, para.136. His argument regarding the SVK Gračac Brigade command post has already been addressed. *Above*, II.D.3. *Contra* Gotovina Brief, para.136, fn.261.

<sup>455</sup> *Above*, II.E.

<sup>456</sup> Gotovina Brief, paras.77, 84.

<sup>457</sup> *See Galić* AJ, para.259.

<sup>458</sup> *Contra* Gotovina Brief, para.136.

<sup>459</sup> Judgement, paras.1225, 1233, 1430, 1463, 1475.

was unlawful. Its finding is not simply based on a few shelling incidents.<sup>461</sup> The Chamber further found that the JCE members intended that this shelling be an unlawful attack on civilians and civilian objects,<sup>462</sup> and specifically that Gotovina shared that intent and intended for this unlawful attack to be carried out.<sup>463</sup>

164. Accordingly, the Prosecution was not required to prove the *mens rea* for unlawful attack for the individuals involved in each particular shelling incident.<sup>464</sup> Also, contrary to Gotovina's suggestion, the Chamber did not ascribe the *mens rea* to a "legal entity," the HV, alone.<sup>465</sup> It found that particular persons, including Gotovina, had the requisite *mens rea* for unlawful attack.<sup>466</sup> Nor did the Chamber fail to consider whether Gotovina acted with intent.<sup>467</sup>

165. Gotovina's erroneous argument that the unlawful attack involved more than one kind of *mens rea* rests on a faulty premise. Contrary to his suggestion, the Chamber found that the attack was indiscriminate and as such directed against civilians.<sup>468</sup>

166. His argument regarding "civilian areas" is addressed elsewhere.<sup>469</sup>

## J. Conclusion

167. For the foregoing reasons, Ground One should be dismissed.

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<sup>460</sup> *Contra* Gotovina Brief, paras.139-141.

<sup>461</sup> *Above* II.C.3.

<sup>462</sup> Judgement, para.2311.

<sup>463</sup> *See* Judgement, paras.2370-2371.

<sup>464</sup> *Contra* Gotovina Brief, para.139. *See also* *Krajišnik* AJ, para.226 (tools of a JCE need not share the *mens rea*).

<sup>465</sup> *Contra* Gotovina Brief, para.139.

<sup>466</sup> Judgement, paras.2311, 2371.

<sup>467</sup> Judgement, para.2371. *Contra* Gotovina Brief, para.140(iii).

<sup>468</sup> *Above*, II.B.2(b). *Contra* Gotovina Brief, para.140(ii).

<sup>469</sup> *Above*, II.B.4. *Contra* Gotovina Brief, para.140(i).

### **III. THE SERB CIVILIANS FLED BECAUSE OF FEAR CREATED BY THE UNLAWFUL ATTACK (GROUND TWO)**

#### **A. Overview**

168. On 4-5 August 1995, Knin, Benkovac, Obrovac and Gračac were subjected to a co-ordinated, unlawful attack, which encompassed indiscriminate shelling and instilled great fear and panic amongst the civilian population. The Chamber reasonably found that this fear created an environment in which those present, some 20,000 Serb civilians, had no choice but to flee.<sup>470</sup>

169. The participants at the Brioni meeting agreed and planned to use an artillery attack to force the Serb population out of the Krajina. This plan was carried out through Gotovina's artillery order to put these towns under fire, and went exactly according to plan. All four towns were subjected to an unlawful shelling attack which caused fear, panic and flight. The Chamber heard considerable evidence of this from those present in the towns when the shells began to fall. Gotovina fails to demonstrate that no reasonable trial chamber could have made this finding.

170. Gotovina's arguments should be dismissed. First, he repeats his mistaken understanding of the Chamber's unlawful attack findings and incorrectly attempts to parse out individual projectiles and to require individual causative links between each shelling incident and each fleeing civilian. Second, in challenging isolated aspects of the eye-witness evidence, he mischaracterises the Chamber's findings, fails to consider the totality of evidence and simply seeks to re-evaluate the facts. Third, in advancing other alleged causes for the civilian departures, Gotovina simply repeats unsuccessful trial arguments and shows no error in the Chamber's reasoning. Finally, he repeats his failed trial argument that "occupation" is an element of the crime of deportation as a crime against humanity, which is based on a misreading of the jurisprudence and misapplication of the GCs. His arguments lack merit and he gives no cogent reason why the definition of deportation as a crime against humanity should be altered to include "occupation".

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<sup>470</sup> Judgement, paras.1743-1745.



## **B. The four towns were subjected to an unlawful attack (2.1)**

### 1. The attack against the four towns was unlawful in its entirety

171. Knin, Benkovac, Obrovac and Gračac were subjected to a co-ordinated and indiscriminate shelling attack, creating great fear that resulted in the forcible displacement of at least 20,000 civilians from the Krajina.<sup>471</sup> As planned at Brioni,<sup>472</sup> ordered by Gotovina<sup>473</sup> and implemented by his subordinates and Markač, the Croatian forces treated the towns of Knin, Benkovac, Obrovac and Gračac as targets themselves, putting them under indiscriminate artillery fire. As discussed above,<sup>474</sup> the Chamber correctly found that the attack on the four towns constituted an unlawful attack on civilians and civilian objects.<sup>475</sup>

172. When challenging the Chamber's findings on deportation, Gotovina claims that the Chamber did not link civilian departures to "unlawful" shelling *incidents*.<sup>476</sup> However, the Chamber's findings on the illegality of the shelling relate to the unlawful attack *in its entirety*.<sup>477</sup> Accordingly, it correctly linked the fear instilled by the unlawful artillery attack on the four towns with the coercive environment which left civilians no choice but to flee.<sup>478</sup>

### 2. Gotovina's arguments proceed on a mistaken premise

173. Gotovina's suggestion that the Chamber failed to distinguish between departures of individual civilians caused by "lawful" shelling and those caused by "unlawful" shelling<sup>479</sup>—and his related arguments<sup>480</sup>—misunderstand the Chamber's findings.

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<sup>471</sup> Judgement, para.2305.

<sup>472</sup> Exh.P461, pp.10, 15; Judgement, paras.1970-1995.

<sup>473</sup> Exh.P1125, p.14; Judgement, paras.1172-1173, 1185, 1194, 1422, 1452-1453, 1473, 1911.

<sup>474</sup> *Above*, II.

<sup>475</sup> Judgement, paras.1911, 1923, 1935, 1943, 2311. *Above*, II.

<sup>476</sup> Gotovina Brief, paras.145, 147, 148, 153.

<sup>477</sup> *See above*, II.B.

<sup>478</sup> Judgement, paras.1743-1745.

<sup>479</sup> Gotovina Brief, paras.145-148; *see also* para.169.

<sup>480</sup> Gotovina Brief, paras.147(1), 148, 153-155.

174. Given the Chamber’s overarching findings on the illegality of the attack, any distinction between “lawful” and “unlawful” artillery fire is misguided.<sup>481</sup> Equally, attempting to determine the “legality” of individual shells that may have prompted individual civilians to leave is both legally and factually incoherent.<sup>482</sup> Civilians fled because their towns were subjected to an indiscriminate shelling attack; not because one or another particular shell may have landed in their personal vicinity. Given its findings on the nature of the unlawful attack operation, the Chamber was not required to link particular unlawful shelling incidents to the departure of individual victims who fled.<sup>483</sup>

### 3. The Chamber found that civilians fled because of the unlawful shelling

175. Gotovina incorrectly argues that the Chamber failed to make a specific finding that the displacement of civilians was caused by fear of *unlawful* attacks.<sup>484</sup>

176. The Chamber did not need to specify whether individual civilians left because of one or more distinct unlawful shelling “incidents”, given that the attack on the four towns was found to be indiscriminate and unlawful in its entirety.<sup>485</sup> Appropriately, the Chamber determined that the attack on the towns as a whole was unlawful, and then considered the causative link between the attack and the mass civilian departures. The Chamber attributed the civilian departures to the unlawful shelling operation<sup>486</sup> and reasonably found the necessary causal link between the “great fear” caused by the unlawful shelling attack and the ensuing forcible civilian displacements.<sup>487</sup>

### **C. The fear instilled by the shelling caused the civilians’ departure from the four towns (2.2)**

177. The Chamber’s finding—that the great fear instilled by the shelling was the primary and direct cause of the mass Serb civilian movement from their homes<sup>488</sup>—

<sup>481</sup> *Contra* Gotovina Brief, paras.145, 147, 153; Judgement, paras.1911, 1923, 1935, 1943, 2311.

<sup>482</sup> *Contra* Gotovina Brief, paras.147(i)-(ii), 148, 153.

<sup>483</sup> To the extent that Gotovina suggests that victims must be cognisant of the illegality or indiscriminate nature of the shelling, this argument must be dismissed. There is no requirement that victims of a crime appreciate the legal classification of the criminal acts that they are subject to.

<sup>484</sup> Gotovina Brief, para.147.

<sup>485</sup> Judgement, paras.1911, 1923, 1935, 1943, 2311.

<sup>486</sup> *See* Judgement, paras.1862, 2305, 2311,2372.

<sup>487</sup> *See* Judgement, paras.1743-1746.

<sup>488</sup> Judgement, paras.1743-1744.

was reasonable and based on ample evidence. Contrary to Gotovina's suggestion, this was a factual determination. The Chamber did not articulate a legal standard of causation, either generally or for forcible displacements.<sup>489</sup>

178. The reasonableness of this factual finding must be considered in light of the elements of forcible displacement. Forcible displacement can be caused by "force or threat of force or coercion, such as that caused by fear of violence [...], or by taking advantage of a coercive environment."<sup>490</sup> A coercive environment may be the product of multiple factors. Some factors, such as pre-existing fears of violence or poor living conditions, may be underlying within a population, ready to be exploited to trigger displacement. In this case, JCE members recognised the pre-existing state of demoralisation and fear of the civilian population and factored that into their plan.<sup>491</sup> The Chamber's finding that the fear arising from the shelling was "the primary and direct cause" of the departures can be understood as a finding that it was the proximate cause, or trigger, for the mass movement.

179. The Chamber's finding was reasonable since the evidence established that: (i) members of the JCE knew of the underlying fear and demoralisation of the Krajina Serbs and intended the shelling attack to trigger further fear and panic; (ii) the indiscriminate shelling attack was directed at civilians and civilian objects; (iii) the timing and location of the shelling attack coincided with the civilians' flight from the towns; (iv) people in the towns experienced fear and panic from shelling; and (v) victim-witnesses connected their flight to the shelling.<sup>492</sup>

180. The common criminal purpose of the JCE was the permanent removal by force of the Serbs from the Krajina. At the Brioni meeting, the JCE members discussed the importance of the Krajina Serbs leaving as a result and part of an attack.<sup>493</sup> They recognised that the civilian population was already demoralised<sup>494</sup> and that an attack would raise panic levels sufficient to trigger civilian flight.<sup>495</sup> They discussed using "artillery [...] for complete demoralisation" and leaving an escape route for the

<sup>489</sup> *Contra* Gotovina Brief, para.151. *See e.g.* Orić TJ, para.347; Čelebići TJ, para.424; Brđanin TJ, para.382; Milutinović TJ, Vol.I, para.137 (substantially contributing factor).

<sup>490</sup> Stakić AJ, paras.281-282; Krajišnik AJ, para.319; *see* Judgement, para.1739.

<sup>491</sup> *Below*, para.210.

<sup>492</sup> *Contra* Gotovina Brief, paras.144, 150-173, 192-193.

<sup>493</sup> Judgement, paras.2310-2311.

<sup>494</sup> Judgement, paras.1974-1975, 1977, 1993.

population.<sup>496</sup> Expert evidence and evidence from HV military personnel supports the panic-inducing effect of artillery fire on civilian populations. For example, Konings testified about “the harassing and frightening effect the use of artillery can have on civilians, causing fear, panic and disorder.”<sup>497</sup>

181. Gotovina’s order to put the whole towns of Knin, Benkovac, Obrovac and Gračac under artillery fire embodied this strategy and was aimed at triggering the panicked flight of civilians from the area. The attack was implemented exactly according to plan.<sup>498</sup> The inhabitants of the four towns were simultaneously subjected to the same pattern of indiscriminate attack, with the same effect: fear, panic and flight. Residents awoke in the early morning hours of 4 August to the sound and effects of shells falling all around them. The shelling caused fear and panic.<sup>499</sup> Even international observers were panic-stricken, huddling in basements with other terrified residents.<sup>500</sup> Whilst some initially took shelter, civilians started to flee spontaneously as soon as lulls in the shelling allowed.<sup>501</sup> For some, the initial destination was a nearby village, away from the shelling of the towns.<sup>502</sup> However, the shelling extended beyond the towns and encompassed the convoy of fleeing civilians. This gave rise to further fear, causing civilians to continue their flight towards safety out of the area.<sup>503</sup>

182. The Chamber made reasonable causation findings for each of the four towns. Gotovina fails to demonstrate that no reasonable trial chamber could have made these findings. His challenges should be dismissed.

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<sup>495</sup> Judgement, paras.1975, 1977, 1978, 1981.

<sup>496</sup> Judgement, paras.1975, 1977-1978, 1981, 1983, 1991-1993.

<sup>497</sup> Konings, T.14346-14348, 14364-14365, 14373-14374, 14379; Judgement, paras.1580, 1743-1744. *See also* Turkalj, T.13719-13720; Exh.P614, p.19.

<sup>498</sup> Judgement, para.2305. *See also* Forand, Exh.P330, pp.4 (“This shelling created mass panic among the population and forced it to flee.”), 5 (“[I]nstead, [it] left the road into Bosnia via Srb open to await the effects from the HV artillery against the villages and towns, including Knin, to force the population out this route.”). *See also* Judgement, para.1336.

<sup>499</sup> *Below*, III.C(a)-(d).

<sup>500</sup> Al-Alfi, Exh.P1160, p.28; Dangerfield, Exh.P699, pp.2-3; Boucher, Exh.P1177, paras.40-45; Dreyer, T.1725. *See also* Judgement, paras.1302, 1296, 1304, 1287.

<sup>501</sup> *See below*, paras.184, 204; Mrkšić, T.19065-19066; Exh.D923, p.6.

<sup>502</sup> *See below*, paras.185, 191, 203; Mrkšić, T.19065-19067.

<sup>503</sup> *See below*, paras.185, 191, 203.

(a) Knin

183. The Chamber reasonably found that the artillery attack on Knin instilled great fear in its population, which was the primary and direct cause of the departure of the vast majority of civilians on 4 and 5 August.<sup>504</sup> This was based on “a great deal of evidence”, well beyond the evidence Gotovina challenges.<sup>505</sup>

184. When the shelling attack on Knin commenced at 5:00 a.m. on 4 August, civilians initially huddled for shelter in their basements. During lulls in the heavy shelling, some took the opportunity to flee.<sup>506</sup> The Chamber found that at least 600 artillery shells were fired into Knin that day, at least 300 of which were fired during the first hours of the attack.<sup>507</sup> Witnesses described the shelling as continuous,<sup>508</sup> and impacting all over town.<sup>509</sup> Against a backdrop of roaring noise and explosions<sup>510</sup> and the town shrouded in smoke,<sup>511</sup> shrapnel and glass tore through the air,<sup>512</sup> and trees, masonry and debris crashed into the street.<sup>513</sup> Houses and cars were impacted by shells and some were on fire.<sup>514</sup> The bodies of injured and dead lay in the street.<sup>515</sup>

<sup>504</sup> Judgement, para.1743. *Contra* Gotovina Brief, paras.153-157.

<sup>505</sup> See Judgement, paras.1158-1187, together with evidence cited earlier in the Judgement and specifically relied upon through para.1158; see also, paras.1269-1369.

<sup>506</sup> Witness 6, Judgement, para.1277; Witness 54, Judgement, para.1274; Witness 136, Judgement, para.1306; [REDACTED], Judgement, para.1275; Mira Grubor, Judgement, paras.1307, 1561; Dreyer, Judgement, paras.1287-1289. See also Mrkšić, T.18888 (shelling was so heavy he took refuge in the basement).

<sup>507</sup> Judgement, para.1367; see also paras.1274, 1293, 1366.

<sup>508</sup> [REDACTED], Judgement, para.1275; Witness 54, Judgement, para.1274; Berikoff, Exh.P740, para.2(g), Judgement, para.1292; Mrkšić, T.18899-18900.

<sup>509</sup> [REDACTED], Judgement, para.1275; Mira Grubor, Judgement, para.1307; Mrkšić, T.18899, 18902; Dangerfield, Exh.P695, para.30 (“blanket shelling”), Judgement, para.1296; Al-Alfi, Exh.P1160, p.27 (“The whole city. It was massive shelling. Massive shelling.”).

<sup>510</sup> [REDACTED], Judgement, para.1275; Witness 136, Judgement, para.1306; Leslie, Judgement, paras.1278-1279; Mrkšić, T.18888, 19050; Al-Alfi, Exh.P1160, p.28 cited in Judgement, para.1302; Dangerfield, Exh.P699, p.2, T.7139-7140.

<sup>511</sup> [REDACTED], Judgement, para.1275; Dangerfield, Exhs.P695, para.30, P699, p.3, T.7140, 7150, Judgement, para.1296; Al-Alfi, Exh.P1160, p.29, Judgement, para.1302; Dreyer, T.1723.

<sup>512</sup> Dawes, Judgement, paras.1281-1282, 1284; Berikoff Exh.D284, p.8, Judgement, para.1292; Dreyer, T.1723. See also Konings, T.14368-14369, 14373-14374.

<sup>513</sup> Berikoff Exh.D284, p.11; Dreyer, T.1723.

<sup>514</sup> [REDACTED], Judgement, para.1275; Berikoff Exh.D284, p.8 Judgement, para.1292; Mrkšić, T.18900-18901; Al-Alfi, Exh.P1160, p.28; Boucher, Exh.P1177, paras.40-45, Judgement, para.1304.

<sup>515</sup> [REDACTED]; Mira Grubor, Judgement, para.1307; Dawes, Judgement, para.1281-1286; Berikoff, Exh.D284, pp.8-9, Judgement, paras.1292-1293; Bellerose, Judgement, paras.1299-1300.

185. Many witnesses testified about the panic and fear created by the shelling.<sup>516</sup> Some testified that this fear triggered their flight from Knin.<sup>517</sup> Many gleaned from the nature of the shelling attack that its purpose was to scare civilians and to catalyse their flight.<sup>518</sup> By noon, civilians were seen gathering belongings and leaving for safety.<sup>519</sup> [REDACTED].<sup>520</sup> Those who initially fled Knin to surrounding villages continued on when shelling of villages was reported and the sound of shelling could be heard.<sup>521</sup> Many testified that the flight was spontaneous and disorganised, amidst panic and confusion.<sup>522</sup> Gotovina fails to demonstrate that the Chamber's finding that shelling was the primary and direct cause for civilian flight from Knin was one that no reasonable trial chamber could make.

186. As addressed in Section II.B above, given that the unlawful attack was directed against the whole town, Gotovina's argument that some of the witnesses who spoke about the panic, fear and flight caused by the shelling attack may have been near military targets in the town is irrelevant and should be dismissed.<sup>523</sup>

187. Gotovina's challenge to the Chamber's reliance on Murray Dawes's evidence isolates his evidence from its context.<sup>524</sup> Dawes' evidence concerned the intense shelling attack on Knin town and his three trips out of the shelter of the UN compound to evacuate UN personnel from their residences in town. During these

<sup>516</sup> Witness 54, Judgement, para.1274; Witness 56, T.3540 ("they were frightened and filled with uncertainty and that's normal when you hear shelling all around, nobody can feel normal or not feel something. Everyone is afraid for their lives."), T.3541 ("all of them felt insecure. They felt afraid. And the essential thing was to save their lives and not come under the effects of any shelling, to remain alive."); Mrkšić, T.18900-18903, 19050-19051; Marker-Hansen, T.14909; Dangerfield, Exh.P699, pp.2-3, Judgement, para.1296; Boucher, Exh.P1178, para.15 ("mayhem"); Dreyer, T.1723-1725.

<sup>517</sup> Witness 6, Judgement, para.1277; Witness 54, Judgement, paras.1559, 1580.

<sup>518</sup> Witness 6, Judgement, para.1277; Berikoff, Exh.D284, p.17; Williams, Judgement, para.1298; Marti, T.4633-4634, Exh.P416, p.14; Mrkšić, T.19064 (Knin and other towns); Dangerfield, Exh.P695, para.30 (destroy morale), Judgement, para.1296; Dawes, Exh.P980, pp.5, 7, Judgement, paras.1281-1286; Al-Alfi, Exh.P1160, p.29 (shaking morale).

<sup>519</sup> Liborius, Judgement, para.1297; Roberts, Judgement, para.1562 (noticed this at 1:30 p.m.). Civilians also gathered near the UN compound from the morning onwards: Dawes, Judgement, para.1283; Williams, Judgement, para.1298. They were allowed in to escape from the shelling: Al-Alfi, Exh.P1160, pp.33-34.

<sup>520</sup> [REDACTED].

<sup>521</sup> Witness 54, Judgement, paras.1559-1560.

<sup>522</sup> [REDACTED]; Mira Grubor, Judgement, para.1561; Witness 54, Judgement, para.1580; Roberts Judgement, para.1562. *See also* Hayden, Judgement, para.1576.

<sup>523</sup> *Contra* Gotovina Brief, paras.153 (Witnesses 6, 54 and 136), 154 (15 civilians running for shelter in a state of panic), 155 (an alleged opportunistic target), 157 (confused and panicked Serb civilians in street). *See also above*, para.174.

<sup>524</sup> Judgement, paras.1281-1286.

trips, shelling was so heavy that shrapnel kept rattling the sides of the APC. Dawes saw injured and dead civilians on the streets. During his third trip, Dawes described intense shelling in the vicinity of the ECMM headquarters. A shell fell near him, knocking him off his feet and perforating his eardrum. At that point, he saw two dead farmers on the side of the road and 15 civilians running for shelter in a state of panic. It was reasonable for the Chamber to associate the panic of these 15 civilians with the heavy shelling that was occurring.<sup>525</sup>

188. Gotovina provides no support for his claim that shelling in this area could only have been by Serbs.<sup>526</sup> There is nothing to associate the few SVK soldiers seen by Dawes—at a different time and a different place in the town—with the 15 civilians he saw “running for shelter” amidst heavy shelling.<sup>527</sup>

189. The Chamber also reasonably associated the confusion and panic of Serb civilians seen in the street by Philip Berikoff with the heavy shelling he described.<sup>528</sup> On his trips, he saw many killed or injured Serb civilians, and numerous burning or destroyed buildings.<sup>529</sup> In addition to the group of confused and panicked civilians on the street at the Jordanian Chief of Staff’s residence, he also saw people hiding, as well as a lot of confusion in other areas of town.<sup>530</sup>

190. Gotovina speculates that the civilians may have been panicked by the SVK soldier who shot at Berikoff at an earlier point in his journey.<sup>531</sup> However, there is no evidence that these civilians were “nearby” when Berikoff was fired at. Whilst his evidence was not precise, it is clear that there was a temporal and geographical gap between the two incidents he described.

<sup>525</sup> *Contra* Gotovina Brief, paras.154-156.

<sup>526</sup> Gotovina Brief, para.154. *See also above*, II.E.

<sup>527</sup> *Contra* Gotovina Brief, paras.155-156. Dawes saw only “a few” individual SVK soldiers, who appeared to be travelling as a unit. Other evidence supports individual desertions at this time. *See* Novaković, T.11802. *See also below*, III.D, responding to Gotovina’s other alleged causes for civilian departure from these towns.

<sup>528</sup> *See e.g.* Exh.P748, pp.5, 12. *See also* Judgement, paras.1292-1293.

<sup>529</sup> Exh.D284, pp.8-9.

<sup>530</sup> Exh.D284, p.11. *See also* Exh.P748, p.12 (the refugees at the UN compound were looking for safety).

<sup>531</sup> Gotovina Brief, para.157.

(b) Benkovac

191. Residents of Benkovac awoke at 4:00 to 5:00 a.m. on 4 August to a similar situation, with the whole town under heavy shelling.<sup>532</sup> This shelling was very different from the previous short bursts of sporadic shelling in 1994 and early 1995. The artillery attack on 4 August left larger holes, lasted longer and hit residential areas and outlying villages.<sup>533</sup> The sound of detonations was heard for hours and shelling came from all areas.<sup>534</sup> [REDACTED].<sup>535</sup> At least 150 projectiles impacted in Benkovac town.<sup>536</sup> Witnesses spoke of the panic and flight induced by this shelling.<sup>537</sup> Initially civilians from the villages fled from the shelling in columns to Benkovac.<sup>538</sup> By mid-afternoon people in Benkovac were panicking and spontaneously leaving the town.<sup>539</sup> Groups without their own transportation gathered spontaneously at the bus station to find a way out.<sup>540</sup> By later that evening, the town was deserted.<sup>541</sup> [REDACTED].<sup>542</sup> The JCE's plan to drive out the civilian population was achieved in Benkovac as well.

192. As with Knin, the Chamber reasonably found that the civilians of Benkovac fled due to the fear caused by the shelling attack. Witnesses testified that shelling was a primary reason for their panic and flight. Strong temporal and geographical correlations between the shelling attack and the spontaneous flight of the civilians also shows that the shelling triggered the mass movement from Benkovac on 4 to 5 August. Considered in its totality, the evidence establishes that the shelling was the

<sup>532</sup> Judgement, para.1420; Sinobad, Judgement, para.1412; Vukašinović, Judgement, para.1414; [REDACTED], Judgement, para.1275; Novaković, T.11753; Exhs.P1263, p.8; D828, p.1.

<sup>533</sup> Sinobad, Exh.P2362, paras.10-11, 14-16, Judgement, paras.1412-1413. *See also* Sinobad, T.16944, 16967-16968; [REDACTED], Judgement, para.1275.

<sup>534</sup> Sinobad, T.17041; Vukašinović, Judgement, para.1414.

<sup>535</sup> [REDACTED].

<sup>536</sup> Judgement, para.1420; Vukašinović, Exh.D1499, para.5, T.18580-18581; Judgement, para.1414; Exh.D828, pp.1, 3.

<sup>537</sup> Vukašinović, T.18558-18560 (panic set in as a result of shelling, and as a result of misinformation, and also some news that caused unrest among the citizens), Exh.D1499, para.15 (panic caused by all the events of the day, including shelling), cited at Judgement, para.1533; Sinobad, T.16946 (villagers fleeing from shelling through Benkovac); [REDACTED].

<sup>538</sup> Sinobad, T.16946.

<sup>539</sup> Sinobad, Judgement, para.1532; Vukašinović, Exh.D1499, para.15, T.18558-18560, Judgement, para.1533; Dangerfield, Exh.P695, paras.18, 32 (at 5:00 p.m., Benkovac licence plates were seen among those escaping through Knin).

<sup>540</sup> Sinobad, Exh.P2362, para.25, Judgement, para.1532.

<sup>541</sup> Vukašinović, Judgement, para.1533.

<sup>542</sup> [REDACTED].



proximate cause of the mass movement. Gotovina fails to demonstrate that the Chamber's finding was one no reasonable trial chamber could make.

193. Gotovina challenges individual strands of evidence, instead of considering the evidence (or, in some case, even a witness' evidence) as a whole.<sup>543</sup>

194. Sinobad and Vukašinić both testified about the panic which arose from the shelling of Benkovac, indicating that the shelling was a major reason why people left Benkovac and surrounding villages in large numbers.<sup>544</sup> Their evidence supports the Chamber's findings that fear from shelling was the primary and direct cause of the civilians' movement *en masse* during the shelling attack.

195. Sinobad explained that the villagers fleeing through Benkovac told him that the nearby villages were being shelled and that they simply had to flee.<sup>545</sup> He said that he had not moved his family out during previous shelling because it was short-lived and sporadic. However, the shelling attack on 4 August was very different.<sup>546</sup> He believed the entire population fled because of both "the fire from the Croatian forces, and the possible coming in of mechanized forces".<sup>547</sup> Only when challenged on his evidence that previous shelling instances did not make him leave, did he focus more on the possibility of incoming Croatian forces as the main source of panic.<sup>548</sup> While the Chamber did not specifically cite this part of Sinobad's evidence, when read as a whole, his evidence supports the finding that the shelling was the direct and immediate cause of the civilian's panic and flight.<sup>549</sup> As such, it supports rather than refutes the Chamber's findings.<sup>550</sup>

196. Vukašinić also testified about the panic in Benkovac on 4 August. He believed the panic was "a result of the shelling" and also resulted "from misinformation and also some news that caused unrest".<sup>551</sup> This included knowing

<sup>543</sup> *Krajišnik* AJ, para.18.

<sup>544</sup> *Contra* Gotovina Brief, paras.160-161.

<sup>545</sup> T.16946.

<sup>546</sup> T.16964.

<sup>547</sup> T.16967-16968.

<sup>548</sup> T.16969. *See* Gotovina Brief, para.160.

<sup>549</sup> *See* *Krajišnik* AJ, para.19. *See also* Judgement, paras.10, 46-47, 60.

<sup>550</sup> *Contra* Gotovina Brief, para.160.

<sup>551</sup> Vukašinić, T.18558-18560; *see also* T.18590 "the people had started fleeing much before that, because the assumption was that the Croatian army was advancing on all parts of the front. Apart from that, shells kept falling on the area of the town of Benkovac, so that the people started fleeing..."

that Grahovo and other positions or villages such as Knin and Gračac had fallen.<sup>552</sup> Since the latter towns did not fall until 5 August, and the lines around Benkovac were holding at the time of the civilian flight from Benkovac,<sup>553</sup> it was reasonable to discount this latter aspect as the primary and direct cause of the mass departures.<sup>554</sup>

197. The Chamber also considered that the civilians' fear and panic may have been influenced by other factors, such as their pre-existing fear of Croatian troops, given what had happened during previous HV offensives in the Krajina.<sup>555</sup> However, the existence of any such underlying fear does not undermine the finding that the fear instilled by the shelling attack was the primary and direct cause of the mass departures. The *actus reus* of forcible displacement can be satisfied through the creation of fear *or* through taking advantage of a fear already in place.<sup>556</sup> The shelling both caused fear and exploited the already demoralised and fearful state of the civilian population. Gotovina's arguments on such other alleged causes for the civilians' fear and departure are addressed in Section III.D below.

198. By 6:00 a.m. on 4 August, Witness 56 had learned of the shelling of Benkovac. Later in the day, he also learned that his family had already fled the town. This supports the temporal proximity between the shelling of the town and the civilian flight. He also testified that, while he was in nearby deserted villages, he was advised to leave because of shelling.<sup>557</sup> The Chamber reasonably relied on this evidence to find that the shelling attack triggered the flight of civilians from Benkovac.

199. Gotovina challenges the Chamber's reliance on Forand's evidence in finding that "large numbers of people [...] left Benkovac town [between 4 and 5 August]." The departure of the civilian population from Benkovac during this timeframe is not contentious and is well-supported by the evidence.<sup>558</sup> As UNCRO Commander of

<sup>552</sup> Vukašinić, Exh.D1499, para.15.

<sup>553</sup> There is no evidence that the frontlines had been breached anywhere near Benkovac. *Contra* Gotovina Brief, para.161. Exhs.D161, [REDACTED], [REDACTED] and D1258 relate to occurrences in Knin or at the frontline on the opposite side of the Krajina from Benkovac. Rather, all lines around Benkovac were reported as stable at 4:00 p.m. on 4 August: *see* Exh.D828, p.3. The 3<sup>rd</sup> Infantry Brigade withdrew only at 11:00 p.m. that evening, the 92<sup>nd</sup> Brigade on 5 August; Vukašinić, T.18564.

<sup>554</sup> *See below* Section.III.D. *See also* Judgement, para.1734 (which acknowledges that underlying fears and hardships may have had some bearing).

<sup>555</sup> *Contra* Gotovina Brief, para.160.

<sup>556</sup> *Above*, para.178, including fn.490.

<sup>557</sup> [REDACTED]. *See also* Judgement, paras.1275-1276.

<sup>558</sup> *See above* fn.539.

Sector South, Forand received reports from Canbat 1 that the civilian exodus he witnessed in Knin on 4 August was also occurring from Benkovac.<sup>559</sup>

200. The erroneous translation of Exhibit P2436 only affects the Chamber's finding that the flight of civilians from Benkovac started as early as 7:00 a.m. on 4 August.<sup>560</sup> However, there is consistent evidence of civilians departing Benkovac during the afternoon of 4 August. The temporal correlation between the shelling and the flight of civilians is not affected by the translation error, and is confirmed by the witness testimony of the panic and fear caused by the shelling. It is also consistent with the events unfolding in Knin, where civilians initially took shelter when the shelling started and fled during a lull or when they realised that the attack was continuing.

(c) Obrovac

201. At 5:00 a.m. on 4 August 1995 the shelling of the Obrovac area also commenced.<sup>561</sup> The shelling of the town itself began at 7:00 a.m.<sup>562</sup> The reaction of the civilians in Obrovac was immediate—they spontaneously started fleeing from their homes during the morning of 4 August.<sup>563</sup> The shelling lasted all day and extended to villages and roads.<sup>564</sup> As the population fled, it became clear to many of them that “the shelling extended far beyond Obrovac and that there was no going back.”<sup>565</sup>

202. The Chamber reasonably found that the shelling attack triggered the population's departure.<sup>566</sup> Again, it heard witness testimony that people left because

<sup>559</sup> Forand, Exh.P330, pp.5-6. Forand also provided evidence of the 5:00 a.m. start of the shelling attack on the towns and villages of Sector South, which included Benkovac: cited at-Judgement, para.1311.

<sup>560</sup> Gotovina Brief, para.158. The Prosecution agrees that the BCS original of Exh.P2436 refers to *Obrovac*, and not Benkovac.

<sup>561</sup> [REDACTED], Judgement, para.1275. *See also* Judgement, para.1473. *Contra* Gotovina Brief, paras.164-165. The Chamber found that the whole attack on Obrovac was unlawful, not just the two specific examples of unlawful shelling it highlighted. *See also above*, II.B. Judgement, para.1473.

<sup>562</sup> Dopud, Exh.P548, para.3, T.5981-5982, 6002-6004, Judgement, para.1535; Novaković, T.11726, Judgement, para.1517; Exh.P2436 (BCS version, 6:55 a.m. 4 August entry).

<sup>564</sup> Dopud, Exh.P548, paras.3-4; Judgement, para.1469.

<sup>565</sup> Dopud, Exh.P548, paras.4, 8 (“the way the attacks spread from the town of Obrovac to the other villages made it impossible to return at any point. It showed that the goal of the operation was to cleanse the territory of Serbs, to expel them from there.”)

<sup>566</sup> Judgement, para.1744.

of the shelling.<sup>567</sup> The strong temporal and geographical proximity between the shelling and the civilian flight also confirmed that the shelling was the primary and direct cause of the panic-induced flight of the civilians. Gotovina fails to demonstrate that this finding was one no reasonable trial chamber could make.

203. Gotovina mischaracterises Dopud's evidence, citing an error which the witness corrected during his testimony.<sup>568</sup> Dopud was clear about the timing of the departure of civilians both from Obrovac and, afterwards, from the surrounding villages. Residents of Obrovac who had relatives in the nearby villages left the town in the morning of 4 August.<sup>569</sup> This timing is corroborated by other evidence, including Novaković, a member of the Command Staff of the SVK and the SVK press officer, who had received reports about the events in the towns including Obrovac.<sup>570</sup> The first wave of people to leave *the area* was comprised of those who did not have family in nearby villages and therefore had not already left the town. The second wave, which left the area at midnight, was comprised of those who had already fled the town for the surrounding villages that morning. Their mid-night departure was from those villages.<sup>571</sup> Dopud was also adamant that the people of Obrovac left on their own initiative because of the shelling and not because of an evacuation order. He had not heard anything about such an order.<sup>572</sup>

(d) Gračac

204. Gračac's citizens also awoke at 5:00 a.m. on 4 August to explosions around their homes.<sup>573</sup> Shells were landing all over town<sup>574</sup> and the attack continued during the day.<sup>575</sup> Buildings were on fire.<sup>576</sup> Residents of Gračac were frightened by the

<sup>567</sup> Dopud, Exh.P548, para.3 ("Most people left the town because of the danger caused by shelling.")

<sup>568</sup> See Gotovina Brief, para.164.

<sup>569</sup> T.5981-5982, 6002-6004.

<sup>570</sup> See above fn.563. Novaković, T.11726, Judgement, para.1517. *Contra* Gotovina Brief, para.165 relating to Novaković's testimony.

<sup>571</sup> T.5979.

<sup>572</sup> Exh.P548, paras.3-4, 8; T.5981-5982, 6010-6011, 6019-6020, 6034-6036, 6039. He denied that any formal evacuation order on the evening of 4 August played a role in the civilians' departure, and disagreed with the two exhibits Gotovina cites as "corroborating" his evidence: see Gotovina Brief, para.164.

<sup>573</sup> Sovilj, Exh.P86, para.5, Judgement, paras.257, 1445; Gaćeša, Exh.P191, para.5, Judgement, para.1446.

<sup>574</sup> Sovilj, Exh.P86, para.6, Judgement, para.1445; Gaćeša, Exh.P191, paras.5, 8-10, Judgement, para.1446.

<sup>575</sup> Sovilj, Exh.P86, paras.5-6, Judgement, para.1445. This witness said he was more mindful of physical safety than to count numbers of shells/explosions; T.2240-2241.

intense shelling.<sup>577</sup> As in Knin, some formed the impression that this shelling attack was meant to cause fear.<sup>578</sup> After initially hiding in shelters, civilians started fleeing of their own accord from the town during the morning and afternoon of 4 August.<sup>579</sup> Sovilj explained why he left Gračac, “[w]ell, obviously as everybody else, I was afraid so I’d say that I left for safety reasons.”<sup>580</sup> The victim-witnesses who testified about leaving Gračac knew nothing of any organised or formal evacuation,<sup>581</sup> instead describing the chaos of the fleeing population.<sup>582</sup> The shelling extended outward towards the villages, reinforcing the civilians’ impetus to leave the area.<sup>583</sup>

205. The Chamber’s finding that the shelling caused the movement of the Serb population from their homes in Gračac was reasonable.<sup>584</sup> Witnesses testified about the fear which the shelling instilled and its effect on the departure of civilians from Gračac from the morning of 4 August.<sup>585</sup> Once again, there was a strong temporal and geographic proximity between the unlawful attack and the civilian movement. Gotovina fails to demonstrate that this finding was one no reasonable trial chamber could make.

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<sup>576</sup> Gaćeša, Exh.P191, para.6, Judgement, para.1446.

<sup>577</sup> Gaćeša, Exh.P191, paras.5, 7-10, Judgement, para.1446. *See also* Exh.P191, paras.2-4, T.2899 on how this attack was very different from any previous shelling; Sovilj, T.2219-2220. *Contra* Gotovina Brief, para.166.

<sup>578</sup> Sovilj, Exh.P86, para.5, Judgement, para.1445.

<sup>579</sup> Gaćeša, Exh.P191, paras.10-11, T.2904, Judgement, para.1446; Sovilj, Exh.P86, para.7 (he sent his family out of Gračac earlier and then at 4:00 p.m. on 4 August left the town himself), T.2219-2220 (saw people on the move by his return to the town at 2-2:30 p.m.).

<sup>580</sup> Sovilj, T.2220. *See also* Gaćeša, Exh.P191, para.13 (having left Gračac in the morning, she continued her flight from a village that evening, “[t]he fact that we had been shelled all day and the fact that we were concerned that we would be alone in the village in the night and the panic that had been created amongst the people were the reasons that we decided to follow the others even though we did not know where we were going to go.”); T.2917-2918 (that evening, the shells were falling closer and closer to the village she had fled to); Judgement, para.1446.

<sup>581</sup> Sovilj, T.2252, 2257.

<sup>582</sup> Gaćeša, Exh.P191, para.11.

<sup>583</sup> Gaćeša, T.2917-2918.

<sup>584</sup> Judgement, para.1744; *see also* paras.1549-1551. *Contra* Gotovina Brief, paras.166-168.

<sup>585</sup> *See above* fn.580. *Contra* Gotovina Brief, paras.166, 168. Sovilj’s family had fled the shelling of Gračac earlier on 4 August to the village of Kijani. Later he told his family to leave the village of Kijani because he was worried about HV troops entering the area. There was no shelling in Kijani: Sovilj, T.2221, Judgement, paras.257, 1445.

(e) Departures before 4 August and departures from 4 August from other places

206. The fact that some civilians chose to leave Knin, Benkovac, Obrovac and Gračac before 4 August, in anticipation of the attack, does not undermine the finding that the shelling-induced fear was the primary and direct cause driving the population movement *en masse* out of these towns on 4 August.<sup>586</sup>

207. While the Chamber found that the shelling did have some bearing on why people left from the other areas in the Krajina from 4 August, because of insufficient evidence of the nature, location and timing of the shelling in those areas, it did not find a causal link between the shelling and their departure.<sup>587</sup> However, this finding does not impact on the findings relating to the towns of Knin, Benkovac, Obrovac and Gračac, for which there was ample evidence of the link between the shelling and the mass civilian flight.<sup>588</sup> Rather, it shows the Chamber's careful approach in establishing a causal link between the shelling, the ensuing civilian fear and their departure from the four towns.

**D. Other alleged influences do not affect the Chamber's findings on shelling (2.4)**

208. The Chamber reasonably rejected Gotovina's claim that other factors (such as underlying fear of crimes by HV forces or Martić's evacuation order)<sup>589</sup> were either the trigger for the civilian flight or undermined the causal connection between the shelling attack and the ensuing panic-stricken flight of the civilians.<sup>590</sup>

<sup>586</sup> *Contra* Gotovina Brief, para.170. *See* Judgement, para.1577.

<sup>587</sup> Judgement, para.1754.

<sup>588</sup> *Contra* Gotovina Brief, para.171.

<sup>589</sup> Gotovina Brief, paras.152, 154 (alleged Serb shells), 156 (a few SVK soldiers returning from the frontline), 157 (an SVK soldier's rocket), 160-161 (fear of Croatian troops), 165 (evacuation order, fear of HV troops), 167, 180 (evacuation order), 190 (various).

<sup>590</sup> *Contra* Gotovina Brief, para.180 which proposes a standard of review based on a mono-causal approach.

1. Any underlying fear held by the civilian population of crimes by Croatian forces does not affect the causal link between the shelling and the displacement

209. The *actus reus* of forcible displacement can be satisfied by either the creation of *or* the taking advantage of fear or a coercive environment.<sup>591</sup> In this case, the unlawful shelling attack created great fear which caused the civilian population to flee. In addition, the shelling also exploited a measure of pre-existing fear and panic among that population, stemming from the history of crimes committed against civilians by Croatian forces.<sup>592</sup>

210. The participants at the Brioni meeting recognised the fear and demoralised state of the Krajina Serbs arising after Grahovo had fallen. They factored this into their criminal plan.<sup>593</sup> They knew that the fear caused by shelling whole towns would be an efficient means to accomplish their criminal purpose—to drive the Serb civilian population out of the Krajina for good.<sup>594</sup> The unlawful intensive shelling attack on the towns triggered the flight of the population; the fact that the attack may have played upon already-held fears does not change this outcome.<sup>595</sup>

2. The evacuation order came too late in the day to influence the civilian population already on the move

211. The Chamber also considered what role Martić's evacuation order in the evening of 4 August may have played in the mass movement of the population.<sup>596</sup> In over 18 pages of its Judgement, the Chamber provided clear and logical reasons for finding that, in general, civilians did not leave because of the evacuation order.<sup>597</sup> Contrary to Gotovina's submission, the Chamber's findings were based on the

<sup>591</sup> *Stakić* AJ, paras.281-282; *Krajišnik* AJ, para.319. *See* Judgement, para.1739.

<sup>592</sup> After Grahovo fell, the Serb residents feared that incoming HV forces would commit crimes against civilians, as they had done during WWII and in more recent offensives, such as Medak pocket and Operation Flash in Western Slavonia. *See* Novaković, T.11865; Galbraith, T.4928-4929; Morić, T.25801; Mirković, T.7421-7422; Cetina, T.23513-23514; Forand, Exh.P401, p.2. *See also* Judgement, para.1743 (considering the fear of incoming HV forces).

<sup>593</sup> Judgement, paras.1975, 2003.

<sup>594</sup> Judgement, para.2311.

<sup>595</sup> Judgement, para.1743.

<sup>596</sup> *Contra* Gotovina Brief, para.182.

<sup>597</sup> Judgement, paras.1512-1539, 1743. *Contra* Gotovina Brief, paras.179, 181-182, 189.

evidence as a whole, not just the evidence of Novaković and Serb military commanders.<sup>598</sup>

212. The Chamber reasonably found that the shelling was the primary and direct trigger of the population movement and that the evacuation order did not influence the civilian movement which was already underway.<sup>599</sup> In addition to the evidence regarding the effect of the shelling on the civilian population, the evidence established that:

- The population of the four towns was *already fleeing* before the evacuation order was signed and conveyed to Civilian Protection at 6:00 p.m. on 4 August;<sup>600</sup>
- The flight of the civilians was disorganised and chaotic;<sup>601</sup>
- There were significant difficulties in conveying and effecting the evacuation order;<sup>602</sup> and
- Neither the prior evacuation planning nor the order provided for the movement of civilians out of the area on a permanent basis.<sup>603</sup>

None of the victim-witnesses who fled from the four towns had heard of the evacuation order.<sup>604</sup> Those involved in the evacuation decision explained that the order was meant to bring some order and assistance to the panic-stricken flight which was already underway.<sup>605</sup>

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<sup>598</sup> See e.g. Judgement, paras.1525, 1530-1533, 1536. *Contra* Gotovina Brief, para.189. Gotovina's challenge to Novaković's credibility is undeveloped and fails to show that the Chamber's reliance on his evidence was "wholly erroneous": *Kupreškić* AJ, para.30. See also *Ntakirutimana* AJ, para.254; *Krajišnik* AJ, para.26. See also Judgement, para.31.

<sup>599</sup> Judgement, paras.1512-1539.

<sup>600</sup> Judgement, para.1537. See also Judgement, paras.1517, 1521, 1533, 1541, 1562 1591; *above*, paras.185, 191, 200, 203.

<sup>601</sup> Judgement, para.1539. See also Judgement, paras.1528, 1530, 1532-1533, 1561-1562, 1576; *above*, paras.181, 185, 191.

<sup>602</sup> Judgement, para.1537. See also paras.1523, 1525-1526, 1562.

<sup>603</sup> Judgement, paras.1513, 1514, 1519-1522.

<sup>604</sup> Judgement, para.1539. See also Judgement, paras.1530, 1532, 1535, 1559-1560; *above*, paras.194-195, 202-203.

<sup>605</sup> Judgement, para.1521 (together with evidence cited at fn.62).



213. Gotovina highlights a few pieces of evidence—largely isolated comments by a few individuals.<sup>606</sup> However, the Chamber made its findings that the evacuation order could not have played any significant role so late in the day based on the substantial evidence regarding the reality on the ground and the geographical and temporal proximity between the shelling and the civilians' departure.<sup>607</sup>

214. Further, Gotovina mischaracterises some of the witnesses' comments, either by taking them out of context or ignoring their testimony as a whole.<sup>608</sup> For example, in his first statement to the OTP in 1996, Forand explained the psychological campaign by the Croatian forces and stated “[t]heir use of artillery was excellent when being used against military targets, however the artillery was to a large extent used against villages and towns like Knin [...] This shelling created mass panic among the population and forced it to flee.”<sup>609</sup> Forand repeated this in his other statements and in his testimony.<sup>610</sup> He believed the aim—to get the civilian population out—was achieved by shelling.<sup>611</sup> Forand also testified that in his opinion the panic and confusion which the shelling caused extended to the Serb leadership and affected its attempts to issue and implement the evacuation order late in the day on 4 August. Forand saw no evacuation plan and there was no follow-up meeting to obtain UN assistance.<sup>612</sup> Gotovina relies on isolated quotes in two documentary exhibits but ignores Forand's explanation of these in his statements and testimony.<sup>613</sup> Finally, the Chamber did not disregard these pieces of evidence, as Gotovina claims.<sup>614</sup>

<sup>606</sup> Gotovina Brief, paras.182-188, 190. *See* Krajišnik AJ, paras.19, 21.

<sup>607</sup> *Krajišnik* AJ, para.21.

<sup>608</sup> *See e.g.* Exh.D928 (discusses evacuation decision, does not say explicitly that civilians left as a result of evacuation decision. It states that the evacuation was already a *fait accompli*, which Novaković explained referred to the fact that the population was fleeing anyway. Šekulić also described the exodus from places not covered by the order, and “the panic movement of the population” (p.25)); Exh.D828 does not comment on whether any Serb civilians had left from Benkovac, only that there had been no evacuation yet: *Contra* Gotovina Brief, para.187. [REDACTED].

<sup>609</sup> Exh.P330, pp.3-4. *See* Gotovina Brief, paras.182-183. *See also* Forand's letters of protest against the Croatian use of shelling; *e.g.* Exhs.P334-336.

<sup>610</sup> Exhs.P330, pp.5-6, 12; P331, pp.8-10; P400, para.3.

<sup>611</sup> Exh.P330, p.12.

<sup>612</sup> Exhs.P330, p.5; P331, p.11.

<sup>613</sup> *Krajišnik* AJ, para.18. *See* Gotovina Brief, paras.182-183. *See e.g.* Forand, T.4351-4354.

<sup>614</sup> *See* Judgement, para.1525 (fns.84, 85, 88, 93, 95 citing Forand's statements, testimony and Exh.P401 (presentation)), *contra* Gotovina Brief, paras.182-183; Judgement, para.1522 on Mrkšić's reasons for the evacuation decision including the fear of encirclement (cites testimony rather than Exh.D106), *contra* Gotovina Brief, para.184; Judgement, paras.1521,1523 (fns.61, 76 citing Novaković and Mrkšić's testimony when relevant part of Šekulić's book put to them), *contra* Gotovina Brief, para.185; Judgement, para.1528 (discussing Exh.D1516, p.2), *contra*

### 3. Conclusion

215. The Chamber reasonably found that fear instilled by the unlawful shelling attack on Knin, Benkovac, Obrovac and Gračac was the primary and direct cause of flight for the vast majority of civilians from these towns. Gotovina's arguments should be dismissed.

#### **E. "Occupation" is not an element of the crime of deportation (2.3)**

##### 1. The Chamber applied the correct definition of deportation

216. The Chamber applied the correct elements of the crime of deportation,<sup>615</sup> citing relevant jurisprudence.<sup>616</sup> "Occupation" has never been recognised as a requisite element of the crime of deportation.<sup>617</sup> Gotovina fails to demonstrate how the Chamber erred in adhering to the settled definition of the crime. Nor does he provide any cogent reasons why the Appeals Chamber should depart from it.<sup>618</sup> He merely repeats unsuccessful trial arguments<sup>619</sup> without demonstrating any error in the Chamber's reasoning.<sup>620</sup>

##### 2. Gotovina conflates the text of Art.49, GCIV, with the elements of deportation as a crime against humanity

217. In arguing that occupation is an element of the crime of deportation, Gotovina relies on Art.49 of GCIV. Art.49 prohibits a specific category of deportations; those occurring in occupied territory. This prohibition appears in Section III of GCIV,

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Gotovina Brief, paras.186-187; Judgement, para.1572 (summarising Witness AG-58's evidence), *contra* Gotovina Brief, para.186; Judgement, para.1534 (discussing Exh.D828, including "Uzelac [...] told Mrkšić that no civilians had been evacuated from Benkovac"), *contra* Gotovina Brief, para.187; Judgement, paras.1998-2003 (Galbraith's evidence mainly related to matters after the shelling and civilian flight).

<sup>615</sup> Judgement, para.1738.

<sup>616</sup> See fn.841, citing *Stakić* AJ, paras.278, 317 and *Krajišnik* AJ, paras.304, 308.

<sup>617</sup> Both *Stakić* AJ and *Krajišnik* AJ clearly set out the elements of deportation. Neither case requires occupation. Nor is "occupation" an element of the crime at the International Criminal Court: see Elements of Crimes ICC-ASP/1/3(part II-B).

<sup>618</sup> See Gotovina Brief, paras.174-177.

<sup>619</sup> Gotovina Preliminary Motion on Jurisdiction, paras.10-18. See also Gotovina Pre-Trial Brief, paras.155-156; Decision on Jurisdictional Challenges, paras.47-57; Decision on Interlocutory Appeal on Jurisdiction, paras.11-15; Gotovina Closing Brief, para.860; T.29256-29258; Judgement, para.1750.

<sup>620</sup> *Krajišnik* AJ, para.24.

which applies in situations of occupation.<sup>621</sup> It does not, however, logically follow that *all* deportations must therefore occur within occupied territory or that occupation is an element of the crime of deportation as a crime against humanity.<sup>622</sup>

### 3. Occupation is not an element of deportation in ICTY jurisprudence

218. While Gotovina suggests that ICTY case law supports his contention,<sup>623</sup> his authorities provide no such support.

219. *Krnojelac* does not support Gotovina's submission that occupation is an element of deportation. The Appeals Chamber in *Krnojelac*<sup>624</sup> considered the various prohibitions against deportation found in Art.49 of GCIV, Art.85 of API, and Art.17 of APII, to determine that the prohibition against deportation constituted customary international law. Since deportation was charged in *Krnojelac* as an underlying crime of persecution, the Appeals Chamber did not need to provide a definition of deportation *per se*. However, insofar as it did so,<sup>625</sup> it did not consider occupied territory to be a requirement.

220. Moreover, in selectively quoting from *Krnojelac*, Gotovina omits the Appeals Chamber's consideration of Art.17 of APII, applicable to internal armed conflict, which does not contain any requirement of occupied territory. Rather, it prohibits the forced movement of civilians generally.

221. Likewise, the passage from *Stakić* AJ which Gotovina cites<sup>626</sup> fails to support his contention. When articulating the elements of deportation, the Appeals Chamber did not include any requirement of occupation.<sup>627</sup> It simply noted that occupation was *one instance* in which forcible displacement could constitute deportation:

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<sup>621</sup> Likewise, the prohibition on the forced movement of civilians appears in Art.17, API, where occupation is not a requirement.

<sup>622</sup> See *e.g.* Art.17, APII, which prohibits deportations in non-international armed conflicts. This contains no mention of occupied territory.

<sup>623</sup> Gotovina Brief, paras.174-175, citing *Krnojelac* AJ, *Stakić* AJ, *Krnojelac* TJ and the Separate and Partly Dissenting Opinion of Judge Schomburg in *Naletilić* AJ.

<sup>624</sup> *Krnojelac* AJ, paras.217-220.

<sup>625</sup> *Krnojelac* AJ, para.222.

<sup>626</sup> Gotovina Brief, fn.325, citing *Stakić* AJ, para.306.

<sup>627</sup> *Stakić* AJ, para.278.

“Customary international law *also* recognises that displacement from ‘occupied territory’, as expressly set out in Art.49 of Geneva Convention IV [...] is *also* sufficient to amount to deportation.”<sup>628</sup>

222. The Appeals Chamber noted that Art.49 was the “underlying instrument prohibiting deportation”, as one of the historical bases for the prohibition against deportation. However it did not adopt the definition of deportation from Art.49 or transpose its requirement of occupation to deportation as a crime against humanity.

223. Finally, the passage from Judge Schomburg’s individual opinion in *Naletilić* likewise fails to support Gotovina’s contention.<sup>629</sup> In considering the *type* of borders across which a forcible displacement could constitute deportation, Judge Schomburg cited the situation of occupied territory as *one example*.<sup>630</sup> He did not suggest it was the only situation.

224. Occupation is not an element of the crime of deportation. Gotovina does not advance any compelling reason why it should now be added as a requirement. His argument should be dismissed.

## **F. Conclusion**

225. Gotovina’s challenges to his conviction for deportation in Ground Two should be dismissed.

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<sup>628</sup> *Stakić* AJ, para.300 (emphasis added, internal citations omitted).

<sup>629</sup> See Gotovina Brief, para.175, citing *Naletilić* AJ, Separate and Partly Dissenting Opinion of Judge Schomburg, para.22.

<sup>630</sup> *Naletilić* AJ, Separate and Partly Dissenting Opinion of Judge Schomburg, para.22 (underlined emphasis added).

#### **IV. A JOINT CRIMINAL ENTERPRISE EXISTED TO PERMANENTLY REMOVE THE SERB POPULATION FROM THE KRAJINA (GROUND THREE)**

##### **A. Overview**

226. The Chamber properly found that there was a JCE to permanently remove the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved the crimes of persecution (forcible displacement, unlawful attack against civilians and civilian objects, and discriminatory and restrictive measures), deportation and forcible transfer.<sup>631</sup> This conclusion was based on four mutually-reinforcing sets of factual findings:

- (1) The discussion at Brioni on 31 July 1995 and other preparations for Operation Storm. At Brioni, the participants agreed on an unlawful artillery attack to force the Serb civilians out of the Krajina.<sup>632</sup> This was followed on 2 August by Gotovina's order to treat whole towns as artillery targets,<sup>633</sup> and on 3 August by a meeting involving Gotovina, Markač and others to coordinate the use of the artillery against these towns.<sup>634</sup>
- (2) The indiscriminate artillery attack against entire towns on 4-5 August 1995.<sup>635</sup> This attack constituted an unlawful attack on civilians and civilian objects, and was the primary and direct cause of the departure of at least 20,000 Serb civilians from these towns.<sup>636</sup> This result was intended.<sup>637</sup>
- (3) The crimes committed by armed units (HV, HVO, VP, Special Police) against the remaining Serb population and property during the months of August and September 1995. In many cases, the commission of these crimes created an environment in which the victims and witnesses had no

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<sup>631</sup> Judgement, para.2314.

<sup>632</sup> Judgement, paras.1991-1995, 2304-2305, 2309-2311. *Below*, paras.229, 237-250.

<sup>633</sup> Exh.P1125, p.14.

<sup>634</sup> Judgement, para.2583.

<sup>635</sup> Judgement, paras.1911-1913, 1923-1925, 1935-1937, 1943-1945, 2305.

<sup>636</sup> Judgement, paras.1743-1745, 2305, 2310-2311.

<sup>637</sup> Judgement, paras.1746, 2310.

choice but to leave, thereby amounting to their forcible displacement.<sup>638</sup>  
This result was intended.<sup>639</sup>

- (4) The Croatian political leadership's demographic policy on the Krajina, one aspect of which was to invite and encourage Croats to return to the area and occupy homes abandoned by Krajina Serbs; the flipside of this policy was that the return of the Serbs should be limited to a minimum.<sup>640</sup> The Croatian leadership thus adopted discriminatory property laws intended to prevent Serbs from returning to provide housing to incoming Croats.<sup>641</sup>

227. Gotovina's attempt to isolate and decontextualise the Chamber's factual and legal findings should be rejected. His selective challenges to the Judgement ignore the Chamber's detailed consideration of the evidence. Moreover, many of Gotovina's arguments fail to meet the appellate standard of review.

**B. The Chamber provided a reasoned opinion (3.1.1, 3.1.3, 3.2.1, 3.3.1, 3.4.1-3.4.2, 3.5)<sup>642</sup>**

228. The Chamber provided extensive reasoning in support of its findings concerning the existence of the JCE. The section of the Judgement addressing this issue spans more than 180 pages and cross-references to the crime-base analysis and other areas of the Judgement.<sup>643</sup> The Chamber did not limit the discussion to a recitation of the evidence.<sup>644</sup> Rather it interwove its factual findings with its legal conclusions, explaining why it had reached particular findings.

229. In particular, the Chamber provided ample reasoning for its conclusion that the JCE members shared the common criminal purpose to remove the Serb civilian population by criminal means.<sup>645</sup> When assessing which crimes were intended, the Chamber explicitly recalled its findings regarding the crimes committed in the Krajina, the significance of the Brioni meeting, the policy of the Croatian leadership

<sup>638</sup> Judgement, para.1756.

<sup>639</sup> Judgement, paras.1757, 2310.

<sup>640</sup> Judgement, paras.2057, 2308.

<sup>641</sup> Judgement, paras.2092-2098, 2308-2309.

<sup>642</sup> This sub-section responds to the "reasoned opinion" arguments made throughout Ground Three.

<sup>643</sup> Judgement, paras.1966-2321.

<sup>644</sup> *Contra*, e.g. Gotovina Brief, para.202.

towards the Serbs, the property laws passed by Croatia, the Croatian policy on the investigation of war crimes and the follow-up to specific criminal acts.<sup>646</sup> For example:

- In finding that the crimes of forcible displacement were part of the common purpose of the JCE, the Chamber specifically referred to its consideration of the Brioni meeting,<sup>647</sup> finding that the transcript of the meeting accurately reflected the discussions.<sup>648</sup> It considered alternative interpretations of the discussions but reasonably rejected them,<sup>649</sup> concluding that specific references to Serb civilians were not about their protection but about their forcible removal.<sup>650</sup> The Chamber did not limit its assessment to the meeting itself, but rather, considered the evidence in context,<sup>651</sup> which included the forcible displacement of the Krajina Serbs,<sup>652</sup> the Croatian leadership's aspiration to encourage Croats from abroad to settle in Croatia and the corresponding need to limit the return of Serbs,<sup>653</sup> and the discriminatory property laws.<sup>654</sup>
- In relation to unlawful attacks on civilians and civilian objects as underlying acts of persecution, the Chamber determined that the participants at Brioni were aware of the difficult and fearful situation of the Serbs in the Krajina, and knew that it would not take much to force them out.<sup>655</sup> It found that the Croatian political and military leadership took the decision to treat the four towns as targets of the artillery attack, that the unlawful attack was carried out on discriminatory grounds and that the fear caused by the unlawful attacks was

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<sup>645</sup> *Contra* Gotovina Brief, paras.201-203, 229.

<sup>646</sup> Judgement, para.2310.

<sup>647</sup> Judgement, para.2310.

<sup>648</sup> Judgement, paras.1989-1992.

<sup>649</sup> Judgement, paras.1993-1994.

<sup>650</sup> Judgement, para.1995.

<sup>651</sup> Judgement, paras.2303, 2310, referring to chapters 4, 5, 6.2.2-6.2.6.

<sup>652</sup> Judgement, paras.1763, 2305, 2310.

<sup>653</sup> Judgement, para.2057.

<sup>654</sup> Judgement, para.2098.

<sup>655</sup> Judgement, para.2311.

the primary and direct cause of the departure (deportation) of the Serb civilians.<sup>656</sup>

- Regarding the imposition of restrictive and discriminatory measures as underlying acts of persecution, the Chamber specifically considered the measures undertaken by the Croatian political and military leadership that targeted the Krajina Serbs and aimed to prevent their return.<sup>657</sup>
- Given the discriminatory nature of the crimes against the Krajina Serbs, the Chamber found in each instance that they constituted persecution, which was intended and within the purpose of the JCE.<sup>658</sup>

230. In light of these extensive findings, Gotovina's allegations that the Chamber failed to render a reasoned opinion<sup>659</sup> are unsustainable. He ignores that an appellant asserting an error based on the lack of a reasoned opinion "must identify the specific issues, factual findings, or arguments, which [he] submits the Trial Chamber omitted to address and [...] explain why this omission invalidated the decision."<sup>660</sup> Gotovina does neither. For example, he fails to articulate what the Chamber allegedly omitted when it found that the JCE members at the Brioni meeting shared the common criminal purpose to commit persecutions through an unlawful attack against civilians and civilian objects.<sup>661</sup> His challenges in relation to the other crimes encompassed by the JCE are raised only in headings, with no substantive argument. Instead Gotovina cross-references to his argument relating to the unlawful attack.<sup>662</sup> Absent specific arguments, Gotovina's challenges should be dismissed.

231. Gotovina's arguments also fail to acknowledge that a trial chamber is not obligated to "articulate every step of its reasoning for each particular finding it makes"<sup>663</sup> or to "justify its findings in relation to every submission made during the trial."<sup>664</sup> The Chamber identified "in a clear and articulate, yet concise manner"<sup>665</sup> the

<sup>656</sup> Judgement, paras.2311, 1924, 1936, 1944, 1743, 1744.

<sup>657</sup> Judgement, para.2312.

<sup>658</sup> Judgement, paras.2310-2312.

<sup>659</sup> See Gotovina Brief, 3.1.1, 3.2.1, 3.3.1, 3.4.1-3.4.2.

<sup>660</sup> *Haradinaj* AJ, para.10; see also para.106.

<sup>661</sup> Gotovina Brief, paras.202-203.

<sup>662</sup> See Gotovina Brief, paras.229 (deportation/forcible transfer), 236 (implementation of discriminatory/restrictive measures), 242-243 (persecution).

<sup>663</sup> *Krajišnik* AJ, para.139.

<sup>664</sup> *Kvočka* AJ, para.23.



factual and legal elements underlying its finding that the JCE existed.<sup>666</sup> When it drew inferences based on circumstantial evidence the Chamber specifically found that this was the only reasonable conclusion available.<sup>667</sup> In doing so, it was not obliged to address *all* other potential inferences advanced by the parties.<sup>668</sup>

232. Similarly, the Chamber provided sound reasoning for its finding that the JCE members—and not just the actual perpetrators—acted with persecutory intent.<sup>669</sup> The Chamber used a two-step approach. It first found that the deportation and forcible transfers, the unlawful attack on civilians and civilian objects, and the imposition of discriminatory and restrictive measures were carried out with discriminatory intent.<sup>670</sup> These findings were primarily based on the ethnicity of the Serb victims but also on the context of the discriminatory attack against them.<sup>671</sup> The Chamber then considered these findings together<sup>672</sup> with its other factual findings including:

- The Brioni meeting, at which the JCE members discussed the importance of forcing out the Krajina Serbs;
- The JCE members' knowledge that it would not take much to force the Serbs out and the consequent treatment of whole towns as targets of attack;<sup>673</sup>
- The mass exodus of the Krajina Serb population caused by Operation Storm; and
- The policy and legislative efforts to prevent them from returning.<sup>674</sup>

233. Contrary to Gotovina's claim,<sup>675</sup> the Chamber specified that the relevant crimes were committed with discriminatory intent against Krajina Serbs.<sup>676</sup>

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<sup>665</sup> See *Hadžihasanović* AJ, para.13.

<sup>666</sup> See *e.g.* Judgement, paras.2303-2320.

<sup>667</sup> Judgement, para.43. *Contra* Gotovina Brief, paras.200, 202.

<sup>668</sup> *Kvočka* AJ, para.23.

<sup>669</sup> Judgement, paras.2310-2312, 2314. *Contra* Gotovina Brief, paras.226, 228.

<sup>670</sup> Judgement, paras.1843, 1862, 1912, 1924, 1936, 1944.

<sup>671</sup> See *e.g.* Judgement, paras.1843, 1845.

<sup>672</sup> See Judgement, para.2310.

<sup>673</sup> Judgement, para.2311.

<sup>674</sup> Judgement, paras.2310, 2312.

<sup>675</sup> *Contra* Gotovina Brief, paras.227-228.

<sup>676</sup> See *e.g.* Judgement, paras.1843, 1862, 1912, 1924, 1936, 1944.

Discrimination on the basis of ethnicity is an accepted ground of persecution.<sup>677</sup> The Chamber also explicitly considered that the JCE members shared this discriminatory intent.<sup>678</sup>

**C. The JCE encompassed persecution by an unlawful attack against civilians and civilian objects (3.1.2)**

234. The Chamber correctly found that an unlawful attack against civilians and civilian objects was intended and within the purpose of the JCE.<sup>679</sup> This conclusion was based on many considerations,<sup>680</sup> not just on four factors as Gotovina claims.<sup>681</sup> His piecemeal approach, challenging isolated factual findings, fails to acknowledge that a chamber must view the evidence in context and that not every piece of evidence is subject to the beyond reasonable doubt test.<sup>682</sup> For example, Gotovina's repeated suggestion that the JCE shared intent must be found in the words of the Brioni meeting alone should be rejected; the Chamber properly made this finding on the totality of the evidence.<sup>683</sup>

235. Moreover, Gotovina does not meet the appellate standard of review merely by advancing another possible interpretation of the evidence.<sup>684</sup> An appellant's burden is higher: he must show that no reasonable trier of fact could have reached the Chamber's factual finding.<sup>685</sup>

1. Civilians and civilian objects were unlawfully attacked

236. In finding that the JCE encompassed an unlawful attack against civilians and civilian objects, the Chamber properly concluded that the artillery attack ordered by Gotovina targeted whole towns and led to the exodus of the Krajina Serbs.<sup>686</sup>

<sup>677</sup> See *Kordić* AJ, para.950; *Krnjelac* AJ, paras.201, 203; *Milutinović* TJ, Vol.I, para.176; *Brđanin* TJ, fn.2484; see also *Nahimana* AJ, para.986.

<sup>678</sup> See above, para.232.

<sup>679</sup> Judgement, para.2311.

<sup>680</sup> See Judgement, paras.2310-2311. See also above, para.229.

<sup>681</sup> Gotovina Brief, para.204.

<sup>682</sup> See *Ntagerura* AJ, paras.171-174.

<sup>683</sup> Gotovina Brief, paras.206-207. See also below, V.B.

<sup>684</sup> Gotovina Brief, para.200.

<sup>685</sup> *Mrkšić* AJ, para.13.

<sup>686</sup> Judgement, paras.2310-2311.

Gotovina's claims to the contrary<sup>687</sup> repeat arguments contained in other grounds of his appeal brief which are themselves insufficient.<sup>688</sup>

## 2. The JCE crystallised at the Brioni meeting

237. The Chamber did not err<sup>689</sup> when finding that the participants at the Brioni meeting were "aware of the difficult situation for the Krajina Serbs"; that they "knew it would not require much effort to force them out;" and that the JCE members "took the decision to treat whole towns as targets for the initial artillery attack."<sup>690</sup> Gotovina merely asserts a different interpretation of the discussions at Brioni but does not show why the Chamber's conclusions were unreasonable. As such, his claims should be summarily dismissed.<sup>691</sup>

238. The Chamber carefully assessed the minutes of the meeting. It "duly considered the context" of the meeting and interpreted the statements of the participants accordingly.<sup>692</sup> It specifically considered that even though the meeting concerned "whether, how, and when a military operation against the SVK should be launched,"<sup>693</sup> there were also discussions about the situation of the Serb civilians and their fate.<sup>694</sup> The participants were fully aware of the weakened state of the Serb military forces<sup>695</sup> and knew that Serbs were already "demoralized."<sup>696</sup> Against this backdrop, the Chamber was entitled to conclude that the participants recognised that it would not require much effort to force the civilian population out.<sup>697</sup> Gotovina himself stated that after the attack it was likely that the only remaining Serbs would be those who were unable to leave.<sup>698</sup>

239. Gotovina appears to suggest that the Chamber found the existence of a *formal* decision at the Brioni meeting by the JCE members to target whole towns.<sup>699</sup> But there is no such finding. Nor would a *formal* decision be required to find the existence

<sup>687</sup> Gotovina Brief, paras.196, 207-209, 211.

<sup>688</sup> Gotovina Brief, Grounds One, Two.

<sup>689</sup> *Contra* Gotovina Brief, paras.205-207.

<sup>690</sup> Judgement, para.2311.

<sup>691</sup> *See Krajišnik* AJ, para.27.

<sup>692</sup> Judgement, para.1990.

<sup>693</sup> Judgement, para.1990.

<sup>694</sup> Judgement, paras.1990-1992.

<sup>695</sup> *See* Judgement, paras.1973-1974.

<sup>696</sup> Judgement, para.1974; *see also* paras.1976-1977.

<sup>697</sup> Judgement, para.2311. *Contra* Gotovina Brief, para.206.

<sup>698</sup> Judgement, para.1993.

of the JCE.<sup>700</sup> The Chamber concluded based on the evidence that “under these circumstances” a general decision was taken at Brioni to subject whole towns to the initial artillery attack.<sup>701</sup> Given the discussions at the meeting where Gotovina and Tuđman made explicit reference to the shelling and potential destruction of Knin,<sup>702</sup> the express terms of Gotovina’s attack order,<sup>703</sup> and the indiscriminate shelling of the four towns that occurred shortly thereafter,<sup>704</sup> the Chamber reasonably found that the JCE members at Brioni decided to target these towns. Such a finding does not impact Croatia’s right to “liberate [its] occupied territory”.<sup>705</sup> The Chamber made clear that its findings were not concerned with this right but rather with the fact that Krajina Serb civilians were made the targets of crimes.<sup>706</sup>

(a) JCE members were not concerned with protecting the Serb civilian population

240. The Chamber correctly found that the statements made by the JCE members at the Brioni meeting were devoid of references as to how the military operations could be conducted to avoid or minimise civilian casualties and that they did not “lend support to an interpretation that the discussions [. . .] were about the protection of civilians.”<sup>707</sup> The Chamber noted that, to the contrary, Tuđman suggested a counterattack by the Serbs from Knin would provide a pretext for Croatian artillery attack. It also considered Tuđman’s comments on the partial destruction of Knin and Gotovina’s statement that if Croatia exerted further pressure, the only civilians left would be those who could not leave.<sup>708</sup>

241. Gotovina’s assertions repeat many of his trial submissions without demonstrating how the Chamber erred.<sup>709</sup> Such arguments should be summarily

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<sup>699</sup> Gotovina Brief, para.207.

<sup>700</sup> *Brdanin* AJ, para.419.

<sup>701</sup> Judgement, para.2311.

<sup>702</sup> Judgement, paras.1975, 1993.

<sup>703</sup> See Judgement, paras.1893, 1911; Exhs.P1125, D970.

<sup>704</sup> See Judgement, para.2305.

<sup>705</sup> *Contra* Gotovina Brief, paras.206-207.

<sup>706</sup> Judgement, para.13.

<sup>707</sup> Judgement, paras.1993, 1995. See also para.1991 (noting that because of the importance of this issue, all the statements have to be assessed together). See also Ground 4.

<sup>708</sup> Judgement, para.1993. See also paras.1975, 1977, 1982.

<sup>709</sup> Gotovina Brief, para.210; see also Gotovina Closing Brief, paras.126-127, 158.

dismissed.<sup>710</sup> A trial chamber can exercise its discretion in deciding which arguments to specifically address.<sup>711</sup> The Chamber repeatedly stressed that it had considered all the evidence before it.<sup>712</sup> Just because a Chamber's finding does not detail the evidence explicitly considered elsewhere, that does not mean it "disregarded" that evidence, as Gotovina alleges.<sup>713</sup> In particular:

- The Chamber considered the context of the Brioni meeting when interpreting the participants' statements.<sup>714</sup> This included "possible reactions by the international community".<sup>715</sup> Contrary to Gotovina's claim,<sup>716</sup> the Chamber noted Žužul's evidence regarding Tuđman's awareness that Croatia would lose the support of the United States if crimes were committed.<sup>717</sup> The Chamber also considered the duplicitous nature of the discussions at Brioni when Tuđman stressed the importance of creating a "pretext" to obtain "political justification" for Croatia's imminent offensive<sup>718</sup> and about "ostensibly" guaranteeing civil rights to the Serbs.<sup>719</sup>
- Tuđman did not emphasise that attacks only be directed against military objects despite Serb provocations.<sup>720</sup> Rather, his concern was about not providing the FRY with a pretext to enter the war.<sup>721</sup>
- The Chamber considered Tuđman's statement that the psychological effect of the fall of a town was greater than shelling it.<sup>722</sup> Gotovina fails to show how this statement would contradict the Chamber's finding that the participants of the Brioni meeting were not concerned about civilian casualties.<sup>723</sup> Rather, it shows Tuđman's interest in efficiently removing the Serb population.

<sup>710</sup> *Krajišnik* AJ, paras.24, 27.

<sup>711</sup> *See Kvočka* AJ, para.23.

<sup>712</sup> *See e.g.* Judgement, paras.11, 1968; *see also, e.g.* paras.1968, 1990, 1996, 2052, 2305, 2308, 2310.

<sup>713</sup> Gotovina Brief, para.210.

<sup>714</sup> Judgement, paras.1990, 1996.

<sup>715</sup> Judgement, para.1990.

<sup>716</sup> Gotovina Brief, para.210(1).

<sup>717</sup> Judgement, para.2022.

<sup>718</sup> *See* Judgement, paras.1971, 1979.

<sup>719</sup> Judgement, paras.1983, 1994.

<sup>720</sup> *Contra* Gotovina Brief, para.210(2).

<sup>721</sup> Judgement, para.1979, referring to Exh.P461, pp.20-21.

<sup>722</sup> Judgement, para.1978.

<sup>723</sup> Gotovina Brief, para.210(3).

- The Chamber considered Tuđman’s remarks on ammunition supplies.<sup>724</sup> Tuđman did not advise against extensive use of artillery.<sup>725</sup> To the contrary, he stressed that if Croatia had possessed enough ammunition, he would have been in favour of “destroying everything.”<sup>726</sup> In addition, Tuđman’s comment that everyone “should stop wasting and start saving” supplies, in the context of the discussion on this point, shows that he was only concerned about the use of resources.<sup>727</sup>
- Gotovina’s argument that measures were taken after the Brioni meeting to protect civilians and their property and to repress crimes<sup>728</sup> mischaracterises the Chamber’s findings and should be summarily dismissed.<sup>729</sup> The Chamber found that the JCE members disapproved of destroying Serb property only so that it could be distributed to Croats returning from abroad.<sup>730</sup> It also concluded that sanitation was a higher priority for the Croatian authorities than the investigation of murders<sup>731</sup> and that there was an “insufficient response by the Croatian law enforcement authorities and judiciary [. . .] in view of the number of crimes committed during and after Operation Storm against Krajina Serbs.”<sup>732</sup>

242. In the same vein, Gotovina’s attempt to depict Tuđman’s plan to leave a way out for soldiers and civilians as “humanitarian”<sup>733</sup> should be rejected. The Chamber did not err in logic when rejecting such explanations.<sup>734</sup> It specifically assessed Tuđman’s statement about the psychological impact that the departure of the civilians would have on the army and *vice versa*, as well as Gotovina’s immediate response indicating that civilians were already leaving Knin and that if the Croatians continued

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<sup>724</sup> Judgement, para.1980.

<sup>725</sup> *Contra* Gotovina Brief, para.210(4).

<sup>726</sup> Judgement, para.1981, referring to Exh.P461, p.22.

<sup>727</sup> See Exh.P461, pp.21-22.

<sup>728</sup> Gotovina Brief, para.210(5).

<sup>729</sup> *Krajišnik* AJ, para.18. It is unclear which paragraph of the Judgement Gotovina relies upon. The citation he offers (Gotovina Brief, fn.376) refers to the Chamber’s finding that the Croatian political and military leadership implemented discriminatory and restrictive measures against the Serbs.

<sup>730</sup> Judgement, para.2056.

<sup>731</sup> Judgement, para.2199.

<sup>732</sup> Judgement, para.2203.

<sup>733</sup> Gotovina Brief, paras.217-220.

<sup>734</sup> See Judgement, para.1993.

the pressure, the only remaining civilians would be those who could not leave.<sup>735</sup> His argument that the Croatian leadership merely wanted to leave civilians an escape route<sup>736</sup> is contradicted by the decision to make the towns themselves the target of attack.<sup>737</sup> Gotovina only offers a different interpretation of this evidence.<sup>738</sup>

(b) The unlawful attack on civilians and civilian objects was aimed at forcing the Serb population out of the Krajina

243. In finding that the JCE participants shared the criminal intent to carry out an unlawful attack on civilians and civilian objects, the Chamber considered that “[d]eportation of the Krajina Serb population was to a large extent achieved through [such attacks] in Knin, Benkovac, Obrovac, and Gračac.”<sup>739</sup> The Chamber recognised that the attack was the means by which the JCE members intended to execute their aim of removing the Serb population from the Krajina. Gotovina’s assertion that no one at Brioni suggested that civilians should be forced out<sup>740</sup> ignores the Chamber’s findings. The Chamber rejected the Defence argument that the participants were trying to protect Serb civilians.<sup>741</sup> It reasonably concluded that Tuđman and Gotovina’s comments could only be interpreted as using the shelling attacks to move the Krajina Serbs out by force.<sup>742</sup> The Chamber specifically referred to:<sup>743</sup>

- Tuđman’s reminder that that many Croatian towns and villages had been destroyed but “that’s still not the situation in Knin today” and his suggestion that a Serb counter-attack would provide the pretext for using artillery attacks for complete demoralisation;<sup>744</sup>
- Gotovina’s response that Knin could be destroyed in a few hours if ordered;<sup>745</sup>

<sup>735</sup> Judgement, paras.1977, 1991, 2304.

<sup>736</sup> Gotovina Brief, paras.218-220.

<sup>737</sup> See also Ground 1(A) of Markač’s Brief.

<sup>738</sup> Gotovina Brief, para.217.

<sup>739</sup> Judgement, para.2311.

<sup>740</sup> Gotovina Brief, para.212; see also para.220.

<sup>741</sup> Judgement, paras.1993-1995. See also above, paras.240-242.

<sup>742</sup> Judgement, paras.1993-1995.

<sup>743</sup> Judgement, paras.1971-1984, 1993.

<sup>744</sup> See Exh.P461, p.10.

<sup>745</sup> See Exh.P461, p.10.

- Tuđman’s statement that they would “pay [the Serbs] back”<sup>746</sup> and his reference to the partial destruction of Knin;<sup>747</sup>
- Gotovina’s remark that if Croatians forces continued to exert pressure, the only civilians left would be those who could not leave;<sup>748</sup> and
- Tuđman, Gotovina and Domazet’s exchange about the possibility of shelling Knin without targeting the UNCRO barracks.<sup>749</sup>

244. The Chamber also considered Tuđman’s reference to “showing the Serbs out” while “ostensibly” guaranteeing their rights. It concluded that in line with the discussions at the meeting, this demonstrated “the true intent to show Serbs out but at the same time give them the impression that they could stay.”<sup>750</sup> This finding is consistent with evidence of Tuđman and others paying lip-service to humanitarian considerations while actually pursuing plans to the contrary.<sup>751</sup>

245. Gotovina’s claim that the Chamber failed to distinguish between “mere awareness of an impending evacuation” and the intent to force the Serbs out<sup>752</sup> should be rejected. Contrary to Gotovina’s suggestion,<sup>753</sup> the Chamber did not disregard evidence of Serbs fleeing Western Slavonia in the wake of Operation Flash earlier in 1995.<sup>754</sup> The fact remains that the unlawful attack agreed at Brioni targeted and forcibly displaced 20,000 Serbs.<sup>755</sup>

246. Moreover, Gotovina’s argument that the Chamber did not pay proper attention to the backdrop to the Brioni meeting is belied by the Chamber’s contextual approach to considering the evidence.<sup>756</sup> Gotovina merely speculates when suggesting that the exodus of the Serbs from the Krajina was a side-effect of retaking the territory. The JCE members were well-aware that the Krajina Serbs had lived in the area for

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<sup>746</sup> See Exh.P461, p.11.

<sup>747</sup> See Exh.P461, p.25.

<sup>748</sup> See Exh.P461, p.15

<sup>749</sup> See Exh.P461, p.15.

<sup>750</sup> Judgement, para.1994.

<sup>751</sup> See above, para.241.

<sup>752</sup> Gotovina Brief, paras.212, 216.

<sup>753</sup> Gotovina Brief, para.216.

<sup>754</sup> Gotovina Brief, paras.213-215; Judgement, paras.2025, 2044.

<sup>755</sup> Above, III.

<sup>756</sup> See Judgement, paras.1990-1995.



“centuries”<sup>757</sup> and that they would not willingly abandon their homes and property. By shelling the four towns, they intended to create fear and panic so as to force out the Serbs.

#### **D. The JCE encompassed deportation and forcible transfer (3.2.2)**

247. The Chamber correctly found that “the crimes of deportation and forcible transfer were central” to the JCE.<sup>758</sup> As with his arguments relating to the unlawful attack, Gotovina isolates some of the Chamber’s findings but ignores the totality of the Chamber’s assessment of the evidence. In particular, his claim that the Chamber based its findings on only three factors<sup>759</sup> ignores the comprehensive approach taken by the Chamber. His challenges should be dismissed.<sup>760</sup>

248. Gotovina fails to show an error in the Chamber’s conclusion that the participants of the Brioni meeting “discussed the importance of the Krajina Serbs leaving as a result and part of the imminent attack”<sup>761</sup> and that references to civilians at the meeting were about “civilians being forced out.”<sup>762</sup> Gotovina’s unfounded assertions<sup>763</sup> mirror his challenge in relation to the unlawful attack on civilians and civilian objects, and the Prosecution refers to its response there.<sup>764</sup> Gotovina claims that there is “no evidence” that, apart from Tudman, other participants of the Brioni meeting, including Gotovina, shared the intent for deportation and forcible transfer.<sup>765</sup> This argument is unsubstantiated and should be summarily dismissed.<sup>766</sup> In any event, the Chamber based its findings on the totality of the evidence.<sup>767</sup> This included its assessment of the minutes of the Brioni meeting,<sup>768</sup> in which a number of participants, including Gotovina, made abundantly clear their agreement with the goal of expelling

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<sup>757</sup> See Judgement, para.2000, referring to Exh.P447, p.1.  
<sup>758</sup> Judgement, para.2310. *Contra* Gotovina Brief, para.234.  
<sup>759</sup> Gotovina Brief, para.230.  
<sup>760</sup> See above, para.234.  
<sup>761</sup> Judgement, para.2310.  
<sup>762</sup> Judgement, para.1995.  
<sup>763</sup> Gotovina Brief, paras.231, 212-221.  
<sup>764</sup> See above, paras.237-246.  
<sup>765</sup> Gotovina Brief, para.231.  
<sup>766</sup> *Krajišnik* AJ, para.26.  
<sup>767</sup> Judgement, para.2310.  
<sup>768</sup> Judgement, para.2310.

the Serb civilian population from the Krajina.<sup>769</sup> The Chamber also considered other explanations of the discussions but reasonably rejected them.<sup>770</sup>

249. The Chamber properly inferred the shared intent to forcibly displace the Krajina Serbs from, *inter alia*, their “mass exodus [...] within days of the launching of Operation Storm.”<sup>771</sup> A chamber is permitted to rely on the actual commission of crimes when determining whether the JCE members intended them.<sup>772</sup> The Chamber explicitly considered Gotovina’s remark that if the Croatians were to continue their pressure the Serbs would leave and noted that “[w]ithin days of the discussion at Brioni, Gotovina’s words became reality.”<sup>773</sup> Gotovina’s argument that there was no nexus between the artillery campaign and the flight of the Serbs<sup>774</sup> mirrors his challenges under Ground Two and should be rejected.<sup>775</sup>

250. Similarly, and contrary to Gotovina’s claims,<sup>776</sup> the Chamber was also entitled to consider that shortly after Operation Storm, the Croatian leadership imposed laws aimed at preventing the Serbs from returning to their homes.<sup>777</sup> As discussed below,<sup>778</sup> the Chamber correctly found that the JCE members, including Gotovina, intended to deprive the Serbs of their housing and property to ensure that their removal from the Krajina became permanent.<sup>779</sup> In this regard, it is not determinative for his intent that Gotovina himself did not participate in the implementation of this aspect of the JCE.<sup>780</sup>

### **E. The JCE encompassed the imposition of discriminatory and restrictive measures (3.3.2)**

251. The Chamber reasonably found that the JCE encompassed the imposition of restrictive and discriminatory measures as persecution.<sup>781</sup> Contrary to Gotovina’s

<sup>769</sup> Judgement, para.1995.

<sup>770</sup> Judgement, paras.1993-1995. *See also above*, paras.240-246.

<sup>771</sup> Judgement, para.2310.

<sup>772</sup> *See e.g. Krstić* AJ, para.33; *see also Kvočka* AJ, para.243; *Naletelić* AJ, fn.265.

<sup>773</sup> Judgement, para.2305.

<sup>774</sup> Gotovina Brief, para.232.

<sup>775</sup> *See above*, III.B-D.

<sup>776</sup> Gotovina Brief, para.233.

<sup>777</sup> Judgement, para.2310.

<sup>778</sup> *Below*, paras.251-254.

<sup>779</sup> Judgement, para.2312.

<sup>780</sup> *Contra*, Gotovina Brief, para.266 (Ground 4).

<sup>781</sup> Judgement, para.2312. *Contra* Gotovina Brief, para.233.

claim,<sup>782</sup> the adoption of measures aimed at depriving Krajina Serbs of their homes and property was not an expansion of the JCE but was within its original purpose and intended by the JCE members.<sup>783</sup> The ultimate purpose of the JCE was to *permanently* reduce the number of Serbs in the Krajina to a strict minimum.<sup>784</sup> The discriminatory and restrictive measures were the legislative means by which the Croatian leadership sought to achieve this goal.

252. The Chamber determined that the JCE came into existence “no later than at the end of July 1995.”<sup>785</sup> It considered that the efforts to prevent the return of the Krajina Serbs were motivated in part by the objective of repopulating the Krajina with Croats.<sup>786</sup> Tuđman’s cynical comment at Brioni about “ostensibly” guaranteeing the Serbs’ civil rights (meaning that in reality such rights would be disregarded)<sup>787</sup> revealed the existence of this plan. In line with prior identical efforts following the re-taking of Western Slavonia, the Serbs would be deprived of their property through formally proper legal procedures that were in truth aimed at making it impossible for the Serbs to recover their property.

253. For instance, parallel laws for taking over Serb property in Western Slavonia following Operation Flash had been discussed “for a long time”<sup>788</sup> prior to the VONS meeting held on 30 June. During that meeting, the Croatian leadership also reiterated its goal of inviting Croats from the diaspora to return and repopulate certain areas.<sup>789</sup> Several of the JCE members were present at this meeting, including Tuđman, Radić, Červenko and Šušak.<sup>790</sup>

254. Former Minister for Reconstruction Jure Radić confirmed that the Law on the Temporary Takeover of Property and Administration of Certain Property was being contemplated “several months” before Operation Storm.<sup>791</sup> Its enactment was intended to have a “determinative effect on the demographic and ethnic composition

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<sup>782</sup> Gotovina Brief, paras.199, 237-240.  
<sup>783</sup> Judgement, paras.2312, 2314.  
<sup>784</sup> Judgement, para.2314.  
<sup>785</sup> Judgement, para.2315.  
<sup>786</sup> See Judgement, paras.2001, 2061, 2091, 2098, 2316.  
<sup>787</sup> See Judgement, para.1994.  
<sup>788</sup> Exh.P2711, p.7.  
<sup>789</sup> See Judgement, para.2093.  
<sup>790</sup> See Judgement, para.2060; Exh.P2711, pp.1, 7.  
<sup>791</sup> See Judgement, para.2060, referring to T.27238.

of the liberated areas”,<sup>792</sup> meaning that by preventing Serbs from returning, Croats would repopulate the territories re-taken during Operation Storm. While this intent was most vocally articulated during the meetings and presidential statements after Operation Storm, it was nevertheless expressed in earlier discussions,<sup>793</sup> as alluded to by Tuđman at Brioni, and formed an integral part of the JCE.

255. In this context, it is irrelevant<sup>794</sup> that the Chamber found that Gotovina did not create discriminatory policies himself or participate in their implementation.<sup>795</sup> Indeed, this finding only relates to Gotovina’s contribution to the JCE and is merely indicative of his role within the common design of the JCE. A JCE member need not have contributed to all crimes comprising the JCE as long as he shares the requisite intent.<sup>796</sup>

256. Finally, the Appeals Chamber should summarily dismiss<sup>797</sup> Gotovina’s argument that Croatia was under no obligation to allow the return of the Serbs as “enemy nationals.”<sup>798</sup> Gotovina merely repeats his trial submissions<sup>799</sup> without demonstrating any error.<sup>800</sup> In any event, the Chamber correctly distinguished the decision of the Eritrea Ethiopia Claims Commission.<sup>801</sup> First, there are no indications that the deported ethnic Serbs were not Croatian citizens. Second, even if they were, the decision of the Commission itself stresses that the right to expel a foreign national must not be abused by acting arbitrarily.<sup>802</sup> Third, Gotovina’s assertion that the Croatian government had the right to exclude “enemy nationals” is inconsistent with his claim that discriminatory measures implemented in the wake of Operation Storm were not targeted at preventing Serbs from returning to the Krajina.<sup>803</sup>

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<sup>792</sup> Judgement, para.2094.

<sup>793</sup> See Exh.P2711, p.8.

<sup>794</sup> *Contra* Gotovina Brief, paras.233, 238.

<sup>795</sup> Judgement, para.2326.

<sup>796</sup> See *Tadić* AJ, para.196 (holding that in effecting the common design, each co-perpetrator can carry out a different role within it).

<sup>797</sup> See *Krajišnik* AJ, para.24.

<sup>798</sup> Gotovina Brief, paras.199, 239.

<sup>799</sup> See Gotovina Closing Brief, paras.568-572, 847.

<sup>800</sup> Judgement, para.1748.

<sup>801</sup> Judgement, para.1748.

<sup>802</sup> See Judgement, para.1748, fn.856.

<sup>803</sup> See Gotovina Closing Brief, paras.574-581.

#### F. The JCE encompassed persecution (3.1.3, 3.2.3, 3.3.3, 3.4.3-3.4.4)

257. The Chamber correctly found that the JCE encompassed the crime of persecution through the following underlying acts:

- deportation and forcible transfer;<sup>804</sup>
- an unlawful attack on civilians and civilian objects;<sup>805</sup> and
- the imposition of discriminatory and restrictive measures.<sup>806</sup>

258. The unlawful attack, carried out through the shelling of whole towns, was of comparable gravity to the other offences listed in Article 5(h) of the Statute and amounted to persecution.<sup>807</sup> The Chamber found that the shelling, and the fear it generated, was the primary and direct cause of the flight of thousands of civilians.<sup>808</sup> Gotovina's contrary claims should be rejected.<sup>809</sup> Furthermore, the shelling resulted in damage to civilian objects.<sup>810</sup> In any event, when, as here, the unlawful attack was charged as persecution, a particular result is not required.<sup>811</sup> Nor was there any requirement for the Chamber to have found that the HV intended to spread terror.<sup>812</sup>

259. The Chamber correctly concluded that the JCE members shared the intent to discriminate against the Serb civilian population.<sup>813</sup> This finding was not just based on the fact that the large majority of affected civilians happened to be Serbs,<sup>814</sup> even though the Chamber would have been allowed to establish discriminatory intent from this fact alone.<sup>815</sup> Rather, the Chamber considered additional evidence, such as the statements at the Brioni meeting— which made clear that it was the Serbs who were to be targeted and removed from the Krajina—and the implementation of measures intended to prevent the return of those Serbs.<sup>816</sup> It is irrelevant whether the individuals

<sup>804</sup> Judgement, para.2310. *Contra* Gotovina Brief, para.235 (incorporating paras.222-228, 230-234).

<sup>805</sup> Judgement, para.2311. *Contra* Gotovina Brief, paras.222-228.

<sup>806</sup> Judgement, para.2312. *Contra* Gotovina Brief, para.241 (incorporating paras.201-228).

<sup>807</sup> *Contra* Gotovina Brief, paras.246-247.

<sup>808</sup> Judgement, paras.1743-1744, 2305, 2311.

<sup>809</sup> *See above*, III.B-D.

<sup>810</sup> Judgement, paras.1903, 1920, 1940. *Contra* Gotovina Brief, paras.246, 209.

<sup>811</sup> *Kordić* AJ, para.105. *Contra* Gotovina Brief, para.209.

<sup>812</sup> *Contra* Gotovina Brief, para.246.

<sup>813</sup> Judgement, paras.2310-2312, 2314. *Contra* Gotovina Brief, paras.228, 235, 241, 245.

<sup>814</sup> *Contra* Gotovina Brief, para.224.

<sup>815</sup> *See Kvočka* AJ, para.460; *Krnjelac* AJ, para.184.

<sup>816</sup> Judgement, para.2310.

responsible for carrying out the underlying acts of persecution acted with persecutory intent.<sup>817</sup> As noted by Gotovina,<sup>818</sup> what is important is the *mens rea* of the JCE members.<sup>819</sup> The Chamber's findings show that it was the JCE members' goal to remove the Serb population from the Krajina by criminal means and that the implementation of that goal involved intentional discrimination against the Krajina Serbs.<sup>820</sup>

## G. Conclusion

260. Gotovina has failed to show an error in the Chamber's finding that a JCE existed whose members of the JCE 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.<sup>821</sup> Ground Three should be dismissed.

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<sup>817</sup> *Stakić* AJ, para.339; *Stakić* TJ, para.741. *Contra* Gotovina Brief, para.225.

<sup>818</sup> Gotovina Brief, para.226.

<sup>819</sup> *Krajišnik* AJ, para.200.

<sup>820</sup> Judgement, para.2314.

<sup>821</sup> Judgement, para.2314. *Contra* Gotovina Brief, para.248.

## V. GOTOVINA WAS A MEMBER OF AND SIGNIFICANTLY CONTRIBUTED TO THE JCE (GROUND FOUR)

### A. Overview

261. The Chamber properly found that Gotovina was a member of the JCE to forcibly displace the Krajina Serbs.<sup>822</sup> It provided reasoned analysis on each of the elements of JCE, finding that Gotovina shared the JCE's common criminal purpose<sup>823</sup> and that he made a significant contribution to it.<sup>824</sup> In addition, the Chamber found that Gotovina was aware that destruction, plunder, murder, inhumane acts, cruel treatment and unlawful detentions (as separate crimes and/or underlying acts of persecution) were foreseeable consequences of the execution of the JCE and that he knowingly took the risk these crimes could occur.<sup>825</sup> Accordingly the Chamber convicted Gotovina for crimes committed pursuant to JCE I and JCE III.

262. Gotovina has failed to show any error of fact or law. Instead, many of his submissions are premised on his own interpretation of the evidence, rather than the Chamber's findings.<sup>826</sup> Without showing specific errors, Gotovina repeatedly claims that the Chamber's findings were based on "no evidence" or were unreasonable or unreasoned.<sup>827</sup> On a number of occasions he re-advances unsuccessful trial arguments.<sup>828</sup> These submissions do not meet the appellate standard of review and should be summarily dismissed.

263. The Appeals Chamber should also summarily dismiss Gotovina's repeated claims that the Chamber failed to exclude other reasonable interpretations of the evidence.<sup>829</sup> The reasonable doubt standard, which requires a Chamber to exclude other reasonable inferences consistent with innocence, only applies to the Chamber's final conclusions on the elements of crimes, modes and other facts indispensable to

<sup>822</sup> Judgement, paras.2369, 2371, 2375. *Contra* Gotovina Brief, para.249 (listing only 3 facts).

<sup>823</sup> Judgement, para.2371.

<sup>824</sup> Judgement, para.2370.

<sup>825</sup> Judgement, para.2374.

<sup>826</sup> *See e.g.* Gotovina Brief, paras.257-262, 271, 333(i), 336.

<sup>827</sup> *See e.g.* Gotovina Brief, para.254-255.

<sup>828</sup> *See e.g.* Gotovina Brief, para.277.

<sup>829</sup> *See e.g.* Gotovina Brief, paras.258, 262, 269, 272, 277, 296, 319(vii), 333, 359.

conviction.<sup>830</sup> On these issues, the Chamber considered, but reasonably rejected, other possible alternatives.

#### **B. Gotovina shared the JCE's common criminal purpose (4.2–4.5)**

264. The Chamber reasonably concluded that Gotovina shared the JCE's common criminal purpose—to permanently remove the Serb civilian population from the Krajina by force or threat of force<sup>831</sup>—with the other members of the JCE.<sup>832</sup> It based this conclusion on the totality of his acts and conduct,<sup>833</sup> including his active participation in the Brioni meeting, discussed above.<sup>834</sup> The evidence considered by the Chamber included—but was not limited to—the evidence Gotovina now cites.<sup>835</sup> The Chamber's extensive analysis of the common purpose comprises more than 350 paragraphs of the Judgement and belies Gotovina's claim that the Chamber failed to give reasons.<sup>836</sup> Gotovina's differing interpretation of this evidence does not demonstrate error in the Chamber's reasoning.<sup>837</sup>

##### 1. Gotovina's participation in the Brioni meeting evidenced his intent

265. The Chamber properly analysed the evidence of Gotovina's participation in the Brioni meeting, during which the common criminal purpose to forcibly displace the Serb civilians from the Krajina crystallised.<sup>838</sup>

266. The Chamber assessed the meaning and significance of Gotovina's statements at the Brioni meeting in the context of the record of the meeting, the related testimony and other evidence about the meeting, and other evidence on the record.<sup>839</sup> Gotovina incorrectly suggests that the Chamber ought to have treated the Brioni meeting, and each of Gotovina's statements in the meeting, in isolation from the other evidence.<sup>840</sup>

<sup>830</sup> Halilovic AJ, para.129; Ntagerura AJ, paras.171-174. *See also above*, para.234.

<sup>831</sup> Judgement, paras.2314-2315.

<sup>832</sup> Judgement, paras.2314, 2371. *Contra* Gotovina Brief, paras.254, 267-268.

<sup>833</sup> Judgement, paras.1968-1969, 2371.

<sup>834</sup> Judgement, paras.1995, 2304-2305, 2310-2311, 2314-2315, 2371, 2580-2582. *Contra* Gotovina Brief, para.254.

<sup>835</sup> Gotovina Brief, para.252 (listing 3 sources of *mens rea*); *compare* paras.255 and 269 (listing two sources).

<sup>836</sup> *See* Judgement, paras.1966-2321. *Contra* Gotovina Brief, paras.254, 271.

<sup>837</sup> *Contra* Gotovina Brief, paras.269, 271-272.

<sup>838</sup> Judgement, paras.1970-1996, 2303-2321. *Contra* Gotovina Brief, paras.256-264.

<sup>839</sup> Judgement, paras.1970-1996, 2303-2321.

<sup>840</sup> Gotovina Brief, paras.257-264.



The approach Gotovina proposes is contrary to the Tribunal's jurisprudence, which requires that evidence should be assessed in its totality.<sup>841</sup>

267. Gotovina does not meet the appellate standard of review by arguing that his statements at the meeting were susceptible to a different interpretation.<sup>842</sup> The Chamber carefully considered other possible interpretations of this evidence, particularly those advanced by the Defence at trial.<sup>843</sup> The Chamber rejected them, finding that they were not reasonable based on the evidence.<sup>844</sup> The Chamber expressly noted the link between the Brioni discussion and the unlawful attack that followed.<sup>845</sup>

268. Gotovina's references to the "accuracy" of his comments are beside the point.<sup>846</sup> The Chamber's focus was appropriately directed at the meaning of Gotovina's statements and those of the other participants in the context of the meeting and subsequent events.<sup>847</sup>

269. Gotovina has not shown that the Chamber used "the comments of others to infer Gotovina's state of mind".<sup>848</sup> The Chamber considered the totality of the evidence, including statements made by Gotovina and by others in his presence. In doing so, the Chamber did not assign "collective guilt" or reverse the burden of proof.<sup>849</sup> Gotovina's unsubstantiated assertions should be summarily dismissed.

(a) The Chamber correctly interpreted Gotovina's statements

270. The Chamber reasonably found that Gotovina and other JCE members were discussing the deportation of Serb civilians, as opposed to civilians of other ethnicities.<sup>850</sup> Although Gotovina did not personally mention the word "Serb" in the quotation he challenges,<sup>851</sup> this does not affect the reasonableness of the Chamber's findings because the ethnicity of the victims and opposing forces was obvious from

<sup>841</sup> *Halilović* AJ, para.125; *Ntagerura* AJ, para.174.

<sup>842</sup> *See* Gotovina Brief, paras.257-258, 262, 269, 272, 359.

<sup>843</sup> *See* Judgement, paras.1992, 1995.

<sup>844</sup> Judgement, paras.1991-1992, 1994-1995.

<sup>845</sup> Judgement, para.2305 ("Gotovina's words [at Brioni] became a reality"). *See also above*, paras.206-207. *Contra* Gotovina Brief, para.257(i),(iii).

<sup>846</sup> Gotovina Brief, paras.257-260.

<sup>847</sup> Judgement, para.2305.

<sup>848</sup> *Contra* Gotovina Brief, para.263.

<sup>849</sup> *Contra* Gotovina Brief, para.264.

<sup>850</sup> Judgement, paras.1992-1993, 2305, 2373.

the context. Since it was clear that this part of the discussion concerned Serbs, the Chamber rightly focused on whether the participants were discussing Serb civilians, as opposed to Serb military personnel.<sup>852</sup>

271. The Chamber's finding that Gotovina intended to target Serb civilians, to force them to leave the Krajina and to use artillery for this purpose, was based on the totality of the evidence, not on a single statement at the Brioni meeting.<sup>853</sup> The Chamber rejected as unreasonable the possibility that the Brioni participants were discussing the protection of Serb civilians.<sup>854</sup> In reaching this conclusion, the Chamber explained that "all the statements have to be assessed together."<sup>855</sup> As part of this analysis, the Chamber considered Gotovina's comments about "destroying" Knin and precision targeting.<sup>856</sup> It did not err by only referring to a part of the quotation; it had already provided a more detailed account in the preceding paragraphs.<sup>857</sup> Gotovina's alternative interpretation<sup>858</sup> of these statements fails to demonstrate any error.

## 2. Gotovina's order to unlawfully attack four towns evidenced his intent

272. Gotovina's argument that the attack order does not reflect his *mens rea*<sup>859</sup> is exclusively premised on his arguments in Grounds One and Two, to which the Prosecution has already responded.<sup>860</sup> The Chamber reasonably concluded that his attack order treated the four towns themselves as targets.<sup>861</sup> It considered and rejected Gotovina's argument that the attack order was limited to designated military targets.<sup>862</sup>

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<sup>851</sup> Gotovina Brief, para.257.

<sup>852</sup> Judgement, para.1992.

<sup>853</sup> *Contra* Gotovina Brief, para.258.

<sup>854</sup> Judgement, para.1993.

<sup>855</sup> Judgement, para.1991.

<sup>856</sup> Judgement, paras.1977, 1993. *Contra* Gotovina Brief, paras.259-261.

<sup>857</sup> Judgement, para.1975. *Contra* Gotovina Brief, para.260.

<sup>858</sup> Gotovina Brief paras.259-260.

<sup>859</sup> Gotovina Brief, para.265.

<sup>860</sup> *Above*, II, III.

<sup>861</sup> Judgement, paras.1911, 2370. *See also above*, II.B-C.

<sup>862</sup> Judgement, paras.1893-1911. *See also above*, II.B-C.

### 3. Gotovina agreed with others to commit the JCE I crimes (4.5)

273. The Chamber correctly found that Gotovina shared the common criminal purpose with the other JCE members.<sup>863</sup> The “contrary evidence” Gotovina advances does not reveal any error.<sup>864</sup> The first two items on Gotovina’s list were explicitly considered by the Chamber:

- (i) The Chamber considered that Gotovina issued orders instructing units to prevent crimes.<sup>865</sup> It found that his repeated failure to take effective measures to prevent or punish his subordinates’ crimes demonstrated his approval of crimes against Serb civilians.<sup>866</sup>
- (ii) The Chamber considered Gotovina’s expressions of disapproval of alleged misconduct against Serb civilians.<sup>867</sup> It found that his failure to take action to enforce his own orders undermined their effectiveness and contributed to the atmosphere of impunity.<sup>868</sup>

Items (iii) to (v) on Gotovina’s list<sup>869</sup> concern the Chamber’s finding that, pursuant to Gotovina’s order, his subordinates unlawfully shelled civilians and civilian objects. As set out in response to Ground One, the record does not support Gotovina’s assertions.<sup>870</sup>

### C. **Gotovina made a significant contribution to the JCE (4.6-4.7)**

274. The Chamber concluded that Gotovina made a significant contribution to the JCE based on the totality of the evidence.<sup>871</sup> The Chamber’s analysis was not limited to the one<sup>872</sup> or two<sup>873</sup> facts Gotovina now isolates. Instead, it included the following extensive analysis:

<sup>863</sup> Judgement, para.2371. *Contra* Gotovina Brief, paras.269-272.

<sup>864</sup> *Contra* Gotovina Brief, para.270.

<sup>865</sup> Judgement, para.2364.

<sup>866</sup> Judgement, paras.2365, 2370-2371.

<sup>867</sup> *See e.g.* Judgement, paras.2337, 2456 (considering Exh.D792, note that Exh.D979 is a continuation of video Exh.D792), 2330, 2364 (considering Exh.D201), 1260 (considering Exh.P71). Exh.P1126 was not specifically cited in the Judgement.

<sup>868</sup> Judgement, paras.2365, 2370-2371.

<sup>869</sup> Gotovina Brief, para.270.

<sup>870</sup> *Above*, II.B-C.

<sup>871</sup> Judgement, para.2370. *Contra* Gotovina Brief, para.331.

<sup>872</sup> Gotovina Brief, para.250.

- Gotovina commanded the Split MD forces;<sup>874</sup>
- Gotovina participated in the Brioni meeting where the plan to force Serbs out of the Krajina crystallised;<sup>875</sup>
- Gotovina ordered his subordinates to treat whole towns as targets for artillery fire during Operation Storm;<sup>876</sup>
- Gotovina's subordinates unlawfully shelled several towns on 4 and 5 August 1995;<sup>877</sup>
- Instead of punishing subordinates for their crimes committed during the Operation itself, Gotovina awarded medals and extraordinary promotions to his HV subordinates participating in Operation Storm;<sup>878</sup> and
- Gotovina's attack order and failures to prevent and follow up on crimes generated an atmosphere of impunity that contributed to crimes in the Split MD and led to the deportation of Serb civilians.<sup>879</sup>

1. Gotovina's order to attack towns substantially contributed to the JCE (4.6.1-4.6.2)

275. The Chamber emphasised that the unlawful attack carried out upon Gotovina's order "formed an important element in the execution of the JCE."<sup>880</sup> His order "amounted, in and of itself, to a significant contribution to the JCE."<sup>881</sup> Gotovina fails to show any error in the Chamber's assessment.

276. The Chamber found that Gotovina ordered HV forces under his control to treat "whole towns" as targets of artillery fire.<sup>882</sup> As set out in the response to Ground One,<sup>883</sup> in reaching this conclusion the Chamber interpreted the attack order in light of

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<sup>873</sup> Gotovina Brief, para.273.

<sup>874</sup> Judgement, para.2324, citing Chapters 3.1.1, 3.1.2.

<sup>875</sup> Judgement, paras.2324, 2370, citing Chapter 6.2.2.

<sup>876</sup> Judgement, paras.2370, citing Chapter 5.8.2(i), para.2324, citing Exh.P1125, Chapter 4.4.3.

<sup>877</sup> Judgement, para.2324, citing Chapter 5.8.2 (i).

<sup>878</sup> Judgement, para.2355.

<sup>879</sup> Judgement, paras.2370, citing Chapter 5.4.2, 2373; *see also* paras.2329-2369.

<sup>880</sup> Judgement, para.2370.

<sup>881</sup> Judgement, para.2370.

<sup>882</sup> Judgement, paras.1893-1911, 2370.

<sup>883</sup> *Above*, II.B-C.

the totality of the evidence.<sup>884</sup> The Chamber carefully considered the evidence concerning the attacks and found that on Gotovina's order the HV targeted the four towns as such. In contrast, the Chamber could not conclude beyond a reasonable doubt that Donji Lapac town was attacked in the same manner.<sup>885</sup>

277. The Chamber did not, as Gotovina suggests,<sup>886</sup> base its reasoning on "assumptions". It considered and reasonably rejected Rajčić's explanation that the attack order was meant and understood as targeting designated military objectives only, finding that his interpretation was inconsistent with the other evidence.<sup>887</sup> By merely repeating his trial arguments and asking for a reassessment of the facts, Gotovina fails to show an error in the Chamber's reasoning.<sup>888</sup>

278. The *Blaškić* AJ does not stand for the proposition that a trial chamber cannot "second-guess" the meaning of a military order.<sup>889</sup> The express language of Gotovina's attack order was clear and the Chamber found that this meaning was confirmed by the surrounding circumstances and the subsequent attack itself. In contrast, the order in *Blaškić* was erroneously construed by the *Blaškić* Trial Chamber in a manner that was inconsistent with its plain meaning, the surrounding evidence, and additional evidence on appeal.<sup>890</sup>

2. Gotovina's failure to prevent and follow up on crimes contributed to the JCE (4.7, 4.7.3)

279. The Chamber found that Gotovina's failures to make a "serious effort to prevent and follow up on crimes" formed part of his contribution to the JCE.<sup>891</sup> While the Chamber established that the evidence would have met the elements of superior responsibility under Article 7(3) of the Statute,<sup>892</sup> it convicted Gotovina of committing through a JCE.<sup>893</sup> Accordingly, it relied on his failure to prevent or punish as contributions to the JCE. In addition, it also found that his failures to prevent or

<sup>884</sup> Above, II.B.

<sup>885</sup> Judgement, paras.1946-1947.

<sup>886</sup> Gotovina Brief, para.274.

<sup>887</sup> Judgement, paras.1893-1911. *Contra* Gotovina Brief, para.277. *See also above*, II.C.

<sup>888</sup> Gotovina Brief, para.275.

<sup>889</sup> *Contra* Gotovina Brief, para.276.

<sup>890</sup> *Blaškić* AJ, paras.330-335.

<sup>891</sup> Judgement, para.2370.

<sup>892</sup> Below, fn.1112.

punish created a command climate in which crimes against Serbs would be ignored or tolerated.<sup>894</sup> The Chamber also relied on this as a contribution to the JCE.

280. The Chamber assessed the evidence concerning Gotovina's reaction to his subordinates' crimes and gave detailed reasons for its findings that Gotovina failed to take the necessary and reasonable measures at his disposal to prevent or punish crimes.<sup>895</sup> While he issued some preventative orders and initiated or approved a few disciplinary measures, the Chamber found that in reality he "only rarely used his authority over the VP with regard to initiating crime investigations and processing."<sup>896</sup> Notably, no such action was taken in respect of the JCE I crimes of unlawful attacks against civilians and civilian objects, deportation, forcible transfer or persecution. Gotovina knew of the widespread crimes being committed by his subordinates, both during the shelling attack and afterwards, and it was "incumbent upon him to take appropriate follow-up action."<sup>897</sup> Instead, Gotovina praised the HV's level of military discipline during the Operation and issued written commendations.<sup>898</sup>

281. Contrary to Gotovina's submissions,<sup>899</sup> the Chamber made explicit findings concerning his mental state, finding that "Gotovina had the state of mind that the crimes forming part of the objective [of the JCE] should be carried out" and that "Gotovina thus intended that his actions contribute to the JCE."<sup>900</sup>

(a) The Chamber properly focused on Gotovina's contribution to the common criminal purpose (4.7.3, 4.7.9-4.7.10)

282. The Chamber properly focused on Gotovina's contribution to the core JCE I crimes, finding that one of the ways he contributed to the JCE's execution was by failing to prevent or punish crimes and thereby creating an atmosphere of impunity.<sup>901</sup> It did not use his "contribution" to JCE III crimes to prove his contribution to JCE I

<sup>893</sup> For a similar approach *see Krajišnik* AJ, paras.193-194, 215-216, 695; *see also Kvočka* AJ, paras.383, 421.

<sup>894</sup> For a similar approach as to how failure to discharge 7(3) duties can encourage crimes, *see e.g. Čelebići* AJ, para.739; *Strugar* AJ, para.301.

<sup>895</sup> Judgement, paras.2329-2367.

<sup>896</sup> Judgement, para.2365.

<sup>897</sup> Judgement, para.2365.

<sup>898</sup> Judgement, para.2355.

<sup>899</sup> Gotovina Brief, para.294.

<sup>900</sup> Judgement, para.2371. *See above*, V.B.

crimes.<sup>902</sup> His failure to prevent or punish crimes of plunder, destruction, murder, inhumane acts (etc.) contributed to the crimes of the JCE I, the object of which was the removal of the Serb population on discriminatory grounds. The fact that Gotovina is also guilty of additional crimes through JCE III cannot restrict the Chamber's ability to consider all forms of his contribution to the JCE I.<sup>903</sup> The Chamber's approach is consistent with the caselaw Gotovina cites.<sup>904</sup>

283. The Chamber's analysis does not stop, as Gotovina suggests,<sup>905</sup> at his contribution to a "general atmosphere"; rather, the Chamber explained that this permissive atmosphere encouraged crimes against Serbs which brought about the deportation of Serb civilians and furthered the common purpose.<sup>906</sup> In reaching this conclusion, the Chamber acknowledged that Gotovina issued some preventative orders but noted that these orders were never enforced.<sup>907</sup> Gotovina merely advances his interpretation of the evidence,<sup>908</sup> which was already rejected by the Chamber at trial.<sup>909</sup> These arguments should be summarily dismissed.

(b) Gotovina failed to prevent and punish (4.7.4)

284. The Chamber properly concluded that Gotovina failed "to make a serious effort to prevent and follow-up on crimes" of his subordinates.<sup>910</sup> The Chamber's reference to a "serious effort" is a factual, rather than a legal, description of Gotovina's failures.<sup>911</sup> The Chamber applied the correct legal standard in finding that his failure to take necessary and reasonable measures formed part of his significant contribution to the JCE. Gotovina's attempt to reargue his case on appeal should be dismissed. His interpretation of the events was rejected at trial and he has shown no error.<sup>912</sup>

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<sup>901</sup> Judgement, para.2365.

<sup>902</sup> *Contra* Gotovina Brief, para.332; *see also* paras.291-295.

<sup>903</sup> *See below*, V.D.

<sup>904</sup> Gotovina Brief, fns.497-501.

<sup>905</sup> Gotovina Brief, paras.329-331.

<sup>906</sup> Judgement, para.2370; *see also* para.1756.

<sup>907</sup> Judgement, paras.2364-2365.

<sup>908</sup> Gotovina Brief, paras.333-334.

<sup>909</sup> Judgement, para.2365.

<sup>910</sup> Judgement, para.2370.

<sup>911</sup> *Contra* Gotovina Brief, para.309.

<sup>912</sup> *See Krajišnik* AJ, paras.24, 27.

285. The list of steps<sup>913</sup> Gotovina claims to have taken to prevent crimes does not undermine the Chamber's reasoned findings. On the contrary, this list confirms that he failed to take adequate measures to suppress the crimes of his subordinates.<sup>914</sup> This evidence supports the Chamber's finding that Gotovina "issued a number of orders between 2 and 18 August 1995 (D201, D281, D204, D888) instructing units to prevent crimes."<sup>915</sup> In reaching this conclusion, the Chamber specifically considered the five most probative items on Gotovina's list.<sup>916</sup> The other items are further evidence of Gotovina's repetitive use of ineffective orders that were not backed up by any enforcement measures. As the Chamber correctly observed, "efficient preventative measures depend, to a high degree, on the stringency of enforcing follow-up measures."<sup>917</sup> None of the items in Gotovina's list establishes that Gotovina took follow-up measures to enforce his orders or to have subordinates punished for crimes committed.<sup>918</sup>

286. Gotovina's reference<sup>919</sup> to the increased disciplinary measures in the third quarter of 1995 reveals no error in the Judgement. The Chamber considered this evidence, along with the testimony of Botteri, who explained that the increase was related to the mobilization of more reserve soldiers, who were less disciplined.<sup>920</sup> Botteri testified that Gotovina did not take disciplinary measures against any of his subordinates during this period.<sup>921</sup>

287. Gotovina had the means to adjust his priorities to ensure that crimes were followed up. He retained effective control over subordinates in Croatia during the time that he was fighting in BiH.<sup>922</sup> He also retained authority over the VP, which he

<sup>913</sup> Gotovina Brief, para.297.

<sup>914</sup> Judgement, para 2365.

<sup>915</sup> Judgement, para.2364.

<sup>916</sup> See Judgement para.2330 (discussing item (iii)); paras.2337-2338 (discussing item (viii)); paras.2353-2354, 2364 (discussing item (ix)); para.2332 (discussing item (xi)); para.2343 (discussing item xii). In other parts of the Judgement, the Chamber gave detailed consideration to Exh.P71, the evidentiary basis for items (vi), (vii) and (x). The Chamber also considered preliminary steps to inform subordinates about the Geneva Conventions, similar to items (i), (ii), (iv), see e.g. Judgement, para.2330.

<sup>917</sup> Judgement, para.2364.

<sup>918</sup> Judgement, para.2365. Note that item (x) is not concerned with the protection of civilians, but rather with "the security of personnel and control of the war booty." Moreover, in response to a question of the Presiding Judge, no party was aware of the existence of any photographs or video produced as a result, see Deverell, T.24436-24437.

<sup>919</sup> Gotovina Brief, para.298.

<sup>920</sup> Judgement, para.2359. See Botteri, T.10996-10997.

<sup>921</sup> Judgement, para.2358.

<sup>922</sup> Below, V.C.2(b)(iii). *Contra* Gotovina Brief, paras.302, 307.



could have used to ensure that his orders were being enforced and that subordinates suspected of crimes were investigated and prosecuted. Finally, the Chamber duly considered the possibility that a commander might be entitled to assume that others were carrying out their duties properly. However, the Chamber found that Gotovina knew that “the specialised branches under his command were not carrying out their duties properly”.<sup>923</sup>

288. The Chamber correctly observed that, had Gotovina adjusted his focus and priorities to ensure that crimes were followed-up, he could have contacted others to seek their assistance.<sup>924</sup> This illustrates an available means of discharging his duty to prevent and punish subordinate criminality.<sup>925</sup> In asserting that other individuals and institutions were responsible for investigating crimes, Gotovina attempts to shift the blame—a defence that was considered and rejected at trial.<sup>926</sup> The Chamber found that, based on his knowledge, Gotovina could not reasonably justify his inaction on the assumption that specialised branches were carrying out their duties properly.<sup>927</sup>

289. The Chamber similarly observed that in order to discharge his duty to prevent and punish, Gotovina could have made public statements.<sup>928</sup> Whether or not he had the official authority to make public statements is irrelevant, since a superior may have to go beyond his formal powers in order to repress subordinate criminality.<sup>929</sup> Gotovina claims that he opposed crime “clearly and consistently,”<sup>930</sup> but the Chamber reasonably disagreed. While he issued some orders ostensibly aimed at preventing crimes, his intention was belied by his order to unlawfully shell civilians and civilian objects as well as his failures to take any enforcement measures in response to his subordinates’ crimes.<sup>931</sup>

290. Although the Chamber could not positively establish an official *policy* of non-investigation of crimes against Serbs, it found that there were incidents of purposeful hindrance of certain investigations.<sup>932</sup> This finding does not undermine the Chamber’s

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<sup>923</sup> Judgement, para.2365.

<sup>924</sup> Judgement, para.2365.

<sup>925</sup> *Contra* Gotovina Brief, para.303.

<sup>926</sup> Judgement, para.2365. *Contra* Gotovina Brief, para.281-304.

<sup>927</sup> Judgement, para.2365. *Contra* Gotovina Brief, para.304.

<sup>928</sup> Judgement, para.2365.

<sup>929</sup> *Krajišnik* AJ, paras.193-194. *See also* *Kvočka* AJ, para.383; *Kayishema* AJ, para.302.

<sup>930</sup> Gotovina Brief, para.306.

<sup>931</sup> Judgement, para.2365.

<sup>932</sup> Judgement, para.2203.

conclusion that Gotovina was aware of the discrepancy between the widespread criminality of his subordinates and the dearth of follow-up measures.<sup>933</sup>

(i) Gotovina had effective control over his subordinates (4.7.7.2)

291. Gotovina had effective control over his subordinates; he possessed the material ability to prevent and punish them. The Chamber applied the correct legal standard for linking perpetrators to JCE members.<sup>934</sup> In response to the Defence's trial argument, the Chamber correctly found that Gotovina's link to his subordinates was not "too tenuous" to result in JCE liability.<sup>935</sup> The Chamber did not reverse the burden of proof on this issue.<sup>936</sup>

292. The Chamber found that Gotovina, as Split MD Commander, had both the duty and the ability to prevent and punish his subordinates' crimes.<sup>937</sup> Gotovina had the duty to inform the VP as soon as he learned of a crime, and the obligation to assess disciplinary measures imposed by his subordinates.<sup>938</sup> However, with respect to the JCE crimes, specifically the crimes that advanced the JCE objective of driving the Serbs out of the Krajina, Gotovina himself did not refer any of his subordinates to the Split Military Prosecutor's Office<sup>939</sup> and only a negligible number of Split MD members were referred at all.<sup>940</sup> Gotovina had a range of options at his disposal to address his subordinates' crimes, yet he failed to take effective measures.<sup>941</sup>

293. The Chamber considered a number of examples that demonstrated that Gotovina had the ability to implement various measures to prevent crimes.<sup>942</sup> He prohibited the arbitrary movement of HV members to prevent theft,<sup>943</sup> he ordered his commanders to prevent arson and other misconduct,<sup>944</sup> he requested additional

<sup>933</sup> Judgement, paras.2203, 2365. *Contra* Gotovina Brief, paras.282, 302, 310.

<sup>934</sup> *See Brđanin* AJ, para.418; Judgement, para.2365. *Contra* Gotovina Brief, para.322(ii). The case Gotovina cites is not on point. *See Blaškić* AJ, para.521. *Contra* Gotovina Brief, fn.582.

<sup>935</sup> Judgement, para.2365. *Contra* Gotovina Brief, para.322; *see also* Gotovina Closing Brief, para.601.

<sup>936</sup> *Above*, II.H. *Contra* Gotovina Brief, para.322(iii).

<sup>937</sup> *Contra* Gotovina Brief, paras.321-323. Gotovina confuses in this sub-ground two distinct legal concepts: 1) the ability to prevent or punish crimes; and 2) the linkage between a JCE member and a principal perpetrator. *Compare Halilović* AJ, para.59 with *Krajišnik* AJ, paras.225-226.

<sup>938</sup> Judgement, paras.136, 138. *See also* para.2365.

<sup>939</sup> *Bajić*: Exh.P2603, paras.11, 13; *Bajić*, T.20739.

<sup>940</sup> Exh.P2614.

<sup>941</sup> Judgement, para.144. *See also* paras.134, 136-139, 144-146, 2358-2359, 2444-2445.

<sup>942</sup> Judgement, paras.135, 2330-2333, 2361, 2364.

<sup>943</sup> Judgement, para.2332.

<sup>944</sup> Judgement, paras.2331, 2361.

information about offenders so he could prevent further crimes,<sup>945</sup> and he made plans for instructing his troops on IHL.<sup>946</sup> However, these measures did not address the widespread commission of persecutory crimes by Gotovina's subordinates that were central to the JCE.

294. Gotovina possessed the ability to appropriately address his subordinates' crimes, although the Chamber found that he did so only rarely in relation to crimes against Serbs during and after Operation Storm.<sup>947</sup> For example, he created commissions of inquiry to deal with routine military offences,<sup>948</sup> made a limited number of referrals to the Split MD Disciplinary Court,<sup>949</sup> ordered HV members to return stolen vehicles to UNCRO,<sup>950</sup> ordered the expropriation of war booty,<sup>951</sup> initiated disciplinary proceedings<sup>952</sup> and assessed the regularity of disciplinary actions.<sup>953</sup> As noted, these actions failed to deal in any serious way with the core crimes that brought about the departure of the Serb population.

(ii) Gotovina could have used his authority over the VP to investigate and process crimes (4.7.6)

295. The Chamber found that Gotovina had the power to initiate criminal or disciplinary proceedings which would result in the involvement of the VP units of the Split MD.<sup>954</sup> Although he was aware of widespread crimes, Gotovina "only rarely used his authority over the VP with regard to initiating crime investigations and processing."<sup>955</sup> There is no evidence he ordered an investigation of the unlawful shelling attack on the four towns, or the resulting deportations, forcible transfers or persecutions.

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<sup>945</sup> Judgement, para.135.

<sup>946</sup> Judgement, para.2330.

<sup>947</sup> Judgement, paras.131-132, 2353-2354, 2361-2362, 2365, 2395, 2397. *Contra* Gotovina Brief, para.322(v).

<sup>948</sup> Judgement, paras.131-132, 146.

<sup>949</sup> Judgement, para.2362.

<sup>950</sup> Judgement, paras.2395, 2397.

<sup>951</sup> Judgement, para.2354.

<sup>952</sup> Judgement, para.2353.

<sup>953</sup> Judgement, para.2362.

<sup>954</sup> Judgement, paras.103, 105, 144-146.

<sup>955</sup> Judgement, para.2365. *Contra* Gotovina Brief, para.310.

296. The Chamber was not required to find that Gotovina had a “legal duty to intervene” in the work of the VP.<sup>956</sup> Gotovina’s legal duty, stemming from his position of command, was to prevent or punish subordinate criminality.<sup>957</sup> Since he had authority over the VP for the purposes of crime prevention and processing, the Chamber rightly faulted Gotovina for failing to use this means to effectively prevent and punish crimes.<sup>958</sup> Gotovina’s suggestion that his duties relating to the VP were limited to “inform[ing] the military police” of crimes that they were not already aware of<sup>959</sup> is undermined by both the Chamber’s reasonable findings regarding the scope of Gotovina’s authority and duties<sup>960</sup> and his knowledge of the ineffectiveness of VP crime processing.<sup>961</sup>

297. The fact that Laušić or other governmental organs also held certain responsibilities for the prevention and punishment of crimes<sup>962</sup> does not exclude Gotovina from holding concurrent responsibilities. While Laušić was responsible for the organization and administration of VP as the Chief of the VP Administration,<sup>963</sup> the relevant VP units were subordinated to Gotovina as the MD Operational Commander in their zone of operation.<sup>964</sup> As such, Gotovina had authority over those units with respect to the performance of regular VP tasks.<sup>965</sup> He issued orders to and received reports from the VP, demonstrating that he exercised such authority.<sup>966</sup> The Chamber explicitly considered, and reasonably rejected, Gotovina’s defence that the VP units were not subordinated to, but rather, horizontally coordinated with, the Military Commander.<sup>967</sup> The VP rules explicitly provided otherwise.<sup>968</sup>

<sup>956</sup> *Contra* Gotovina Brief, para.319(i), *see also* para.319(vi)(f).

<sup>957</sup> Gotovina’s reference to caselaw concerning the identification of a legal duty in cases of commission by omission is inapposite: *see* Gotovina Brief, paras.288, 322; fns.495, 529, 545, 575, 584. The Appeals Chamber has not required that the significant contribution to a JCE must adhere to the same requirements, even when partly based on omissions: *see e.g.* *Kvočka* AJ, para.104; *Krajišnik* AJ, paras.194, 216-219. In any event, the facts of this case meet the requirements for commission by omission because as a commander Gotovina had a legal duty to act and failed to do so.

<sup>958</sup> Judgement, paras.146, 2365.

<sup>959</sup> Gotovina Brief, para.319(ii), (iii).

<sup>960</sup> Judgement, paras.145-146. *Contra* Gotovina Brief, para.319(iv).

<sup>961</sup> *See e.g.* Judgement, para.2363.

<sup>962</sup> *See* Gotovina Brief, paras.308, 319(iv)-(vi).

<sup>963</sup> Judgement, paras.102-105.

<sup>964</sup> Judgement, para.103.

<sup>965</sup> Judgement, paras.103, 145.

<sup>966</sup> Judgement, paras.131-132, 135, 2331, 2354, 2361. *Contra* Gotovina Brief, paras.319(iv)-(vi).

<sup>967</sup> Judgement, para.145.

<sup>968</sup> Exh.P880.

298. Moreover, irrespective of whether the prevention and punishment of crimes ordinarily fell within the purview of other governmental organs,<sup>969</sup> it nonetheless became Gotovina's responsibility to take follow-up measures when it became apparent that the usual disciplinary mechanisms were failing.<sup>970</sup> The Chamber noted Gotovina's argument that he "had the right to assume that others would take care of their tasks."<sup>971</sup> However, it found that this assumption was rebutted when it became evident that the specialised branches under his control were not carrying out their duties properly.<sup>972</sup>

299. In considering the scope of Gotovina's authority under the VP Rules the Chamber explicitly noted both Gotovina's formal authority<sup>973</sup> and his *de facto* authority in exercising these powers.<sup>974</sup> The fact that Gotovina may have exercised these powers "rarely"<sup>975</sup> does not demonstrate a lack of authority, but rather, a failure to adequately exercise that authority.<sup>976</sup> The Chamber concluded that Gotovina failed to take adequate measures to prevent or punish crimes.<sup>977</sup> By re-advancing arguments made at trial<sup>978</sup> without showing any error in the Chamber's reasoning, Gotovina fails to demonstrate that the Chamber's findings were unreasonable.<sup>979</sup>

(iii) Gotovina exercised control over the Split MD when he was in BiH (4.7.7.3)

300. The Chamber correctly found that Gotovina remained responsible for the control of his Split MD subordinates even when he was not physically present in that area.<sup>980</sup> Gotovina's claim that, while he was in BiH, he had neither the duty nor the ability to control his units in Croatia should be summarily dismissed, because he cites

<sup>969</sup> Gotovina Brief, para.319(ii), (v).

<sup>970</sup> Judgement, para.2365.

<sup>971</sup> Judgement, para.2365.

<sup>972</sup> Judgement, para.2365.

<sup>973</sup> Judgement, paras.102-104, 145-146.

<sup>974</sup> Judgement, para.146. The Chamber took into account Exhs.P1013 and P1019, illustrating Gotovina's exercise of disciplinary powers; *Contra* Gotovina Brief, para.319(vi)(a).

<sup>975</sup> Gotovina Brief, para.319(vi)(a), citing Judgement, para.2364 (the correct citation is para.2365). Gotovina Brief, fn.564 cites T.20572-20573, which makes no reference to Laušić.

<sup>976</sup> Judgement, para.2365.

<sup>977</sup> Judgement, para.2365.

<sup>978</sup> *See* Gotovina Closing Brief, paras.650-683.

<sup>979</sup> Gotovina Brief, para.319(vii).

<sup>980</sup> Judgement, para.144. *Contra* Gotovina Brief, paras.324-326; *see also*, paras.280-281, 296, 307-308.

no findings or evidence in support of his position.<sup>981</sup> A commander cannot avoid his obligations to deal with subordinates' crimes merely by leaving the area after an operation is completed.

301. Gotovina retained the authority to prevent or punish his subordinates' crimes, regardless of where he was. The Chamber found that Gotovina was "the Commander of the Split MD [...] at all times relevant to the Indictment."<sup>982</sup> Gotovina thus had command and control over units in Croatia even when he was in BiH. According to Botteri, Gotovina did not transfer power to any other military authority after Operation Storm.<sup>983</sup>

302. The Chamber was presented with ample evidence that Gotovina maintained effective control even after Operation Storm was concluded. It highlighted one example, *i.e.*, General Červenko's 12 September 1995 letter to Gotovina stating that Gotovina was personally responsible for the treatment of UNCRO members in the Split MD and that Gotovina needed to ensure discipline in his units.<sup>984</sup> Other examples included Gotovina's orders and reports after Operation Storm in which he demonstrated his continued authority over the Split MD.<sup>985</sup> These involved matters such as assignment and re-subordination of soldiers to the Knin Garrison,<sup>986</sup> establishment of a forward command post in Knin,<sup>987</sup> the organisation of the Split MD,<sup>988</sup> withdrawal and relocation of units,<sup>989</sup> demobilization,<sup>990</sup> collection of weapons,<sup>991</sup> sanitation activities<sup>992</sup> and commendations.<sup>993</sup> Similarly, Gotovina's colleagues and superiors, as well as international observers, viewed him throughout

<sup>981</sup> *Krajišnik* AJ, para.27. *Contra* Gotovina Brief, paras.324-325.

<sup>982</sup> Judgement, para.96. *See also* paras.2324, 2604.

<sup>983</sup> Judgement, para.73. *Contra* Gotovina Brief, paras.324-325.

<sup>984</sup> Judgement, paras.142, 144.

<sup>985</sup> Judgement, paras.83, 85-86, 89, 92, 95, 126, 132, 558, 784, 859, 922, 1013, 1695-1696, 2331-2332, 2355-2357, 2361, 2364, 2366 & fns.2586, 2384-2386, 2391, 2395, 2397, 2440, 2535.

<sup>986</sup> Judgement, paras.2385-2386, 2440.

<sup>987</sup> Judgement, paras.85, 89.

<sup>988</sup> Judgement, paras.83, 85-86.

<sup>989</sup> Judgement, paras.85-86.

<sup>990</sup> Judgement, para.92.

<sup>991</sup> Judgement, para.2357.

<sup>992</sup> Judgement, para.2366 & fn.2586.

<sup>993</sup> Judgement, para.2355.

the period after Operation Storm as responsible for matters within the Split MD,<sup>994</sup> including troop misconduct.<sup>995</sup>

303. As discussed above,<sup>996</sup> Gotovina issued orders after Operation Storm that show that he had the ability to prevent or punish his subordinates' crimes. These efforts took place from immediately after the Operation ended<sup>997</sup> to as late as 11 November 1995,<sup>998</sup> thereby demonstrating his continuous control throughout the Indictment period.

304. Finally, the Chamber found that Gotovina "was present in Sector South on several occasions during the Indictment period."<sup>999</sup> Specifically, he was in Knin on various dates in August, September and October 1995.<sup>1000</sup> On each of these occasions, he received reports of his troops' misconduct.<sup>1001</sup> Gotovina offers no explanation for why he failed to act regarding these units when he was in Croatia.

305. Gotovina's argument that the Chamber reversed the burden of proof on this issue should be dismissed.<sup>1002</sup>

(iv) Gotovina could not assume diligence of subordinates because he was on notice of continuing crimes (4.7.5)

306. The Chamber reasonably concluded that Gotovina could not avoid his responsibility by assuming that specialised branches under his command were addressing crimes, because he was well-informed about the nature and scale of crimes against Serb civilians and that very few crimes were being followed up.<sup>1003</sup> As a commander, Gotovina was required to take all necessary and reasonable measures to prevent or punish his subordinates' crimes. This is the case whether or not those ordinarily responsible for investigating and processing crimes were under Gotovina's authority.<sup>1004</sup> Once he was on notice that a particular response was ineffective, he was

<sup>994</sup> Judgement, paras.132, 135, 179, 2150, 2341, 2343-2344, 2352, 2384-2385, 2517, 2520.

<sup>995</sup> Judgement, paras.2340, 2345, 2397, 2483.

<sup>996</sup> *Above*, paras.293-294, 297, 302.

<sup>997</sup> Judgement, paras.2353-2354.

<sup>998</sup> Judgement, para.2397.

<sup>999</sup> Judgement, para.2363.

<sup>1000</sup> Judgement, paras.2340, 2345-2350.

<sup>1001</sup> Judgement, paras.2340, 2345-2350.

<sup>1002</sup> *Above*, II.H. *Contra* Gotovina Brief, para.324.

<sup>1003</sup> Judgement, para.2363-2365. *Contra* Gotovina Brief, paras.314-318.

<sup>1004</sup> *Contra* Gotovina Brief, para.315.

obliged to take other measures. A commander's duty to act may require him to take measures beyond his formal authority.<sup>1005</sup>

307. Contrary to Gotovina's assertion,<sup>1006</sup> the Chamber found that Gotovina had authority over the VP with regard to criminal investigations and processing and that he was on notice that the VP was not "doing their job"<sup>1007</sup> to adequately address crimes.<sup>1008</sup> While the Chamber did not positively establish that there was a Croatian policy of non-investigation, the Chamber found that "the general picture that emerges from the evidence is of an insufficient response by the Croatian law enforcement authorities."<sup>1009</sup>

(c) Gotovina received a fair trial (4.7.1, 4.7.2)

308. Gotovina claims that the Chamber surprised him by inventing "new measures" which he should have taken.<sup>1010</sup> The Chamber did no such thing. The Chamber's factual findings concerning measures that Gotovina should have taken are consistent with the IHL duties of a commander<sup>1011</sup> and with the Prosecution's pleadings in this case.<sup>1012</sup>

309. First, the Chamber's reference to "adjusting his focus and priorities"<sup>1013</sup> was in response to the Defence's argument that Gotovina was too busy commanding troops in BiH to respond to reports of subordinates' crimes in the Krajina.<sup>1014</sup>

310. Second, the examples provided by the Chamber of what Gotovina might have done—such as contacting relevant people for assistance, making public statements or using available capacities—were illustrations of Gotovina's failure to fulfil his duties. Far from being "completely different measures" as Gotovina suggests,<sup>1015</sup> these factual descriptions were covered by the Indictment<sup>1016</sup> and accorded with the monitoring and implementation measures set out in the Prosecution's Pre-Trial and

<sup>1005</sup> *Krajišnik* AJ, para.194; *Mrkšić* AJ, paras.93-94.

<sup>1006</sup> Gotovina Brief, paras.314-317.

<sup>1007</sup> Gotovina Brief, para.310-311.

<sup>1008</sup> Judgement, paras.2364, 2365. *Contra* Gotovina Brief, paras.310-311, 313, 317.

<sup>1009</sup> Judgement, para.2203. *Contra* Gotovina Brief, paras.310, 314.

<sup>1010</sup> Gotovina Brief, paras.284-290; *see also* para.299-300.

<sup>1011</sup> ICTY Statute, Art.7(3); AP1, Arts.86-87.

<sup>1012</sup> *See e.g.* Indictment, para.17(e); Prosecution Pre-Trial Brief, paras.54-71.

<sup>1013</sup> Judgement, para.2365.

<sup>1014</sup> *See e.g.* Gotovina Pre-Trial Brief, para.153. *Above*, V.C.2(b)(iii).

<sup>1015</sup> Gotovina Brief, para.285.



Closing Briefs.<sup>1017</sup> Many of these measures articulated in the Prosecution's case would require Gotovina to contact relevant people, make public statements, and reallocate capacity. The fact that the Chamber used different words than the Prosecution does not mean that Gotovina was not on notice of the allegations against him. Nor was the Chamber obligated to give the additional details Gotovina now requests.<sup>1018</sup> These details are implicit in the Chamber's review of the evidence and accompanying discussion.

311. The Chamber reasonably disregarded the evidence of General Jones, since his expert opinion was based on inaccurate and incomplete facts.<sup>1019</sup> While the Chamber explicitly noted that it reviewed all of the evidence<sup>1020</sup> it was under no obligation to cite all of it.<sup>1021</sup> General Jones' report was largely based on abstract, generic propositions from his own military experience.<sup>1022</sup> Where he did seek to apply his opinions to the case at hand, his conclusions were based on a limited, selective and skewed factual foundation.<sup>1023</sup> Ultimately, General Jones' "conclusions" were based on hypothetical or inaccurate factual assumptions at odds with the totality of the evidence.<sup>1024</sup> It was reasonable for the Chamber to have disregarded this evidence.

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<sup>1016</sup> Indictment, para.17(e).

<sup>1017</sup> See e.g. Prosecution Pre-trial Brief, paras.61-67; Prosecution Closing Brief, paras.207, 209-280.

<sup>1018</sup> Gotovina Brief, para.289.

<sup>1019</sup> *Contra* Gotovina Brief, paras.283-284, 299-300, 336.

<sup>1020</sup> Judgement, para.47.

<sup>1021</sup> *Kvočka AJ*, para.23.

<sup>1022</sup> See e.g. Exh.D1633, paras.1-20.

<sup>1023</sup> Jones' report cites only Defence exhibits, with the exception of P1125 (Gotovina's attack order) and P71 (Split MD Operations Diary): See Exh.D1633. In particular, Exhs.[REDACTED], [REDACTED], P1120, D652 (relating to the commission of crimes by Gotovina's subordinates, and his notice thereof) were not referred to in the report. Nor were Exhs.P2585 (Gotovina's analysis of Operation Storm), D1596 (Gotovina's proposal on the selection, deployment and control of NCOs), or D793 (changes to Gotovina's key subordinate personnel). In his testimony, General Jones stated he had not previously seen Exh.P918 (explicit warning about the commission of crimes post-Storm): See Jones, T. 21041, 21045.

<sup>1024</sup> For instance, General Jones did not assume any facts involving HV crimes, stating: "I cannot refute that undisciplined behaviour occurred in the area of operations. Whether this behaviour was conducted by soldiers, criminals, or refugees is not for me to determine." See Exh.D1633, para.43. He was never asked to assume any facts involving criminal activity by the Split MD: See Exh.D1632. See also Prosecution Closing Submissions, T.29395-29396; Prosecution Closing Brief, paras.163, 188, 191.

**D. Gotovina was properly convicted for JCE III crimes (4.7.13, 4.8-4.9)**

1. The Chamber applied the correct legal standard (4.8)

312. The Chamber applied the correct legal standard to assess Gotovina's *mens rea* with respect to the JCE III crimes of destruction, plunder, murder, inhumane acts, cruel treatment and unlawful detentions.<sup>1025</sup> It found that these crimes were the natural and foreseeable consequences of the execution of the JCE objective and that Gotovina was aware of and took the risk that these crimes would be committed.<sup>1026</sup> Consistent with the caselaw, this was not an "implausibly remote scenario" but rather a risk that was "sufficiently substantial as to be foreseeable" to Gotovina.<sup>1027</sup>

2. The JCE III crimes were objectively natural and foreseeable (4.7.13)

313. The Chamber reasonably found that the execution of the common objective, involving the discriminatory and large-scale deportation of a civilian population through unlawful shelling, would entail the possibility of further crimes.<sup>1028</sup> The Chamber's findings were based on the totality of the evidence and not only on the two factors Gotovina refers to.<sup>1029</sup> Other factors considered by the Chamber included the climate of ethnic tension and the well-known revenge motive. Gotovina's challenges overlook salient aspects of the Judgement, misconstrue the Chamber's findings, and misunderstand the basis of his JCE III liability.

314. The Chamber correctly considered the effects of Gotovina's unlawful artillery order<sup>1030</sup> in assessing the objective foreseeability of the JCE III crimes, finding that this signalled a permissive attitude towards crimes against Serb civilians.<sup>1031</sup> This finding is supported, rather than undermined, by Gotovina's wholly inadequate responses to criminal conduct. As discussed above, the evidence did not show that Gotovina "vigorously opposed criminal conduct,"<sup>1032</sup> but instead that he contributed

<sup>1025</sup> Judgement, paras.1952-1953, 2372-2375.

<sup>1026</sup> Judgement, paras.2372-2375.

<sup>1027</sup> *Karadžić* JCE III Foreseeability AD, paras.15, 18, citing *Blaškić* AJ, para.33. *Contra* Gotovina Brief, paras.340, 350.

<sup>1028</sup> Judgement, paras.2373-2374; Gotovina Brief, paras.335-338.

<sup>1029</sup> Gotovina Brief, para.335.

<sup>1030</sup> Judgement, paras.1911,1923, 1935, 1943, 2324, 2370.

<sup>1031</sup> Judgement, para.2373.

<sup>1032</sup> Gotovina Brief, para.336.

to the atmosphere of impunity by failing to take follow-up measures.<sup>1033</sup> This made additional crimes more likely.

315. The Chamber also based its foreseeability findings on the fact that the purpose of the JCE envisaged a scenario where few Serb civilians would remain in the Krajina following the mass departures. The Chamber did not make any findings on the relationship between the percentage of Serbs in the Krajina and the “crime rate”.<sup>1034</sup> Rather, it concluded that since the purpose of the JCE was to force Serb civilians out of their homes and in light of the climate of ethnic tensions, this would increase the risk of crimes being committed against uninhabited Serb properties.<sup>1035</sup> The JCE members correctly anticipated that following the mass exodus of civilians, only the most vulnerable Serbs would remain.<sup>1036</sup> Gotovina himself stated “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.”<sup>1037</sup> The consequences were eminently foreseeable. Contrary to Gotovina’s suggestion, there was no obligation for this to be “put to” defence witnesses.<sup>1038</sup>

316. Gotovina’s argument that the Chamber “failed to explain how shelling in the four towns [...] could reasonably have caused ‘natural and foreseeable crimes’ in areas outside those towns”<sup>1039</sup> similarly misapplies the basis of JCE III liability.<sup>1040</sup> The Chamber was correct to find that the JCE III crimes were natural and foreseeable consequences of the JCE goal to permanently remove the Serb civilian population from the Krajina by force or threat of force.<sup>1041</sup> The expulsion of the majority of the Serb civilians from the area left the remaining Serbs and Serb property vulnerable to crimes by the Croatian forces.<sup>1042</sup> It is irrelevant whether or not the JCE goal was fully realized. Nor was it necessary for the Chamber to link the JCE III crimes to the JCE I crimes committed in a particular place.<sup>1043</sup>

<sup>1033</sup> Judgement, paras.2364-2365, 2373.

<sup>1034</sup> *Contra* Gotovina Brief, para.337.

<sup>1035</sup> Judgement, para.2373.

<sup>1036</sup> *See* Exh.P461, p.15.

<sup>1037</sup> *See* Exh.P461, p.15.

<sup>1038</sup> *Contra* Gotovina Brief, para.337.

<sup>1039</sup> Gotovina Brief, para.337.

<sup>1040</sup> *Stakić* AJ, para.87.

<sup>1041</sup> Judgement, para.2314.

<sup>1042</sup> Judgement, para.2373.

<sup>1043</sup> *Contra* Gotovina Brief para.337.

317. Finally, Gotovina focuses on a reference in the Judgement stating that members of the leadership, including Tuđman “disapproved of the destruction of property”, suggesting this contradicts the finding that such crimes were the “consequence of the implementation of the supposed JCE”.<sup>1044</sup> Again, Gotovina misunderstands JCE III liability and the Chamber’s findings. In the cited passage, the Chamber found that, consistent with Tuđman’s wish to resettle the Krajina with Croats,<sup>1045</sup> the destruction of property was not part of the common criminal purpose of the JCE and accordingly did not constitute a JCE I crime.<sup>1046</sup> However, the standard for JCE III is not whether such crimes were intended.<sup>1047</sup> Such crimes may not have been the immediate goal of the JCE, but they were nonetheless a natural and foreseeable *consequence*, and Gotovina personally reconciled himself to the possibility that these crimes could be committed.<sup>1048</sup> Gotovina fails to demonstrate any error in the Chamber’s reasoning.

3. Gotovina knowingly took the risk that JCE III crimes would occur (4.9)

318. The Chamber properly found that Gotovina was aware of the possibility that JCE III crimes would occur. Gotovina’s challenges to this finding should also be dismissed.<sup>1049</sup>

319. In wrongly suggesting that the Chamber could not legitimately take into account the climate of ethnic tensions in assessing Gotovina’s awareness of the possibility of JCE III crimes,<sup>1050</sup> Gotovina seeks to isolate the JCE III crimes from their context. The Chamber was entitled to consider the prevailing political, historical and ethnic factors bearing on the likelihood and foreseeability of such crimes. It is untenable to suggest that ethnic tensions and feelings of revenge were “unrelated” to the JCE.<sup>1051</sup> These factors were in fact central to the JCE, and formed part of the wider context in which the JCE was executed.

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<sup>1044</sup> Gotovina Brief, para.338, citing Judgement, para.2313.

<sup>1045</sup> See e.g. Judgement, paras.2001, 2053.

<sup>1046</sup> Judgement, para.2313; see also paras.2038, 2053-2054, 2310-2312.

<sup>1047</sup> *Kvočka* AJ, para.37.

<sup>1048</sup> Judgement, para.2374.

<sup>1049</sup> Gotovina Brief, paras.341-351.

<sup>1050</sup> Gotovina Brief, para.342.

<sup>1051</sup> *Contra* Gotovina Brief, para.342.

320. Gotovina's argument that his conversation with General Forand on 5 September 1995<sup>1052</sup> should not have been taken into account since it occurred after the JCE came into existence takes an overly restrictive view of the evidence.<sup>1053</sup> Gotovina was well-aware of the prevailing revenge mentality prior to the inception of the JCE, as evidenced by his statements at the Brioni meeting.<sup>1054</sup> The Croat desire for retribution against the Serbs for crimes committed in 1991 did not simply reveal itself to Gotovina in hindsight.<sup>1055</sup> It was reasonable for the Chamber to consider this evidence that Gotovina was aware of the pre-existing climate of ethnic tensions and revenge-mentality, as further evidence of his awareness of the possibility of the JCE III crimes being committed in the execution of the common purpose of the JCE.<sup>1056</sup>

321. In the meeting on 2 August, Šušak warned military officials, including Gotovina, of the need to prevent uncontrolled conduct such as torching and looting.<sup>1057</sup> In arguing that this "'notice' had nothing to do with 'implementation of the common purpose,'"<sup>1058</sup> Gotovina conflates the intent required for JCE I with the knowledge required for JCE III. There is no inconsistency in the Chamber's finding that while JCE members may not have specifically intended such JCE III crimes to happen—and as such, those crimes did not fall within the purpose of the JCE<sup>1059</sup>—they were nonetheless aware of the risk such crimes could occur, and willingly ran that risk.<sup>1060</sup> The meeting of 2 August specifically addressed issues relating to the pending offensive, and it was in the context of this discussion that Šušak mentioned the need to prohibit "uncontrolled conduct". It was thus clearly contemplated that such crimes could arise in the execution of the JCE's common purpose. This discussion shows Gotovina appreciated that risk. By contributing to the JCE, Gotovina shows he reconciled himself to the possibility that such crimes could be committed.<sup>1061</sup>

<sup>1052</sup> Exhs.P331, pp.18-19, P333, para.8, P383, p.4; Judgement, para.2345.

<sup>1053</sup> Gotovina Brief, para.343.

<sup>1054</sup> See also Judgement, para.1975.

<sup>1055</sup> *Contra* Gotovina Brief, para.343.

<sup>1056</sup> Judgement, para.2373.

<sup>1057</sup> Exh.D409; Judgement, para.1987.

<sup>1058</sup> Gotovina Brief, para.344.

<sup>1059</sup> Judgement, para.2313.

<sup>1060</sup> Judgement, para.2374. *Above*, para.317.

<sup>1061</sup> Judgement, para.2374.

322. Gotovina's preventative orders were not the only evidence of his awareness of the likelihood of JCE III crimes being committed.<sup>1062</sup> The Chamber also relied on other evidence including Gotovina's order to attack towns, the risk caused by the mass deportations to the remaining Serbs and Serb property, and Gotovina's knowledge of the context of ethnic tension and revenge-mentality.<sup>1063</sup> Moreover, Šušak discussed the risk of JCE III crimes in Gotovina's presence on 2 August.<sup>1064</sup> The *Blaškić* precedent cited by Gotovina concerns the permissibility of using an accused's preventative orders to prove his indirect intent for ordering. It is thus factually and legally distinguishable.<sup>1065</sup>

323. The Chamber rejected Gotovina's defence at trial that he took all necessary and reasonable measures to prevent and punish crime.<sup>1066</sup> Once again, Gotovina re-advances his own version of the facts, claiming that he opposed subordinates' crimes.<sup>1067</sup> In arguing that Croatia did not have a "policy" of non-investigation of crime and that the senior leadership disapproved of the destruction of property,<sup>1068</sup> Gotovina again conflates the requirements of JCE I with JCE III.<sup>1069</sup> Gotovina knowingly took the risk that such crimes could be committed.<sup>1070</sup> The Chamber did not equate recklessness with "indifference," contrary to Gotovina's attempt to blur these two distinct concepts.<sup>1071</sup> Furthermore, while the senior leadership's position on property destruction was relevant to whether such crimes fell within the core JCE, it was not relevant to determining Gotovina's *subjective* awareness of the risk of such crimes occurring as foreseeable consequences of the JCE.

324. In suggesting that he had good reason to believe that JCE III crimes would not be committed, Gotovina merely invites the Appeals Chamber to re-evaluate the evidence and substitute its own factual findings, without showing any error in the

<sup>1062</sup> *Contra* Gotovina Brief, para.345.

<sup>1063</sup> Judgement, paras.2373-2374.

<sup>1064</sup> Judgement, para.2374, *see also* para.1975. For a similar approach, *see Krstić* AJ, para.149; *Kvočka* AJ, para.213. *See also Milutinović* TJ, Vol.3, para.785.

<sup>1065</sup> *Blaškić* AJ para.602.

<sup>1066</sup> Judgement, paras.2329-2365. *Contra* Gotovina Brief, paras.346-348. *Above*, para.311.

<sup>1067</sup> Gotovina Brief, paras.346-348. As such, this argument should be summarily dismissed: *Krajišnik* AJ, para.18. *See also above*, V.C.2.

<sup>1068</sup> Gotovina Brief, para.347, citing Judgement 2313.

<sup>1069</sup> Judgement, para.2374. *See above*, paras.317, 321.

<sup>1070</sup> Judgement, para.2374.

<sup>1071</sup> Gotovina Brief, para.347. The Chamber did not use the term "indifference" at any point in discussing Gotovina's attitude to crimes or his JCE III liability.

Chamber's reasoning.<sup>1072</sup> For instance, Gotovina suggests that he "could have reasonably assumed that crimes would not be committed"<sup>1073</sup> on the basis that he and others took measures to prevent crimes and had "no reason to think that these measures would be ineffective."<sup>1074</sup> To the contrary, the evidence demonstrates that Gotovina knew that these measures were insufficient.<sup>1075</sup> Despite Gotovina's limited steps to prevent crimes,<sup>1076</sup> he knew of the ongoing risk of further crimes being committed.<sup>1077</sup> For instance, with respect to Knin, Gotovina recognised that it was in a state of "complete chaos" post-Operation Storm, calling the situation a "disgrace" and stating "[b]arbarians and vandals work like that!"<sup>1078</sup> On 6 August, Gotovina expressed anger at the actions of Croatian soldiers<sup>1079</sup> and on 8 August he met with Forand, who complained about looting, arson, and indiscriminate shooting.<sup>1080</sup> Thus, even during the period in which Gotovina claims he was taking measures to prevent crimes,<sup>1081</sup> the evidence clearly demonstrates that he knew that these measures were inadequate.

325. Gotovina also suggests that the Chamber failed to consider that there was insufficient evidence to prove that troops under Gotovina's command had committed crimes immediately prior to Operation Storm<sup>1082</sup> and that this constituted "very good reasons to assume" they would not commit future crimes.<sup>1083</sup> However, Gotovina was aware that he was entering into a plan to ethnically cleanse the Krajina of the Serb population, leaving only the most vulnerable behind, against a backdrop of ethnic tensions and a desire to seek vengeance for historical grievances.<sup>1084</sup> Moreover, Gotovina could not reasonably have assumed on the basis of other operations that his units would not commit crimes during Operation Storm, given his own

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<sup>1072</sup> *Krajišnik*, para.27.

<sup>1073</sup> Gotovina Brief, para.350(i).

<sup>1074</sup> Gotovina Brief, para.350(i).

<sup>1075</sup> *See above*, V.C.2.

<sup>1076</sup> *See* Judgement, paras.2330-2333.

<sup>1077</sup> Judgement, paras.2334-2365.

<sup>1078</sup> Exh.D792, p.2; Judgement, para.2337.

<sup>1079</sup> Exh.D1687, paras.20-30; Judgement, para.2338.

<sup>1080</sup> Exhs.P331, p.18, P333, para.7; Judgement, para.2340.

<sup>1081</sup> *See* Gotovina Brief, para.350(i), citing Section 4.7.4.

<sup>1082</sup> Gotovina Brief, para.350(ii), citing Judgement, para.2367.

<sup>1083</sup> Gotovina Brief, para.350(ii).

<sup>1084</sup> Judgement, para.2373. *See also* P461, p.15.

acknowledgment at Brioni that “it was difficult to keep them on a leash”<sup>1085</sup> and Sušak’s warnings about looting and torching.

326. Finally, the Chamber correctly found that persecution by unlawful detention was a natural and foreseeable consequence of the execution of the JCE objective, and that Gotovina was aware of this.<sup>1086</sup> It observed that unlawful detentions are often part of the process of deportation, as borne out by the evidence in this case.<sup>1087</sup> With deportation as the goal, it was foreseeable that Croatian forces would find it necessary to control the Serbs’ movement by unlawfully detaining them.

#### **E. Gotovina shared the discriminatory intent for persecution (4.10)**

327. The Chamber correctly found that Gotovina shared the common purpose of the JCE, which amounted to or involved the crime of persecution and that Gotovina intended “that the crimes forming part of the objective should be carried out.”<sup>1088</sup> The Chamber’s analysis of the Brioni meeting was based on an assessment of the totality of the evidence, including the statements made by Gotovina and other participants at the meeting,<sup>1089</sup> the general discussion with regard to civilians,<sup>1090</sup> as well as the unfolding of subsequent events, whereby “Gotovina’s words became reality.”<sup>1091</sup> The Chamber also drew appropriate inferences from the mass exodus of the Krajina Serbs, the discriminatory measures adopted to prevent their return and Tudman’s post-Storm references to the restoration of a “Croatian Knin” and the leadership’s intention to repopulate the Krajina with Croats.<sup>1092</sup> In light of this evidence, the Chamber reasonably found that Gotovina’s statements at Brioni were referring to Serb civilians and were amongst the relevant factors demonstrating his discriminatory intent.<sup>1093</sup> Gotovina has shown no legal or factual error in the Chamber’s analysis.

328. The Chamber applied the correct legal test for discriminatory intent.<sup>1094</sup> It did not apply an awareness or knowledge standard.<sup>1095</sup> In suggesting his “sole objective”

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<sup>1085</sup> Judgement, para.1975.

<sup>1086</sup> Judgement, paras.2372-2375, *see also* para.2586.

<sup>1087</sup> Judgement, paras.2372-2374. *Contra* Gotovina Brief, para.349.

<sup>1088</sup> Judgement, para.2371, *see also* paras.2310-2313-2314.

<sup>1089</sup> Judgement, para.1990.

<sup>1090</sup> Judgement, para.1994.

<sup>1091</sup> Judgement, para.2305.

<sup>1092</sup> Judgement, paras.2009, 2316, 2310.

<sup>1093</sup> *Above*, IV.C, F.

<sup>1094</sup> Judgement, para.1802.



was to defeat SVK forces, Gotovina conflates motive with intent.<sup>1096</sup> As the Appeals Chamber has repeatedly explained, persecutory intent is distinct from motive and can be inferred from the circumstances of the crimes, particularly an accused's knowing participation in them.<sup>1097</sup>

329. The Chamber found that the crimes against the Krajina Serbs were committed with the intent to discriminate on political, racial or religious grounds.<sup>1098</sup> This finding is consistent with the jurisprudence, which has accepted persecution on ethnic grounds as falling within the terms of the ICTY's statutory definition.<sup>1099</sup>

330. In finding that Gotovina possessed the requisite discriminatory intent for the crime of persecution, the Chamber considered his statements, his acts and his conduct in the context of all the evidence.<sup>1100</sup> Gotovina's attempt to reinterpret the Chamber's findings does not demonstrate any error in the Judgement:

- Gotovina's claim<sup>1101</sup> that his sole objective was to defeat SVK forces is belied by his order to put the four towns under artillery fire when these towns contained overwhelmingly Serb civilian populations. The Chamber reasonably found this signalled his "attitude towards crimes and towards Serbs."<sup>1102</sup>
- His claim that he never expressed animosity towards Serbs, made discriminatory statements, or encouraged discriminatory acts<sup>1103</sup> is contradicted by the Chamber's findings concerning Gotovina's involvement in the planning and ordering of Operation Storm and his failure to address crimes against Serbs. Moreover, such overtly discriminatory actions are not legally required.

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<sup>1095</sup> *Contra* Gotovina Brief, paras.353-354.

<sup>1096</sup> *Contra* Gotovina Brief, para.355.

<sup>1097</sup> *Kvočka* AJ, paras.367, 460; *see also Blaškić* AJ, para 165; *Kordić* AJ, paras.111, 721-722; *Krnojelac* AJ, para.184.

<sup>1098</sup> *See* Judgement, paras.1746, 1757, 1802, 1862, 1912, 1924, 1236, 1944.

<sup>1099</sup> *See Kordić* AJ, paras.111, 950; *Kvočka* AJ, paras.366, 455; *Krnojelac* AJ, paras.185, 201; *Kupreškić* TJ, paras.636, 589, 591, 780; *Krstić* TJ, para.538; *Simić* TJ, para.56; *Brđanin* TJ, para.992, fns.2484, 993; *Milutinović* TJ, Vol.I, para.176. *See also Nahimana* AJ, para.986. *Contra* Gotovina Brief, para.358. *Above*, para.233.

<sup>1100</sup> Judgement, para.2371.

<sup>1101</sup> Gotovina Brief, para.354.

<sup>1102</sup> Judgement, para.2373.

<sup>1103</sup> Gotovina Brief, para.355.

- Although Gotovina issued some preventative orders, the Chamber found that his failure to enforce these orders did not show “disapproval”<sup>1104</sup> but rather, like his attack order, created an atmosphere of impunity towards crimes against Serbs.<sup>1105</sup>
- Although Gotovina did not make a direct “contribution” to the implementation of discriminatory measures against Serbs,<sup>1106</sup> the Chamber found that he was a member of a JCE, the common purpose of which encompassed these measures as part of a persecutory campaign against Serbs. Gotovina need not have been directly involved in all of the conduct by which the JCE was implemented.<sup>1107</sup>

331. Gotovina’s argument that other evidence shows his lack of discriminatory intent<sup>1108</sup> should be rejected. The evidence he cites is insufficient to undermine the Chamber’s conclusion, which is firmly based on the totality of the record.<sup>1109</sup> Similarly, although Gotovina’s attack order contains no specific reference to Serbs, the Chamber correctly understood it as an order to deliberately target whole towns with an overwhelmingly Serb population.<sup>1110</sup> Finally, by claiming that “awareness of ethnic tension” cannot prove persecutory intent,<sup>1111</sup> Gotovina places unreasonable weight on one of many factors considered by the Chamber.

## F. Conclusion

332. For the above reasons, Ground Four should be dismissed.

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<sup>1104</sup> Gotovina Brief, para.355.

<sup>1105</sup> Judgement, paras.2370, 2374.

<sup>1106</sup> Gotovina Brief, para.355.

<sup>1107</sup> See *Kvočka* AJ, para.99 citing *Tadić* AJ, para.191.

<sup>1108</sup> Gotovina Brief, para.356.


<sup>1109</sup> See *Stakić* AJ, para.335, rejecting a similar argument.

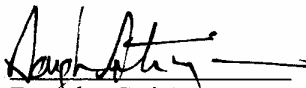
<sup>1110</sup> *Contra* Gotovina Brief, para.357.

<sup>1111</sup> Gotovina Brief, para.358.

## VI. CONCLUSION

333. For the above reasons, the Prosecution requests that the Appeals Chamber dismiss Gotovina's appeal in its entirety.<sup>1112</sup>

  
Helen Brady  
Senior Appeals Counsel

  
Douglas Stringer  
Senior Appeals Counsel

Dated this 12th day of September 2011  
At The Hague, The Netherlands


Word Count: 39, 824 (including Annex)

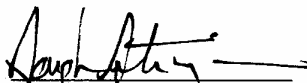
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<sup>1112</sup> However, in the event that the Appeals Chamber were to find any error affecting Gotovina's JCE liability, it should enter convictions under one of the alternative modes of liability, namely: ordering, planning, instigating, aiding and abetting and superior responsibility under Art.7(3). Because the Chamber found Gotovina liable through his participation in the JCE, it did not enter findings on the alternative modes of liability. However, the Judgement contains all the underlying findings sufficient to support convictions for the alternative modes under 7(1) and for 7(3) liability. If the Appeals Chamber were to find any error in the Chamber's findings on the unlawful attack based on its indiscriminate nature, it should uphold the finding of unlawful attacks based on its disproportionate nature. Evidence of this was advanced at trial, but not ultimately considered by the Chamber due to its method of analysis and its conclusion that the attack was indiscriminate: *see* Judgement, Vol.II, fn.935.

**RULE 112 DECLARATION**

The Prosecutor will exercise due diligence to comply with his continuing Rule 68 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to the Accused all material under Rule 68(i) which has come into his actual knowledge and, in addition, has made available to them collections of relevant material held by the Prosecutor.

  
Helen Brady  
Senior Appeals Counsel

  
Douglas Stringer  
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## GLOSSARY

**Pleadings, Orders, Decisions etc. from *Prosecutor v. Ante Gotovina & Mladen Markač*, Case No. IT-06-90-A**

Abbreviation used in Prosecution	Full citation
Chamber	Trial Chamber in <i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-T
Indictment	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-T, Amended Joinder Indictment, appended to Corrected Corrigendum to Prosecution's Notice of Filing Amended Joinder Indictment, 12 March 2008 (public)
Judgement	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-T, T.Ch., Judgement, 15 April 2011 (public with confidential appendix)
Decision on Interlocutory Appeal on Jurisdiction	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-AR72.1, App.Ch., Decision on Ante Gotovina's Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007 (public)
Decision on Jurisdictional Challenges	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-PT, P.T.C., Decision on Several Motions Challenging Jurisdiction, 19 March 2007 (public)
Decision on Rule 73	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-PT, T.Ch., Decision on Ante Gotovina's Motion Pursuant to Rule 73 Requesting Pre-Trial Chamber to Strike Parts of Prosecution Pre-Trial Brief Constituting Effective Amendment of the Joinder Indictment, and on Prosecution's Motion to Amend the Indictment, 14 February 2008 (public)
Errata	<i>Prosecutor v. Ante Gotovina &amp; Mladen Markač</i> , Case No. IT-06-90-A, Errata to Appellant's Brief of Ante Gotovina, 6 September 2011 (public)
Gotovina Brief	<i>Prosecutor v. Ante Gotovina &amp; Mladen Markač</i> , Case No. IT-06-90-A, Appellant's Brief of Ante Gotovina, 1 August 2011 (public redacted version filed on 2 August 2011)
Gotovina Closing Brief	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> ,

	Case No. IT-06-90-T, Gotovina Defence Final Trial Brief, 16 July 2010 (public redacted version filed on 27 July 2010)
Gotovina Notice	<i>Prosecutor v. Ante Gotovina &amp; Mladen Markač</i> , Case No. IT-06-90-A, Notice of Appeal of Ante Gotovina, 16 May 2011 (public)
Gotovina Preliminary Motion on Jurisdiction	<i>Prosecutor v. Ante Gotovina &amp; Mladen Markač</i> , Case No. IT-06-90-PT, Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007 (public)
Gotovina Pre-Trial Brief	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-PT, Pre-Trial Brief of General Ante Gotovina, 5 April 2007 (public version)
Prosecution Closing Brief	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-T, Prosecution's Final Trial Brief, 16 July 2010 (Public Redacted Version filed 2 August 2010)
Prosecution Indictment Motion	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-PT, Prosecution Motion to Amend the Indictment, 17 May 2007 (public)
Prosecution Motion to Strike	<i>Prosecutor v. Ante Gotovina &amp; Mladen Markač</i> , Case No. IT-06-90-A, Prosecution's Motion to Strike Gotovina's Abandoned Grounds of Appeal, 12 September 2011 (public)
Prosecution Pre-Trial Brief	<i>Prosecutor v. Ante Gotovina, Ivan Čermak &amp; Mladen Markač</i> , Case No. IT-06-90-PT, Prosecution's Submission Pursuant to Rule 65ter (E), 16 March 2007 (Public version filed on 23 March 2007)

**Other ICTY authorities**

<b>Abbreviation used in Prosecution</b>	<b>Full citation</b>
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Brdanin</i> AJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brdanin</i> TJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004

<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić &amp; Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001</i>
<i>Čelebići</i> TJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić &amp; Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, T.Ch., Judgement, 16 November 1998</i>
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006</i>
<i>Galić</i> TJ	<i>Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, T.Ch., Judgement and Opinion, 5 December 2003</i>
<i>Hadžihasanović</i> AJ	<i>Prosecutor v. Enver Hadžihasanović &amp; Amir Kubura, Case No. IT-01-47-A, App.Ch., Judgement, 22 April 2008</i>
<i>Halilović</i> AJ	<i>Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, App.Ch., Judgement, 16 October 2007</i>
<i>Haradinaj</i> AJ	<i>Prosecutor v. Ramush Haradinaj, Idriz Balaj &amp; Lahi Brahimaj, Case No. IT-04-84-A, App.Ch., Judgement, 19 July 2010</i>
<i>Hartmann</i> AJ	<i>Prosecutor v. Florence Hartmann, Case No. IT-02-54-R77.5-A, App.Ch., Judgement, 19 July 2011</i>
<i>Karadžić</i> JCE III Foreseeability AD	<i>Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR72.4, App.Ch., Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009</i>
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić &amp; Mario Čerkez, Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004</i>
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, App.Ch., Judgement, 17 March 2009</i>
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003</i>
<i>Krnojelac</i> TJ	<i>Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, T.Ch., Judgement, 15 March 2002</i>
<i>Krstić</i> AJ	<i>Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, App.Ch., Judgement, 19 April 2004</i>
<i>Krstić</i> TJ	<i>Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, T.Ch., Judgement, 2 August 2001</i>

<i>Kupreškić</i> AJ	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović &amp; Vladimir Šantić</i> , Case No. IT-95-16-A, App.Ch., Judgement, 23 October 2001
<i>Kupreškić</i> TJ	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić &amp; Vladimir Šantić, a.k.a. “Vlado”</i> , Case No. IT-95-16-T, T.Ch., Judgement, 14 January 2000
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić &amp; Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
<i>Kvočka</i> TJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić &amp; Dragoljub Prcać</i> , Case No. IT-98-30/1-T, T.Ch., Judgement, 2 November 2001
<i>Limaj</i> AJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala &amp; Isak Musliu</i> , Case No. IT-03-66-A, App.Ch., Judgement, 27 September 2007
<i>Lukić</i> TJ	<i>Prosecutor v. Milan Lukić &amp; Sredoje Lukić</i> , Case No. IT-98-32/1-T, T.Ch., Judgement, 20 July 2009
<i>Martić</i> AJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Martić</i> TJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-T, T.Ch., Judgement, 12 June 2007
<i>Milošević</i> AJ	<i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-A, App.Ch., Judgement, 12 November 2009
<i>Milošević</i> TJ	<i>Prosecutor v. Dragomir Milošević</i> , Case No. IT-98-29/1-T, T.Ch., Judgement, 12 December 2007
<i>Milutinović</i> TJ	<i>Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević &amp; Sreten Lukić</i> , Case No. IT-05-87-T, T.Ch., Judgement, 26 February 2009
<i>Mrkšić</i> AJ	<i>Prosecutor v. Mile Mrkšić &amp; Veselin Šljivančanin</i> , Case No. IT-95-13/1-A, App.Ch., Judgement, 5 May 2009
<i>Naletilić</i> AJ	<i>Prosecutor v. Mladen Naletilić &amp; Vinko Martinović</i> , Case No. IT-98-34-A, App.Ch., Judgement, 3 May 2006
<i>Orić</i> TJ	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, T.Ch., Judgement, 30 June 2006



<i>Popović TJ</i>	<i>Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero &amp; Vinko Pandurević, Case No. IT-05-88-T, T.Ch., Judgement, 10 June 2010 (Public Redacted)</i>
<i>Simić AJ</i>	<i>Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, App.Ch., Judgement, 28 November 2006</i>
<i>Simić TJ</i>	<i>Prosecutor v. Blagoje Simić, Miroslav Tadić &amp; Simo Zarić, Case No. IT-95-9-T, T.Ch., Judgement, 17 October 2003</i>
<i>Stakić AJ</i>	<i>Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, App.Ch., Judgement, 22 March 2006</i>
<i>Stakić TJ</i>	<i>Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, T.Ch., Judgement, 31 July 2003</i>
<i>Strugar AJ</i>	<i>Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, App.Ch., Judgement, 17 July 2008</i>
<i>Strugar TJ</i>	<i>Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, T.Ch., Judgement, 31 January 2005</i>
<i>Tadić AJ</i>	<i>Prosecutor v. Duško Tadić, Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999</i>
<i>Tadić TJ</i>	<i>Prosecutor v. Duško Tadić a/k/a “Dule”, Case No. IT-94-1-T, T.Ch., Opinion and Judgement, 7 May 1997</i>

***ICTR authorities***

<b>Abbreviation used in Prosecution</b>	<b>Full citation</b>
<i>Gacumbitsi AJ</i>	<i>Sylvestre Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, App.Ch., Judgement, 7 July 2006</i>
<i>Kayishema AJ</i>	<i>Prosecutor v. Clément Kayishema &amp; Obed Ruzindana, Case No. ICTR-95-1-A, App.Ch., Judgement (Reasons), 1 June 2001</i>

<i>Nahimana AJ</i>	<i>Ferdinand Nahimana, Jean-Bosco Barayagwiza &amp; Hassan Ngeze v. Prosecutor</i> , Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007
<i>Ntagerura AJ</i>	<i>Prosecutor v. André Ntagerura, Emmanuel Bagambiki &amp; Samuel Imanishimwe</i> , Case No. ICTR-99-46-A, App.Ch., Judgement, 7 July 2006
<i>Ntakirutimana AJ</i>	<i>Prosecutor v. Elizaphan Ntakirutimana &amp; Gérard Ntakirutimana</i> , Case Nos. ICTR-96-10-A and ICTR-96-17-A, App.Ch., Judgement, 13 December 2004

**General Sources**

<b>Abbreviation used in Prosecution</b>	<b>Full citation</b>
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978)
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609 (entered into force 7 December 1978)
Dinstein (2010)	Dinstein, <i>The Conduct of Hostilities under the Law of International Armed Conflict</i> , 2 Ed., CUP (Cambridge: 2010)
GCIV	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 286 (entered into force 21 October 1950)
Oeter (2008)	Oeter, in Fleck, ed., <i>The Handbook of International Humanitarian Law</i> , 2 Ed., OUP (Oxford: 2008)
Schmitt (2006)	Schmitt, "Fault lines in the law of attack" in Breau & Jachec-Neale, eds., <i>Testing the Boundaries of International Humanitarian Law</i> , BIICL (London: 2006)

**Other Abbreviations**

<b>Abbreviation used in Prosecution</b>	<b>Full citation</b>
Art.	Article
BiH	Bosnia and Herzegovina
Croatia	Republic of Croatia
ECMM	European Community Monitor Mission
Exh.	Exhibit
Exhs.	Exhibits
fn.	footnote
“four towns”	Knin, Benkovac, Gračac, Obrovac
FRY	Federal Republic of Yugoslavia
GCs	Geneva Conventions I to IV of 12 August 1949
HV	<i>Hrvatska Vojska</i> – Croatian Army
HVO	Croatian Defence Council (army of the Bosnian Croats)
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
JCE	Joint criminal enterprise
Krajina	Republic of Serb Krajina
MBRL	Multi-Barrel Rocket Launcher
MD	Military District
OED	Oxford English Dictionary Online, Oxford University Press, <a href="http://dictionary.oed.com">http://dictionary.oed.com</a> , 2011
OG	Operation Group
OTP	Office of the Prosecutor, ICTY
para.	paragraph

paras.	paragraphs
p.	page
pp.	pages
RSK	<i>Republika Srpska Krajina</i> – Republic of Serb Krajina
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
SVK	<i>Srpska Vojska Krajine</i> – Serbian Army of Krajina
T.	Trial Transcript
TO	<i>Teritorijalna Odbrana</i> – Territorial Defence
UN	United Nations
UNCIVPOL	United Nations Civilian Police
UNCRO	United Nations Confidence Restoration Operation
UNMO	United Nations Military Observer
VONS	<i>Vijeća Obrane i Nacionalne Sigurnosti</i> – Defence and National Security Council
VP	<i>Vojna Policija</i> – Croatian Military Police
WWII	World War II

## ANNEX A

334. The Prosecution disputes Gotovina's numerical analysis. Gotovina overlooks the fact that the Chamber made precise findings regarding only a sample of the minimum number of projectiles that it found the HV to have fired. By the Prosecution's analysis, this sample comprised 154 projectiles, approximately 13% of the minimum number of shells (1200) fired by the HV at the four towns. Given the size of the sample—and the supporting evidence *inter alia* of Gotovina's attack order, the orders of his subordinates, the general evidence of eyewitnesses (including military eyewitnesses), and the damage assessments—the only reasonable inference was that the sample indicated the generally indiscriminate nature of the remainder of the impact locations. The Judgement must be read in this context.

335. Table 1 sets out the percentage of impacts beyond 200m from a designated target relative to the actual number of impacts found by the Chamber. Table 2, below, sets out references in the Judgement which are authority for the figures in column D of Table 1.

Table 1: percentage of precise impact locations actually found by the Chamber beyond 200m from a designated target

A	B	C	D	E	F
<b>Town</b>	<b>Minimum rounds fired</b>	<b>Judgement references (supporting B)</b>	<b>Total no. of impacts determined (minimum)</b>	<b>Total no. of impacts beyond 200m from designated target</b>	<b>Percentage of known impacts beyond 200m from designated target for impacts determined</b>
<i>Knin</i>	900	1367–1368	88	52	59.09%
<i>Benkovac</i>	150	1420–1421	36	18	50%
<i>Gračac</i>	150	1451	25	5	20%
<i>Obrovac</i>	Unknown	1473	5	2	40%
<b>GRAND TOTAL</b>	<b>1200</b>	<b>—</b>	<b>154</b>	<b>77</b>	<b>50%</b>

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336. Applying the “specific terminology” adopted by the Chamber,<sup>1113</sup> the Prosecution notes that the factual findings recorded in the Judgement substantiate 52 projectiles impacting beyond 200m from a designated target in Knin, including at least one impact near the UN compound on 5 August 1995 (incident 19 in Table 2) and at least one impact in area R of Exhibit P1095 on 4 or 5 August 1995 (incident 26 in Table 2).

337. To compile Table 2, the Prosecution strictly construed the relevant passages of the Judgement. (Thus, the minimum value of the finding that “artillery projectiles” or “an unknown number of projectiles” struck a particular location is understood to be 2; the minimum value of the finding that “several artillery projectiles” struck a location is understood to be 3;<sup>1114</sup> the minimum value of the finding that “three to four” artillery projectiles struck a location is understood to be 3; and so on.) The Chamber did not necessarily accept HV documentation at face value but considered it in light of all the evidence.<sup>1115</sup>

**Table 2: analysis of minimum number of impacts found in the Judgement (summarised in column D of Table 1)**

<b>Incident</b>	<b>Date</b>	<b>Town</b>	<b>Location</b>	<b>Minimum impacts consistent with findings</b>	<b>Judgement references</b>	<b>Running total</b>
1.	4-Aug-95	Knin	Vicinity of SVK HQ (“H” on P1095)	3	1373, 1899	3

<sup>1113</sup> Judgement, para.63.

<sup>1114</sup> See OED (“several, *adj.*, *adv.*, and *n.* [...] A. *adj.* I. Existing apart, separate [...] 4. a. As a vague numeral: Of an indefinite (but not large) number exceeding two or three; more than two or three but not very many. (The chief current sense.)”). *E.g.* Judgement, paras.44, 109.

<sup>1115</sup> See Judgement, paras.1267, 1895–1896.

2.	4-Aug-95	Knin	Railway station ("E8" on D131)	2	1373, 1899	5
3.	4-Aug-95	Knin	RTV Knin ("A" on P1095)	2	1373	7
4.	4-Aug-95	Knin	Intersection ("E15" on D131)	2	1377, 1900	9
5.	4-Aug-95	Knin	Police station ("F" on P289)	3	1379, 1899	12
6.	4-Aug-95	Knin	Martić residence (near "M" on P1095)	2	1379, 1899, 1910	14
7.	4-Aug-95	Knin	Old hospital complex ("R" on P2337)	2	1262, 1910	16
8.	4-Aug-95	Knin	Northern (Slavko Rodić) barracks ("C" on P1095)	2	1382, 1899	18
9.	4-Aug-95	Knin	Area of hospital field ("I1" on P58)/high school ("F" on P1095)	2	1383, 1901	20
10.	4-Aug-95	Knin	TVIK factory ("O" on P1095)	2	1384, 1902	22
11.	4-Aug-95	Knin	Residential area north of TVIK factory and POL station but within 200m of the TVIK factory and/or Senjak barracks	2	1385	24
12.	4-Aug-95	Knin	Field south of the Krka river, north of the UN compound in Southern barracks	4	1392, 1904	28
13.	4-Aug-95	Knin	House "J" on P984	1	1905	29
14.	4-Aug-95	Knin	Police car on road north-east of TVIK factory	1	1391	30
15.	5-Aug-95	Knin	Vicinity of SVK HQ	1	1376, 1378, 1899	31
16.	5-Aug-95	Knin	Railway station	1	1376, 1378, 1899	32
17.	5-Aug-95	Knin	RTV Knin	1	1376, 1378	33
18.	5-Aug-95	Knin	Northern (Slavko Rodić) barracks	1	1899	34
19.	5-Aug-95	Knin	Vicinity of UN compound in Southern barracks (including field south of the Krka river, north of the UN compound in Southern barracks)	1	1392	35
20.	5-Aug-95	Knin	Police station	1	1899	36

21.	5-Aug-95	Knin	Intersection	1	1900	37
22.	4 and/or 5-Aug-95	Knin	Vicinity of Senjak barracks ("D" on P1095)	2	1384, 1899	39
23.	4 and/or 5-Aug-95	Knin	Vicinity of hospital	4	1389, 1905	43
24.	4 and/or 5-Aug-95	Knin	House "L" on P681	1	1387, 1903	44
25.	4 and/or 5-Aug-95	Knin	Vicinity of RC Knin (ECMM HQ)	40	1388, 1903	84
26.	4 and/or 5-Aug-95	Knin	Area east of Knin (P78 and "J" on P984) including railway depot "R" on P1095	1 <sup>1116</sup>	1391	85
27.	4 and/or 5-Aug-95	Knin	Area near cemetery	1	1389, 1905	86
28.	4 and/or 5-Aug-95	Knin	AA site ("C4" on D131) south-east of UN compound in Southern barracks	2	1392	88
29.	4-Aug-95	Benkovac	Vicinity of apartment buildings in Barice ("A" on P2363)	3	1427, 1920	91
30.	4-Aug-95	Benkovac	Stadium and ticket office	2	1427, 1918	93
31.	4-Aug-95	Benkovac	High school	5	1427, 1918	98
32.	4-Aug-95	Benkovac	Bagat and Kepol factory/cool storage/petrol station/Slobodan Macura barracks/police station/Benkovačko Selo/Ristić hamlet/Ristić pine woods	N/A <sup>1117</sup>	1429	98
33.	4-Aug-95	Benkovac	Slobodan Macura barracks	2	1917	100
34.	4-Aug-95	Benkovac	Police station	2	1918	102
35.	4-Aug-95	Benkovac	Petrol station	1	1919	103
36.	4-Aug-95	Benkovac	Bagat and Kepol factory/cool storage/Ristić pine woods/Ristić hamlet/Benkovačko Selo hamlet	5	1920	108

<sup>1116</sup> See separate entry above (incident number 13) for impact at house "J", which occurred on 4 August 1995.

<sup>1117</sup> This finding (relating to "approximately 100 shells"), and the finding relevant to incident 37 (relating to "30-40 shells"), potentially incorporated the entire area of Benkovac without discrimination between lawful and unlawful targets. Their effect can be no more than corroboration of the minimum number of rounds fired at Benkovac (at least 150). For this reason, these general findings are not considered further for the purpose of Tables 1 or 2. Specific findings, including incidents 29-31, 33-36, 38-41, are considered to fall within these general findings.



37.	4-Aug-95	Benkovac	Stadium/Ristić/Slobodan Macura barracks/other facilities <sup>1118</sup>	N/A <sup>1118</sup>	1429	108
38.	4-Aug-95	Benkovac	Area of Ristić	10	1429	118
39.	4-Aug-95	Benkovac	Firemen's hall	2	1429, 1919	120
40.	4 and/or 5-Aug-95	Benkovac	"First" house "X" on P290	2	1428, 1918	122
41.	4 and/or 5-Aug-95	Benkovac	"Second" house "X" on P290	2	1428, 1920	124
42.	4-Aug-95	Gračac	Near Steenberg house ("G" on P538)	2	1456, 1932	126
43.	4-Aug-95	Gračac	Near Gačča house ("A" on P192)	3	1456, 1932	129
44.	4-Aug-95	Gračac	Approx. 100m north of intersection "B" ("B" on P88)	1	1456, 1931	130
45.	4-Aug-95	Gračac	Vet. operating room ("C" on P192)	1	1457, 1931	131
46.	4-Aug-95	Gračac	"Eastern" warehouse ("D" on P192)	1	1457, 1931	132
47.	4-Aug-95	Gračac	House "X" on D1900	1	1458, 1930	133
48.	4-Aug-95	Gračac	Vicinity of intersection "D" (P537, D439)	10	1459, 1931	143
49.	4-Aug-95	Gračac	Roads and intersections not including "D"	2	1459	145
50.	4-Aug-95	Gračac	Gračac Brigade CP (location unknown)	2	1460, 1929	147
51.	4-Aug-95	Gračac	Police station	2	1460, 1929	149
52.	4-Aug-95	Obrovac	Trio textile factory	1	1473, 1940	150
53.	4-Aug-95	Obrovac	Health clinic	1	1473, 1940	151
54.	4-Aug-95	Obrovac	Restaurant	1	1473, 1939	152
55.	4-Aug-95	Obrovac	Movie theatre	1	1473, 1939	153
56.	4-Aug-95	Obrovac	Bus station	1	1473, 1939	154

<sup>1118</sup> See footnote relating to incident 32 above.