

**UNITED
NATIONS**



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

Case No. IT-06-90-A
Date: 2 October 2012
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 2 October 2012

PROSECUTOR

v.

**ANTE GOTOVINA
MLADEN MARKAČ**

PUBLIC

**PUBLIC REDACTED VERSION OF THE 21 JUNE 2012
DECISION ON ANTE GOTOVINA'S AND MLADEN
MARKAČ'S MOTIONS FOR THE ADMISSION OF
ADDITIONAL EVIDENCE ON APPEAL**

The Office of the Prosecutor

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of three motions to admit additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), filed confidentially by Ante Gotovina (“Gotovina”) on 27 October 2011,¹ 30 March 2012,² and 2 May 2012,³ respectively, and of the “Appellant’s Second Motion to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence”, filed confidentially with a confidential annex by Mladen Markač (“Markač”) on 25 October 2011 (“Markač Motion”) (collectively, “Rule 115 Motions”).⁴

I. BACKGROUND

2. On 15 April 2011, Trial Chamber I of the Tribunal (“Trial Chamber”) found that Gotovina and Markač (collectively, “Appellants”) participated in a joint criminal enterprise (“JCE”) by making significant contributions to its common purpose of permanently removing the Serb civilian population from the Krajina region of the Republic of Croatia (“Krajina” and “Croatia”, respectively) by force or threat of force, amounting to persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer.⁵ The Trial Chamber further concluded that the Appellants were guilty of the deviatory crimes of murder, inhumane acts, cruel treatment, plunder, destruction, and unlawful detention (on their own or as underlying acts of persecution), ascribing liability to them on the basis of the third, extended form of joint criminal enterprise.⁶ The Appellants have appealed the Trial Judgement.⁷

3. The Office of the Prosecutor (“Prosecution”) filed its response to the First Gotovina Motion on 28 November 2011.⁸ Gotovina filed his reply on 12 December 2011.⁹ The Prosecution

¹ Appellant Ante Gotovina’s Motion to Admit New Evidence Pursuant to Rule 115, 27 October 2011 (confidential with confidential exhibits) (“First Gotovina Motion”). A public redacted version of the First Gotovina Motion was filed on 4 November 2011.

² Appellant Ante Gotovina’s Second Motion to Admit Additional Evidence Pursuant to Rule 115, 30 March 2012 (confidential with confidential exhibits) (“Second Gotovina Motion”).

³ Ante Gotovina’s Third Rule 115 Motion, 2 May 2012 (confidential with confidential annexes) (“Third Gotovina Motion”).

⁴ Markač joined the First Gotovina Motion and the Second Gotovina Motion. *See* Mladen Markač’s Joinder to “Appellant Ante Gotovina’s Motion to Admit New Evidence Pursuant to Rule 115”, 27 October 2011 (confidential), para. 2; Mladen Markač’s Joinder to “Appellant Ante Gotovina’s Second Motion to Admit Additional Evidence Pursuant to Rule 115”, 2 April 2012 (confidential), para. 2.

⁵ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011 (“Trial Judgement”), Volume II, paras 2369-2371, 2375, 2579-2583, 2587.

⁶ Trial Judgement, Volume II, paras 2372-2375, 2584-2587.

⁷ *See* Notice of Appeal of Ante Gotovina, 16 May 2011; Mladen Markač’s Notice of Appeal, 16 May 2011 (confidential).

⁸ Prosecution Response to Gotovina’s Rule 115 Motion, 28 November 2011 (confidential with confidential annexes and a confidential and *ex parte* annex) (“First Prosecution Response (Gotovina)”). A public redacted version of the First Prosecution Response (Gotovina) was filed on 16 December 2011.

responded to the Second Gotovina Motion on 27 April 2012,¹⁰ and Gotovina replied on 18 May 2012.¹¹ The Prosecution responded to the Third Gotovina Motion on 7 May 2012.¹² Gotovina did not file a reply. The Prosecution responded to the Markač Motion on 24 November 2011.¹³ Markač did not file a reply.

4. On 19 January 2012, the Prosecution requested leave to file a supplemental response to the First Gotovina Motion (“Request to File Supplemental Response”).¹⁴ Gotovina filed a response on 27 January 2012.¹⁵ On 23 May 2012, the Prosecution requested leave to file a sur-reply to the Second Gotovina Reply and included the proposed sur-reply as part of the submission (“Request to File Sur-Reply”).¹⁶ Gotovina filed a response on 25 May 2012,¹⁷ and the Prosecution replied on 29 May 2012.¹⁸

5. On 4 and 7 May 2012, the Pre-Appeal Judge deferred deciding on the Rule 115 Motions until after oral arguments had taken place.¹⁹

⁹ Reply Brief of Ante Gotovina in Support of His Motion to Admit Additional Evidence Pursuant to Rule 115, 12 December 2011 (confidential) (“First Gotovina Reply”). A public redacted version of the First Gotovina Reply was filed on 19 December 2011.

¹⁰ Prosecution Response to Gotovina’s Second Motion to Admit Additional Evidence Pursuant to Rule 115 and Supplemental Response to Gotovina’s First Rule 115 Motion, 27 April 2012 (confidential with confidential annexes) (“Second Prosecution Response (Gotovina)”). See also Corrigendum to Prosecution Response to Ante Gotovina’s Second Motion to Admit Additional Evidence Pursuant to Rule 115, 2 May 2012 (confidential with a confidential annex). The Pre-Appeal Judge denied Gotovina’s request to strike the Second Prosecution Response (Gotovina). See Decision on Ante Gotovina’s Motion to Strike the Prosecution’s Response to Gotovina’s Second Rule 115 Motion, 9 May 2012 (confidential), p. 3.

¹¹ Reply in Support of Appellant Ante Gotovina’s Second Rule 115 Motion, 18 May 2012 (confidential) (“Second Gotovina Reply”). The Pre-Appeal Judge orally granted Gotovina’s request for an extension of time for filing his reply to the Second Prosecution Response (Gotovina). See AT. 14 May 2012 p. 124.

¹² Prosecution Response to Ante Gotovina’s Third Rule 115 Motion, 7 May 2012 (confidential with confidential annexes) (“Third Prosecution Response (Gotovina)”).

¹³ Prosecution Response to Markač’s Second Rule 115 Motion, 24 November 2011 (confidential with confidential annexes and a confidential and *ex parte* annex) (“Prosecution Response (Markač)”).

¹⁴ Prosecution’s Request for Leave to File a Supplemental Response to Gotovina’s Rule 115 Motion, and Proposed Supplemental Response, 19 January 2012 (confidential with a confidential annex).

¹⁵ Ante Gotovina’s Response to Prosecution’s Request for Leave to File a Supplemental Response, 27 January 2012 (confidential) (“Response to Request to File Supplemental Response”). Markač joined the Response to Request to File Supplemental Response. See Mladen Markač’s Joinder to “Ante Gotovina’s Response to Prosecution’s Request for Leave to File a Supplemental Response”, 30 January 2012 (confidential).

¹⁶ Request for Leave to File Sur-Reply to “Reply in Support of Appellant Ante Gotovina’s Second Rule 115 Motion”, and Proposed Sur-Reply, 23 May 2012 (confidential with a confidential annex).

¹⁷ Appellant Ante Gotovina’s Response to Prosecution’s 22 May 2012 Motion for Leave to File Sur-Reply, 25 May 2012 (confidential) (“Response to Request to File Sur-Reply”).

¹⁸ Reply to “Appellant Ante Gotovina’s Response to Prosecution’s 22 May 2012 Motion for Leave to File Sur-Reply”, 29 May 2012 (confidential).

¹⁹ See Decision Deferring Consideration of Motions for the Admission of Additional Evidence on Appeal, 4 May 2012 (confidential); Decision Deferring Consideration of Ante Gotovina’s Third Rule 115 Motion, 7 May 2012 (confidential).

II. APPLICABLE LAW

6. Pursuant to Rule 115(A) of the Rules, requests to present additional evidence before the Appeals Chamber must be submitted no later than 30 days from the date of filing of the brief in reply unless good cause or, after the appeal hearing, cogent reasons are shown for a delay.²⁰

7. For additional evidence to be admissible under Rule 115 of the Rules, the applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.²¹ The applicant's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber.²² An applicant is therefore expected to apprise the Trial Chamber of all difficulties that he encounters in obtaining the evidence in question.²³

8. The applicant must then show that the evidence is both relevant to a material issue and credible.²⁴ Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence.²⁵ Evidence is credible if it appears to be reasonably capable of belief or reliance.²⁶

9. The applicant must further demonstrate that the evidence *could* have had an impact upon the verdict. In other words, the evidence must be such that, if considered in the context of the evidence adduced at trial, it could show that the verdict was unsafe.²⁷ A verdict will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that it might have been different if the new evidence had been admitted.²⁸

10. If the evidence was available at trial or could have been obtained through the exercise of due diligence, it may still be admissible on appeal if the applicant shows that exclusion of the additional evidence would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.²⁹

²⁰ See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 ("*Popović Decision*"), para. 6; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Sixth Motion for Admission of Additional Evidence on Appeal, 25 August 2011 ("*Lukić Decision*"), para. 7.

²¹ *Popović Decision*, para. 7; *Lukić Decision*, para. 8.

²² *Popović Decision*, para. 7; *Lukić Decision*, para. 8.

²³ *Popović Decision*, para. 7; *Lukić Decision*, para. 8.

²⁴ *Popović Decision*, para. 8; *Lukić Decision*, para. 9.

²⁵ *Popović Decision*, para. 8; *Lukić Decision*, para. 9.

²⁶ *Popović Decision*, para. 8; *Lukić Decision*, para. 9.

²⁷ *Popović Decision*, para. 9; *Lukić Decision*, para. 10.

²⁸ *Popović Decision*, para. 9; *Lukić Decision*, para. 10.

²⁹ *Popović Decision*, para. 10; *Lukić Decision*, para. 11.

11. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the Trial Chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the Trial Chamber's verdict.³⁰ A party that fails to do so runs the risk that the tendered material will be rejected without detailed consideration.³¹

12. Finally, the Appeals Chamber has repeatedly recognised that the significance and potential impact of the tendered material is not to be assessed in isolation, but in the context of the evidence presented at trial.³²

III. PRELIMINARY MATTERS

13. The Appeals Chamber notes that the Second Gotovina Motion and Third Gotovina Motion incorporate by reference arguments made in the First Gotovina Motion concerning several documents' relevance and effect on the verdict.³³ The Appeals Chamber further notes that the Request to File Supplemental Response was not filed within 30 days of the First Gotovina Motion. The Prosecution acknowledges that the information contained in the Request to File Supplemental Response was available during the filing period, but contends that despite the delay, the information is of "sufficiently compelling importance" to justify a supplemental filing.³⁴ Gotovina responds that the Prosecution failed to exercise due diligence and, accordingly, that the Request to File Supplemental Response should be denied.³⁵ The Appeals Chamber finds that the Request to File Supplemental Response, Second Gotovina Motion, and Third Gotovina Motion do not comply with the requirements for filings before the Tribunal³⁶ and reminds the parties of the importance of respecting these requirements. However, considering the complex nature of the submissions on appeal and in the interests of justice and judicial economy, the Appeals Chamber will exceptionally consider the relevant submissions in their entirety.³⁷

14. The Appeals Chamber observes that Rule 115(A) of the Rules requires motions for the admission of additional evidence on appeal to be filed "not later than thirty days from the date for filing of the brief in reply, unless good cause" is shown, and that the Second Gotovina Motion and

³⁰ *Popović* Decision, para. 11; *Lukić* Decision, para. 12.

³¹ *Popović* Decision, para. 11; *Lukić* Decision, para. 12.

³² *Popović* Decision, para. 12; *Lukić* Decision, para. 13.

³³ See Second Gotovina Motion, paras 1, 52, 61; Third Gotovina Motion, paras 18-19.

³⁴ See Request to File Supplemental Response, para. 1. See also Request to File Supplemental Response, para. 3.

³⁵ Response to Request to File Supplemental Response, paras 1, 22.

³⁶ See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012 ("Practice Direction"), paras 12(c)-13. See also Decision on Ante Gotovina's Renewed Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 16 November 2011 ("Rule 54 *bis* Decision"), para. 4.

³⁷ Cf. Practice Direction, para. 19; Rule 54 *bis* Decision, para. 4.

Third Gotovina Motion were filed outside the 30-day time limit.³⁸ The Appeals Chamber notes, however, that multiple exhibits included in the Second Gotovina Motion and Third Gotovina Motion were disclosed by the Prosecution only after expiry of the relevant time limit set out in Rule 115 of the Rules,³⁹ and is satisfied that disclosure at such a late stage of the proceedings constitutes good cause for the late filing of motions pursuant to Rule 115 of the Rules.⁴⁰ The Appeals Chamber further notes that the Prosecution specifically contends that Gotovina fails to demonstrate good cause for the late request with respect to the Second Gotovina Motion's Confidential Exhibit E, a report by a former General regarding artillery attacks.⁴¹ Confidential Exhibit E is not a Prosecution disclosure, and a request to admit it should have been filed within the timeframe prescribed by Rule 115 of the Rules. However, in light of the complex nature of the submissions on appeal and in the interests of judicial efficiency, the Appeals Chamber will exceptionally consider the request to admit Confidential Exhibit E.⁴²

15. The Appeals Chamber further observes that neither the Rules nor the Practice Direction provides for a party to file a sur-reply,⁴³ although leave to file a sur-reply may be granted "where the reply raises a new issue to which the respondent has not already had the opportunity to respond".⁴⁴ The Prosecution seeks leave to file a sur-reply on the basis that, in the Second Gotovina Reply, Gotovina misrepresents the Prosecution's position as stated during correspondence between the parties.⁴⁵ However, the Appeals Chamber considers that the Second Gotovina Reply contains no new substantive arguments and, accordingly, dismisses the Request to File Sur-Reply.⁴⁶

IV. DISCUSSION

16. The Rule 115 Motions seek the admission of 32 additional documents relating, *inter alia*, to: (i) the cause(s) of Serb civilians' departure from the Krajina before, during, or after Operation

³⁸ The Appeals Chamber notes that Gotovina filed his brief in reply on 27 September 2011. *See* Reply Brief of Appellant Ante Gotovina, 27 September 2011 (confidential).

³⁹ *See* Second Gotovina Motion, para. 4, Confidential Exhibits A-C; Third Gotovina Motion, para. 5, Confidential Annexes 1-3.

⁴⁰ *Cf. Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009, para. 22.

⁴¹ Second Prosecution Response (Gotovina), para. 42. *See also* Second Gotovina Motion, Confidential Exhibit E.

⁴² [REDACTED].

⁴³ Decision on Ante Gotovina's Motion for Relief to Remedy the Prosecutor's Violations of Rules 68 and 112(B), and for Sanctions Pursuant to Rule 68 *bis*, 21 May 2012 (confidential) ("Decision of 21 May 2012"), para. 5. *See also* Decision on Prosecution's Request for Leave to File Sur-Reply to Respond to False Allegations in Markač's Reply Brief, 1 November 2011 ("Decision on Sur-Reply"); Practice Direction, para. 11.

⁴⁴ Decision of 21 May 2012, para. 5. *See also Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009, para. 15; Practice Direction, para. 19.

⁴⁵ Request to File Sur-Reply, para. 1.

⁴⁶ *Cf.* Decision on Sur-Reply, p. 2.

Storm (“Category I Documents”);⁴⁷ (ii) the lawfulness of artillery strikes by the Croatian Army (“HV”) and the Trial Chamber’s adoption of a 200 metre range of error for artillery shells (“Category II Documents”);⁴⁸ and (iii) Gotovina’s authority to make public statements about matters involving the investigation of crimes (“Category III Document”).⁴⁹

1. Category I Documents

17. The Trial Chamber convicted the Appellants as members of the JCE based, in part, on its finding that unlawful artillery shelling of the towns of Knin, Benkovac, Obrovac, and Gračac on 4 and 5 August 1995 (“Four Towns”) instilled “great fear in those present”, and that this fear was the “primary and direct cause” of Serb civilians’ departure from the Four Towns,⁵⁰ constituting forcible displacement.⁵¹ In reaching this finding, the Trial Chamber relied, *inter alia*, on: its conclusion that the artillery attacks were unlawful and intended to discriminate; testimony from affected individuals; and evidence regarding the involvement of Republic of Serb Krajina (“RSK”) and Serbian Army of Krajina (“SVK”) authorities in the evacuation and transfer of Serb civilians from the Four Towns.⁵²

18. The Appellants seek to admit 25 Category I Documents, comprised of: (i) “Shorthand Notes” from four sessions of the Supreme Defence Council of the Federal Republic of Yugoslavia (“SDC”) between 14 August 1995 and 5 October 1995, providing transcripts of discussions between members of the Serb leadership (collectively, “SDC Transcripts”);⁵³ (ii) internal communications between members of the Serb leadership addressing the causes of Serb civilian departure from the Krajina, including a letter prepared by Slobodan Jarčević, Advisor to the President of the RSK, an Intelligence Report prepared by the General Staff of the Yugoslav Army, two reports prepared by SVK leaders in Knin, and a report prepared by Yugoslav Army Main Staff Intelligence (collectively, “Internal Documents”);⁵⁴ (iii) eight statements of individuals present in

⁴⁷ First Gotovina Motion, Confidential Exhibits 1-19; Second Gotovina Motion, Confidential Exhibits A-D; Third Gotovina Motion, Confidential Annexes 1-3; Markač Motion, Confidential Annex A. The Appeals Chamber notes that the Markač Motion seeks to admit three documents contained in unredacted form in the First Gotovina Motion. Compare Markač Motion, para. 3, Confidential Annex A, with First Gotovina Motion, para. 2, Confidential Exhibits 1-3. The Appeals Chamber further notes that the Second Gotovina Motion seeks to replace the United States diplomatic cable exhibit from the First Gotovina Motion (Confidential Exhibit 10) with an original copy of the same document, which he submits he received after filing the First Gotovina Motion. See First Gotovina Motion, para. 9, Confidential Exhibit 10; Second Gotovina Motion, paras 56-57, Confidential Exhibit D. In the interests of judicial efficiency, the Appeals Chamber grants this request.

⁴⁸ First Gotovina Motion, Confidential Exhibits 20-24; Second Gotovina Motion, Confidential Exhibit E.

⁴⁹ First Gotovina Motion, Confidential Exhibit 25.

⁵⁰ Trial Judgement, Volume II, paras 1743-1744.

⁵¹ Trial Judgement, Volume II, para. 1745. The Trial Chamber also concluded that the HV and Special Police forces intended to forcibly displace Serb civilians from the Four Towns. See Trial Judgement, Volume II, paras 1743, 1746-1751.

⁵² Trial Judgement, Volume II, paras 1511-1539, 1742-1763.

⁵³ First Gotovina Motion, para. 9, Confidential Exhibits 1-4; Markač Motion, para. 3, Confidential Annex A.

⁵⁴ First Gotovina Motion, para. 9, Confidential Exhibits 5-9.

the Four Towns⁵⁵ discussing the causes of civilian departure therefrom (collectively, “Witness Statements”); and (iv) external agency and government documents reflecting on the causes of civilian departure from the Krajina, including a [REDACTED] diplomatic cable prepared by Prosecution Witness [REDACTED],⁵⁶ a statement prepared by the individual who headed the [REDACTED] Task Force charged with distribution of humanitarian aid and assistance to refugees in the former Yugoslavia in 1995,⁵⁷ a report [REDACTED],⁵⁸ four reports [REDACTED],⁵⁹ and the record of a [REDACTED] teleconference⁶⁰ (collectively, “External Documents”).

(a) Submissions

19. Gotovina submits that the Category I Documents fulfil all the requirements of Rule 115 of the Rules and should be admitted.⁶¹ With respect to the SDC Transcripts, Gotovina contends that although the Prosecution disclosed “heavily redacted versions” of the documents in 2007, he was only able to determine their particular relevance to his case as the result of a recent variation of a confidentiality order by the Tribunal.⁶² Gotovina similarly contends that he was only made aware of the Internal Documents and External Documents as a result of either the Prosecution’s disclosure or the release of diplomatic cables via Wikileaks after the Trial Judgement was rendered, and that he was otherwise duly diligent.⁶³ He maintains that it would be “unjust” to deny him the opportunity to admit these materials merely because of the Prosecution’s failure to meet its disclosure obligations.⁶⁴ With respect to the Witness Statements, Gotovina submits that despite an intensive investigative effort undertaken by his defence team, the existence and relevance of the individuals who provided them was unknown to him at trial.⁶⁵ He further contends that he could not have discovered two of the witnesses without them having come forward voluntarily.⁶⁶

⁵⁵ First Gotovina Motion, para. 9, Confidential Exhibits 12-19.

⁵⁶ Second Gotovina Motion, para. 56, Confidential Exhibit D. *See also supra* n. 47.

⁵⁷ First Gotovina Motion, para. 9, Confidential Exhibit 11.

⁵⁸ Second Gotovina Motion, paras 4-5, Confidential Exhibit C.

⁵⁹ Second Gotovina Motion, paras 4, 7-8, Confidential Exhibits A-B; Third Gotovina Motion, paras 7, 9, Confidential Annexes 1-2. A redacted version of one of the [REDACTED] reports, Third Gotovina Motion, Confidential Annex 2, was admitted into evidence at trial as Defence Exhibit [REDACTED]. [REDACTED]. *See* Third Gotovina Motion, para. 10.

⁶⁰ Third Gotovina Motion, para. 13, Confidential Annex 3.

⁶¹ First Gotovina Motion, paras 1, 39; Second Gotovina Motion, paras 1, 52, 55; Third Gotovina Motion, paras 16, 22. *See also* First Gotovina Motion, paras 11, 16, 37-38; Second Gotovina Motion, paras 53-54.

⁶² First Gotovina Motion, para. 17.

⁶³ First Gotovina Motion, paras 23, 28-31; Second Gotovina Motion, paras 4, 10; Third Gotovina Motion, paras 1-2, 5, 15. *See also* First Gotovina Motion, paras 24-27. Gotovina concedes that redacted versions of one of the External Documents was available and admitted into evidence at trial but submits that the unredacted versions of these documents were not available at trial. *See* Third Gotovina Motion, para. 10.

⁶⁴ Second Gotovina Motion, para. 53; Third Gotovina Motion, para. 17. *See also* Third Gotovina Motion, paras 15, 20.

⁶⁵ First Gotovina Motion, paras 31-33, 36.

⁶⁶ First Gotovina Motion, paras 35-36.

20. Gotovina asserts that the Category I Documents are relevant and credible.⁶⁷ He also asserts that they could and would have affected the Trial Chamber's verdict,⁶⁸ as they demonstrate that there was an "undisputed",⁶⁹ consistent, and contemporaneous understanding between "all relevant parties", including members of the Serb leadership and members of the international community, that the cause of Serb civilian departure from the Four Towns was unrelated to HV shelling.⁷⁰ Gotovina also contends that the evidence calls into question the credibility and weight of certain documents relied upon by the Trial Chamber, including evidence from Mile Mrkšić ("Mrkšić") and other SVK officers.⁷¹

21. Markač contends that the three SDC Transcripts he seeks to admit fulfil all of the requirements set out in Rule 115 of the Rules.⁷² He asserts that the Prosecution only disclosed those documents to him on 1 June 2011,⁷³ and requests further explanation from the Prosecution as to why they were not disclosed to him before or during the trial.⁷⁴ He further contends that the documents are both relevant and credible and would affect the Trial Chamber's findings, as they "directly and flatly contradic[t]" the findings of the Trial Chamber with respect to the causes of Serb civilians' departure from the Krajina.⁷⁵

22. The Prosecution responds that the Appellants fail to demonstrate that the Category I Documents fall within the parameters of Rule 115 of the Rules, and asserts that the documents should thus not be admitted.⁷⁶ More specifically, the Prosecution contends that much of the proposed additional evidence was available at trial or discoverable through the exercise of due diligence.⁷⁷ Although the Prosecution acknowledges that some relevant passages of the SDC Transcripts were among those that were initially redacted,⁷⁸ it submits that the unredacted portions of the disclosed documents put Gotovina on notice, at least as of 2007, that the documents were related to the issue of civilian departures from the Krajina.⁷⁹ With respect to the Witness

⁶⁷ First Gotovina Motion, paras 6, 11; Second Gotovina Motion, paras 5-9; Third Gotovina Motion, paras 4, 6, 18-19. See also First Gotovina Motion, paras 7-9.

⁶⁸ First Gotovina Motion, para. 14; Second Gotovina Motion, paras 9, 54; Third Gotovina Motion, paras 6, 18-19. See also First Gotovina Motion, paras 12-13, 15-16; Second Gotovina Motion, paras 11-51.

⁶⁹ First Gotovina Motion, para. 14.

⁷⁰ First Gotovina Motion, para. 9. See also First Gotovina Motion, paras 14, 16, 21-22.

⁷¹ See First Gotovina Motion, para. 9.

⁷² See Markač Motion, paras 5-25.

⁷³ Markač Motion, para. 4.

⁷⁴ Markač Motion, para. 27.

⁷⁵ Markač Motion, para. 20 (emphasis omitted). See also Markač Motion, paras 7-9, 12-14, 17, 19, 21-24.

⁷⁶ First Prosecution Response (Gotovina), paras 1, 8, 14, 122, pp. 12, 16; Second Prosecution Response (Gotovina), paras 1, 13-14, 21, 26, 32, 61; Third Prosecution Response (Gotovina), paras 1, 6, 16; Prosecution Response (Markač), paras 1-3, 24.

⁷⁷ First Prosecution Response (Gotovina), paras 2, 9, 15, 17-22, 46-49; Second Prosecution Response (Gotovina), para. 22; Prosecution Response (Markač), paras 6-10. With respect to the Markač Motion, the Prosecution also argues that Markač fails to even address the issue of the SDC Transcripts' availability at trial or through due diligence. See Prosecution Response (Markač), paras 2, 5.

⁷⁸ First Prosecution Response (Gotovina), para. 19.

⁷⁹ First Prosecution Response (Gotovina), paras 19-21.

Statements, the Prosecution maintains that Gotovina fails to justify why this evidence only became available after the trial, and maintains that they could have been identified earlier through due diligence.⁸⁰

23. The Prosecution further contends that the Category I Documents would not and could not impact the Trial Chamber's findings. In particular, the Prosecution asserts that several of the Category I Documents are either irrelevant,⁸¹ not credible,⁸² misleading,⁸³ or reflect vague or unsubstantiated opinions,⁸⁴ and that the proposed evidence is "repetitive and cumulative" to the information already considered by the Trial Chamber.⁸⁵ In this context, the Prosecution maintains that Gotovina should not be able "simply to re-argue a position that was rejected by the [Trial] Chamber."⁸⁶

24. In reply, Gotovina submits, *inter alia*, that the Prosecution "ignores the central theme" presented by the Category I Documents,⁸⁷ and reiterates his contention that the proposed Category I Documents demonstrate, "individually *and as a whole*, the unreasonableness" of the Trial Chamber's conclusions regarding the causes of Serb civilian departure from the Krajina and could have impacted the verdict.⁸⁸

(b) Analysis

(i) Availability and Due Diligence

25. The Appeals Chamber notes that the Prosecution concedes that three of the Category I Documents were not available at trial, as they were disclosed to Gotovina on 5 April 2012.⁸⁹ Consequently, the two [REDACTED] reports and the record of the [REDACTED] teleconference⁹⁰ may be admitted as additional evidence on appeal only if the Appeals Chamber finds the material credible and relevant, and if, when considered in the context of the evidence presented at trial, the material *could* have had an impact upon the verdict.⁹¹ With respect to the rest of the Category I Documents, the Appeals Chamber notes that the Prosecution asserts that they were available at trial

⁸⁰ First Prosecution Response (Gotovina), paras 46-49.

⁸¹ First Prosecution Response (Gotovina), paras 9, 28, 38-39, 52, 57; Second Prosecution Response (Gotovina), para. 15; Third Prosecution Response (Gotovina), paras 8, 10-13.

⁸² First Prosecution Response (Gotovina), paras 41, 44, 51, 55.

⁸³ Second Prosecution Response (Gotovina), paras 16, 18-19, 34-35.

⁸⁴ First Prosecution Response (Gotovina), paras 38, 40-41, 57; Second Prosecution Response (Gotovina), paras 2, 6, 25-27.

⁸⁵ First Prosecution Response (Gotovina), para. 13. *See also* First Prosecution Response (Gotovina), paras 16, 23, 42, 45, 50-51, 55, 57-58, 64; Second Prosecution Response (Gotovina), paras 6, 17; Third Prosecution Response (Gotovina), para. 6.

⁸⁶ First Prosecution Response (Gotovina), para. 2. *See also* Second Prosecution Response (Gotovina), para. 5.

⁸⁷ First Gotovina Reply, para. 1.

⁸⁸ First Gotovina Reply, para. 2 (emphasis in original). *See also* First Gotovina Reply, paras 9-10, 19-20, 23-25, 27-29.

⁸⁹ *See* Third Prosecution Response, para. 6, n. 13.

⁹⁰ Third Gotovina Motion, Confidential Annexes 1-3.

or through the exercise of due diligence,⁹² while the Appellants contend, *inter alia*, that the documents were in the possession of the Prosecution at trial and that their non-disclosure is the result of the Prosecution's violations of its obligations under Rule 68 of the Rules.⁹³ As demonstrated below,⁹⁴ the Appeals Chamber finds that, even in applying the lowest threshold for admission under Rule 115 of the Rules, namely whether the additional evidence *could* have been a decisive factor in reaching the decision at trial,⁹⁵ the Appellants have failed to demonstrate that the Category I Documents could have affected the Trial Chamber's verdict if they had been admitted at trial. In light of the very particular circumstances of this case, the Appeals Chamber exceptionally leaves aside the question of the availability of the Category I Documents at trial.

(ii) Credibility, Relevance, and Impact on the Verdict

26. The Appeals Chamber considers that the Category I Documents bear sufficient indicia of credibility, including dates, names of recipients, signatures and seals.⁹⁶ Consequently, the Appeals Chamber finds the Category I Documents to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules. The Appeals Chamber also considers that the Category I Documents are relevant to the Trial Chamber's findings concerning the causes of Serb civilian departure from the Krajina.

27. The Appeals Chamber is not convinced, however, that the Category I Documents could have had an impact on the Trial Chamber's verdict, if admitted. The Appellants fail to demonstrate how the evidence presented in the Category I Documents materially differs from that already on the record. The Trial Chamber considered extensive and varied evidence addressing the causes of Serb civilians' departure from the Krajina, including testimony and other evidence from, *inter alia*: (i) civilians who fled their homes;⁹⁷ (ii) members of both the Serb and Croatian military and political leadership;⁹⁸ and (iii) military and international observers on the ground, many of whom watched the civilian departures, including representatives of foreign governments, United Nations bodies, and the ECMM.⁹⁹ The Trial Chamber also considered evidence suggesting that civilians may have

⁹¹ See *supra* para. 9.

⁹² See First Prosecution Response (Gotovina), paras 2, 9, 15, 17-22, 46-49; Second Prosecution Response (Gotovina), para. 22; Prosecution Response (Markač), paras 6-10.

⁹³ See, e.g., First Gotovina Motion, paras 23-28, 34; First Gotovina Reply, paras 3, 6, 16, 26; Second Gotovina Motion, paras 4, 10; Markač Motion, para. 4.

⁹⁴ See *infra* paras 27-30.

⁹⁵ Cf. *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence, 21 March 2011, para. 19; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Streten Lukić's First Motion to Admit Additional Evidence on Appeal, 11 March 2010 ("Šainović Decision"), para. 18.

⁹⁶ See First Gotovina Motion, Confidential Exhibits 1-19; Markač Motion, Confidential Annex A; Second Gotovina Motion, Confidential Exhibits A-D; Third Gotovina Motion, Confidential Annexes 1-3.

⁹⁷ See, e.g., Trial Judgement, Volume II, paras 1512, 1536.

⁹⁸ See, e.g., Trial Judgement, Volume II, para. 1512.

⁹⁹ See, e.g., Trial Judgement, Volume II, paras 1525, 1536, 1562, 1565-1566, 1602, 2004.

fled due to fear from the artillery attacks, poor living conditions, the imminent approach of Croatian forces, the flight of neighbours,¹⁰⁰ and, most notably, RSK and SVK evacuation orders.¹⁰¹

28. In this context, insofar as the Appellants suggest that the Category I Documents could affect the verdict, they fail to demonstrate how admission into evidence of additional documents of the same nature as those already on the record, containing similar information, could have had an impact on the Trial Chamber's findings.¹⁰²

29. The Appeals Chamber further observes that the Trial Chamber indicated a preference for the evidence of individuals who directly observed Serb civilians' departure.¹⁰³ In this context, the Appellants are unpersuasive in suggesting that the SDC Transcripts, representing opinions of individuals physically and temporally removed from the events, could have affected the Trial Chamber's findings. Gotovina similarly fails to demonstrate that the Internal Documents, External Documents, and Witness Statements provide information not considered at trial.¹⁰⁴ The Appeals Chamber is also not persuaded that the SDC Transcripts could have had an impact on the Trial Chamber's findings concerning the credibility of evidence from Mrkšić and other SVK officers in the Krajina.¹⁰⁵

30. In view of the foregoing, the Appeals Chamber finds that the Appellants have failed to demonstrate that the Category I Documents could have affected the Trial Chamber's verdict if they had been admitted at trial.

2. Category II Documents

31. The Trial Chamber concluded that Gotovina was a member of a JCE based, in part, on its finding that he ordered the unlawful artillery attacks carried out by the HV on civilians and civilian objects in the Four Towns.¹⁰⁶ The Trial Chamber's assessment of artillery attacks on the Four

¹⁰⁰ See Trial Judgement, Volume II, para. 1743.

¹⁰¹ See Trial Judgement, Volume II, paras 1511-1539. The Appeals Chamber also notes that the Trial Chamber considered discussions of and decisions made by the SDC in this analysis. See, e.g., Trial Judgement, Volume II, paras 1518-1519. The Trial Chamber further considered evidence regarding, *inter alia*, the timing and organisation of Serb civilians' movements and the lack of assistance and security provided by the RSK and SVK to civilians. See Trial Judgement, Volume II, paras 1539, 1743.

¹⁰² *Sainović* Decision, para. 44.

¹⁰³ See Trial Judgement, Volume II, paras 1512, 1537, 1539, 1743.

¹⁰⁴ In this context, the Appeals Chamber notes that Gotovina acknowledges that the Category I Documents, and the External Documents in particular, are duplicative of evidence already on the record, suggesting that the evidence should be admitted because the materials "corroborate" evidence concerning the evacuation of Serb civilians. See Second Gotovina Motion, paras 25, 40-41. See generally Second Gotovina Motion, paras 7, 11-51; Third Gotovina Motion, para. 18. While corroborating evidence may, in some cases, indicate that additional material would/could affect a trial chamber's findings, the Appeals Chamber is not convinced that the Category I documents could have that effect.

¹⁰⁵ The Appeals Chamber notes that, in evaluating witness testimony, the Trial Chamber explicitly considered the "possible involvement in the events and fear of self-incrimination" of witnesses, Trial Judgement, Volume I, para. 31, and further observes that Gotovina provides only vague assertions as to how the SDC Transcripts could have had an impact on the relevant witnesses' credibility, see First Gotovina Motion, para. 9.

¹⁰⁶ Trial Judgement, Volume II, paras 2370-2375.

Towns included analysis of individual artillery impact sites, and the finding that “a reasonable interpretation of the evidence” was that an artillery projectile fired by the HV which impacted within 200 metres of a legitimate target was deliberately fired at that target (“200 Metre Rule”).¹⁰⁷ In making these findings, the Trial Chamber considered testimony and reports regarding the accuracy and capabilities of the HV’s artillery.¹⁰⁸ The Trial Chamber also found that there was little evidence of mobile targets of opportunity in the Four Towns.¹⁰⁹

(a) Submissions

32. Gotovina seeks the admission of: four expert reports prepared by Major General Robert Scales (“Scales”), Lieutenant General Wilson A. Shoffner (“Shoffner”), General Ronald H. Griffith (“Griffith”), and General Granville-Chapman (“Chapman”), which address the lawfulness of the HV’s artillery fire and the reasonableness of the 200 Metre Rule (collectively, “Four Statements”);¹¹⁰ an excerpt from a book by Prosecution Witness Kosta Novaković (“Novaković”) discussing the presence of a brigade of SVK troops in Knin on 4 August 1995 (“Book Excerpt”);¹¹¹ and a NATO press release reporting NATO targeting of Serb surface-to-air radar sites near Knin on 4 August 1995 (“NATO Press Release”).¹¹²

33. Gotovina contends that the Category II Documents were unavailable at trial and could not have been discovered through the exercise of due diligence.¹¹³ He asserts that the Four Statements were not obtainable because he had no notice that the Trial Chamber would impose the 200 Metre Rule in place of the 400 metre standard he submits was advanced by the Prosecution.¹¹⁴ With respect to the Book Excerpt, Gotovina contends that Novaković’s book was “apparently published” in 2010 after the Defence rested its case in September 2009, and that the Defence “had no notice” that Novaković had published his book until after the Trial Judgement was rendered.¹¹⁵ Gotovina also submits that the NATO Press Release could not have been tendered at trial because he had no notice that the targeting of the Serb anti-aircraft facility south-east of the UN compound was part of the Prosecution’s case.¹¹⁶

¹⁰⁷ Trial Judgement, Volume II, para. 1898.

¹⁰⁸ Trial Judgement, Volume I, paras 1163-1169; Trial Judgement, Volume II, para. 1898.

¹⁰⁹ Trial Judgement, Volume II, para. 1908.

¹¹⁰ First Gotovina Motion, paras 2, 40-43, Confidential Exhibits 20-22; Second Gotovina Motion, paras 58-61, Confidential Exhibit E.

¹¹¹ First Gotovina Motion, paras 2, 44-47, Confidential Exhibit 24.

¹¹² First Gotovina Motion, paras 2, 48-50, Confidential Exhibit 23.

¹¹³ First Gotovina Motion, paras 55-59.

¹¹⁴ First Gotovina Motion, para. 55; Second Gotovina Motion, para. 61. *See also* First Gotovina Reply, para. 33.

¹¹⁵ First Gotovina Motion, para. 58. *See also* First Gotovina Motion, para. 46.

¹¹⁶ First Gotovina Motion, para. 59.

34. Gotovina submits that there is “no basis to question” the authenticity of the Category II Documents¹¹⁷ and that they are relevant to demonstrating the unreasonableness of the Trial Chamber’s conclusions, including *inter alia*, its findings that: (i) Gotovina ordered an unlawful attack on civilians and civilian objects; (ii) an unlawful attack actually occurred; (iii) all instances of unlawful shelling were attributable to HV artillery; and (iv) the location of those shells could not reasonably be attributed to any purpose other than intentional targeting of those locations.¹¹⁸ Gotovina asserts that the Category II Documents, if admitted, could have an impact on the Trial Chamber’s verdict. In particular, with respect to the Four Statements, Gotovina contends that the statement by Scales, corroborated by the statements of Shoffner, Griffith, and Chapman, establishes that the Trial Chamber was unreasonable in concluding that any shell falling beyond 200 metres of a known military target must have been fired with the intent to target “civilian areas”.¹¹⁹ He further contends that the Four Statements broadly dispute the Trial Chamber’s finding that the shelling was indiscriminate and unlawful,¹²⁰ and, more specifically, could affect the verdict because they “would result in the rejection of the [200 Metre] Rule and the Trial Chamber’s [...] findings regarding the unlawfulness of HV shelling.”¹²¹ To reject this evidence, he asserts, would lead to a miscarriage of justice.¹²²

35. Gotovina contends that the Book Excerpt contradicts Novaković’s previous testimony which the Trial Chamber relied on in determining that there was an “insignificant number of SVK troops in Knin”¹²³ and establishes the presence of a brigade of SVK troops in Knin on 4 August 1995 suggesting “ample evidence of targets of opportunity.”¹²⁴ He further contends that the additional evidence undermines the Trial Chamber’s reliance on Novaković’s evidence more generally.¹²⁵ Gotovina also maintains that the NATO Press Release contradicts the Trial Chamber’s assumption that “only the HV fired in Knin, and that only artillery was fired in Knin,”¹²⁶ and thus undermines the Trial Chamber’s attribution of all unlawful shelling to the HV.¹²⁷

36. The Prosecution responds that the Category II Documents were available at trial.¹²⁸ With respect to the Four Statements, it contends that Gotovina should not be permitted to produce

¹¹⁷ First Gotovina Motion, para. 51.

¹¹⁸ First Gotovina Motion, paras 40-51.

¹¹⁹ First Gotovina Motion, para. 42. *See also* First Gotovina Motion, paras 43, 52; Second Gotovina Motion, para. 59.

¹²⁰ Second Gotovina Motion, para. 60. *See also* First Gotovina Motion, para. 42.

¹²¹ First Gotovina Motion, para. 52. *See also* First Gotovina Motion, paras 42, 56; First Gotovina Reply, para. 34.

¹²² First Gotovina Motion, para. 56. Gotovina adds that, even if the Four Statements are admitted pursuant to the First Gotovina Motion, he does not waive or abandon his submission that the 200 Metre Rule went beyond the charges and constituted a breach of the right of the accused to timely notice of the charges. *See* First Gotovina Motion, para. 57.

¹²³ First Gotovina Motion, para. 45, *referring to* Trial Judgement, Volume I, para. 1222. *See also* First Gotovina Motion, paras 47, 53.

¹²⁴ First Gotovina Motion, para. 44. *See also* First Gotovina Motion, paras 2, 46-47, 53.

¹²⁵ First Gotovina Motion, para. 53.

¹²⁶ First Gotovina Motion, para. 54.

¹²⁷ First Gotovina Motion, paras 48-49, 54.

¹²⁸ First Prosecution Response (Gotovina), para. 67; Second Prosecution Response (Gotovina), paras 36, 41-42.

additional expert witnesses to support his case on appeal,¹²⁹ and submits that “[t]he HV artillery range of error was a live issue at trial and the subject of numerous witnesses’ testimony.”¹³⁰ The Prosecution further contends that Novaković’s book was published in 2009, prior to the delivery of the Trial Judgement.¹³¹ The Prosecution submits that the NATO Press Release was available on the internet since 18 July 2003.¹³² The Prosecution also maintains that the Four Statements are neither credible nor reliable because they fail to cite sources upon which the experts relied,¹³³ and are not relevant for the purposes of Rule 115 of the Rules because they address evidence not relied on by the Trial Chamber.¹³⁴

37. The Prosecution asserts that the Category II Documents would not, and could not, affect the verdict. With regard to the Four Statements, the Prosecution submits that the Trial Chamber’s findings of an unlawful attack were based on factual findings and extensive evidence separate from the HV artillery’s range of error.¹³⁵ The Prosecution asserts that the Trial Chamber considered the range of error “primarily as a means to assess and [...] reject [Prosecution Witness Marko] Rajčić’s claim that Gotovina did not order an unlawful attack”,¹³⁶ and submits that the Four Statements are contradictory and ignore or duplicate existing evidence and each other.¹³⁷

38. The Prosecution indicates that should the Appeals Chamber find the Four Statements admissible, it will not accept them and, under the aegis of Rule 94 *bis* of the Rules, will seek to cross-examine Scales, Shoffner, Griffith, and Chapman, and challenge the relevance of portions of the Four Statements which do not address the HV artillery’s range of error.¹³⁸ The Prosecution also proffers three witness statements¹³⁹ which it contends confirm that the Trial Chamber relied on a range of evidence, in addition to the 200 Metre Rule, in determining the deliberate and unlawful use

¹²⁹ First Prosecution Response (Gotovina), para. 67. *See also* First Prosecution Response (Gotovina), paras 71-72; Second Prosecution Response (Gotovina), para. 41.

¹³⁰ First Prosecution Response (Gotovina), para. 73.

¹³¹ First Prosecution Response (Gotovina), para. 107.

¹³² First Prosecution Response (Gotovina), para. 100. *See also* First Prosecution Response (Gotovina), para. 101.

¹³³ First Prosecution Response (Gotovina), paras 70, 93-97; Second Prosecution Response (Gotovina), para. 44. The Prosecution also asserts that Griffith and Chapman lack relevant expertise. *See* First Prosecution Response (Gotovina), para. 97; Second Prosecution Response (Gotovina), para. 44.

¹³⁴ First Prosecution Response (Gotovina), paras 98-99; Second Prosecution Response (Gotovina), para. 47. The Prosecution also asserts that Shoffner’s and Griffith’s statements are duplicative of Scales’ statement. *See* First Prosecution Response (Gotovina), para. 98.

¹³⁵ First Prosecution Response (Gotovina), paras 68, 74, 77; Second Prosecution Response (Gotovina), para. 45.

¹³⁶ First Prosecution Response (Gotovina), para. 74. *See also* First Prosecution Response, para. 78; Second Prosecution Response (Gotovina), para. 47.

¹³⁷ First Prosecution Response (Gotovina), paras 69, 75-76, 79-80, 82-92; Second Prosecution Response (Gotovina), paras 46-48.

¹³⁸ *See* First Prosecution Response, para. 122, n. 264; Second Prosecution Response (Gotovina), para. 40.

¹³⁹ Second Prosecution Response (Gotovina), Confidential Annexes 1-3.

of artillery by the HV,¹⁴⁰ and thus demonstrate that the Four Statements could not affect the verdict.¹⁴¹

39. The Prosecution submits that the Book Excerpt raises issues already addressed by the Trial Chamber.¹⁴² The Prosecution contends that the Book Excerpt does not address the location of SVK troops in Knin,¹⁴³ and that any inconsistency by Novaković does not require rejection of his other testimony.¹⁴⁴ The Prosecution further contends that the NATO Press Release would not affect the the Trial Chamber's determinations because it addresses a minor issue,¹⁴⁵ is duplicative of evidence on the trial record,¹⁴⁶ is inconclusive in its reference to an anti-aircraft site "near Knin",¹⁴⁷ and was contradicted by evidence supporting the conclusion that the HV deliberately targeted the site in question.¹⁴⁸

40. Gotovina replies, *inter alia*, that the Prosecution materially misstates the facts, and contends that there was no dispute at trial about the range of error of certain weapons.¹⁴⁹ He further maintains that the Prosecution confuses the ranges of error of different types of weapons systems.¹⁵⁰

(b) Analysis

(i) Availability and Due Diligence

41. The Appeals Chamber finds that all of the Category II Documents were available at trial through the exercise of due diligence. With respect to the Four Statements, Gotovina's suggestion that he could not have been expected to submit his own expert evidence regarding an alternate range of error¹⁵¹ is unpersuasive in light of the evidence regarding artillery weapons' range of error which was considered by the Trial Chamber.¹⁵² The Appeals Chamber recalls that "the duty to act with due diligence requires the parties to make the best case in the first instance".¹⁵³ Accordingly, Gotovina should have anticipated the Trial Chamber's consideration of the range of error and accuracy of the weapons used during the shelling of the towns. The Appeals Chamber also notes that the NATO Press Release appears to have been publicly released on 18 July 2003¹⁵⁴ and that the

¹⁴⁰ Second Prosecution Response (Gotovina), para. 38.

¹⁴¹ Second Prosecution Response (Gotovina), paras 49-51.

¹⁴² First Prosecution Response (Gotovina), paras 109-111. *See also* First Prosecution Response (Gotovina), para. 69.

¹⁴³ First Prosecution Response (Gotovina), para. 112.

¹⁴⁴ First Prosecution Response (Gotovina), para. 109.

¹⁴⁵ First Prosecution Response (Gotovina), paras 102-103.

¹⁴⁶ First Prosecution Response (Gotovina), paras 101, 104. *See also* First Prosecution Response (Gotovina), para. 69.

¹⁴⁷ First Prosecution Response (Gotovina), para. 106, *citing* NATO Press Release, p. 4 (internal quotations omitted).

¹⁴⁸ First Prosecution Response (Gotovina), para. 105.

¹⁴⁹ First Gotovina Reply, paras 30-31.

¹⁵⁰ First Gotovina Reply, para. 32.

¹⁵¹ *See* First Gotovina Motion, para. 55.

¹⁵² *See* Trial Judgement, Volume I, paras 1163-1168; Trial Judgement, Volume II, para. 1898.

¹⁵³ *Šainović* Decision, para. 20 (internal quotations omitted).

¹⁵⁴ *See* Gotovina First Motion, Confidential Exhibit 23, p. 1.

issue of air strikes against land-based rocket systems was explicitly litigated at trial.¹⁵⁵ The Appeals Chamber further observes that the Book Excerpt's date of publication is in the year 2009¹⁵⁶ and is unconvinced by Gotovina's assertion that "Novaković apparently published his book in 2010."¹⁵⁷ Consequently, the Category II Documents can be admitted as additional evidence on appeal only if the Appeals Chamber finds the material is credible, relevant, and that its exclusion would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.¹⁵⁸

(ii) Credibility, Relevance, and Impact on the Verdict

42. The Appeals Chamber is satisfied that all of the Category II Documents bear sufficient indicia of credibility, observing that: the Four Statements contain signatures and biographical information;¹⁵⁹ the Book Excerpt bears the document's publication details;¹⁶⁰ and the NATO Press Release includes the web domain name and other marks of the organization.¹⁶¹ Consequently, the Appeals Chamber finds the Category II Documents to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules. The Appeals Chamber also considers that the Category II documents are relevant to the Trial Chamber's findings concerning the lawfulness of the HV's artillery strikes against the Four Towns.

43. However, the Appeals Chamber is not satisfied that the NATO Press Release or the Book Excerpt would have affected the Trial Chamber's conclusions, had they been admitted at trial. The Appeals Chamber observes that the NATO Press Release refers to an isolated artillery strike that took place during an extensive shelling campaign,¹⁶² and that reference to similar evidence was made during trial.¹⁶³ Similarly, Gotovina has not demonstrated how the Book Excerpt is materially different from testimony and evidence considered by the Trial Chamber,¹⁶⁴ given that the Book Excerpt is extremely vague regarding the location of soldiers in Knin.¹⁶⁵

44. The Appeals Chamber is also not satisfied that Gotovina has demonstrated that the Four Statements would have affected the verdict, had they been admitted at trial. As an initial matter, the Appeals Chamber underscores its reluctance to admit, on appeal, expert witness statements commenting on the Trial Chamber's assessment of relevant evidence. Such statements could be

¹⁵⁵ T. 17 November 2008 pp. 11916-11917.

¹⁵⁶ First Prosecution Response, Confidential Annex 6.

¹⁵⁷ First Gotovina Motion, para. 58.

¹⁵⁸ See *supra* para. 10.

¹⁵⁹ See First Gotovina Motion, Confidential Exhibits 20-22; Second Gotovina Motion, Confidential Exhibit E.

¹⁶⁰ First Gotovina Motion, Confidential Exhibit 24.

¹⁶¹ First Gotovina Motion, Confidential Exhibit 23.

¹⁶² See Trial Judgement, Volume II, para. 1909.

¹⁶³ See T. 17 November 2008 pp. 11916-11917.

¹⁶⁴ The Trial Chamber considered direct evidence of the presence of SVK forces in Knin on 4 and 5 August 1995. See Trial Judgement, Volume II, para. 1908.

construed as an attempt to re-litigate trial points on appeal, and will be accepted only where it is clearly indicated that their exclusion would lead to a miscarriage of justice. In any event, the Trial Chamber considered evidence which addressed issues related to the HV's artillery shelling, including range of error and accuracy.¹⁶⁶ While the Four Statements provide additional analyses regarding these types of issues, Gotovina does not demonstrate that they would have affected the Trial Chamber's conclusions; the fact that different experts disagreed about issues such as range of error was already evident during the trial.¹⁶⁷ The Four Statements' critiques of evidence adduced at trial confirm that there is disagreement on relevant technical issues, but do not definitively alter the range of evidence considered by the Trial Chamber.

45. In view of the foregoing, the Appeals Chamber finds that Gotovina has failed to show that the Category II Documents would have affected the Trial Chamber's verdict if they had been admitted at trial, and accordingly finds that their exclusion would not result in a miscarriage of justice.

3. Category III Document

46. The Trial Chamber found that Gotovina made a significant contribution to a JCE based, in part, on its finding regarding his "failures to make a serious effort to prevent and follow-up on crimes reported to have been committed in light of [his] order to unlawfully attack civilians and civilian objects".¹⁶⁸ The Trial Chamber found, in relevant part, that Gotovina could have made additional efforts, including "contacting relevant people and seeking their assistance, making public statements, or using available capacities temporarily more focused on other tasks."¹⁶⁹

(a) Submissions

47. Gotovina seeks the admission of an HV regulation of 25 January 1995 ("Regulation"), which prohibits HV members from making public statements in the media without permission.¹⁷⁰ Gotovina acknowledges that he could have obtained this evidence during the trial, but asserts that he had no reason to believe the evidence would be relevant because the Prosecution did not allege that he was culpable for failing to make public statements.¹⁷¹ Gotovina further contends that, even if

¹⁶⁵ First Gotovina Motion, Confidential Exhibit 24, p. 1 ("During the general aggression, the Guards Brigade was not on Dinara but was resting in Knin.").

¹⁶⁶ See Trial Judgement, Volume I, paras 1163-1170, 1237; Trial Judgement, Volume II, para. 1898.

¹⁶⁷ See, e.g., Trial Judgement, Volume I, paras 1163-1170, 1237; Trial Judgement, Volume II, para. 1898.

¹⁶⁸ Trial Judgement, Volume II, para. 2370.

¹⁶⁹ Trial Judgement, Volume II, para. 2365.

¹⁷⁰ First Gotovina Motion, para. 61, Confidential Exhibit 25.

¹⁷¹ First Gotovina Motion, para. 67.

the Appeals Chamber were to find that the Regulation was available to him at trial, it should nevertheless be admitted “to protect the interests of justice”.¹⁷²

48. Gotovina submits that the Regulation undermines the Trial Chamber’s finding that he, *inter alia*, “failed to make a serious effort to prevent” and punish crimes and “failed to make public statements in order to ensure that crimes were followed up”,¹⁷³ because it establishes that he did not have the legal authority to make public statements in the media.¹⁷⁴

49. The Prosecution submits that the Regulation was readily available at trial and that Gotovina had notice of the relevance of such evidence.¹⁷⁵ The Prosecution asserts that the “factual description of making public statements” was covered by the Indictment and accorded with the monitoring and implementation measures set out in the Prosecution’s pre-trial and closing briefs.¹⁷⁶ The Prosecution further asserts that the Trial Chamber’s finding that Gotovina failed to make a “serious effort to prevent and follow-up on crimes” does not hinge on only one item in the Trial Chamber’s list of possible actions Gotovina could have taken.¹⁷⁷

50. Gotovina replies, *inter alia*, that neither the Indictment nor the Prosecution’s trial briefs suggest that he should have made public statements.¹⁷⁸

(b) Analysis

(i) Availability and Due Diligence

51. The Appeals Chamber considers that the Regulation was discoverable at trial had Gotovina exercised due diligence. The Appeals Chamber notes that Gotovina concedes that the evidence was “readily available”¹⁷⁹ and finds that the Indictment and the Prosecution’s pre-trial brief would clearly have put Gotovina on notice of its relevance.¹⁸⁰ Consequently, the Regulation can only be admitted as additional evidence on appeal if the Appeals Chamber finds that it is credible, relevant, and that its exclusion would lead to a miscarriage of justice, in that if it had been admitted at trial, it *would* have affected the verdict.¹⁸¹

¹⁷² First Gotovina Motion, para. 68 (internal quotations omitted).

¹⁷³ First Gotovina Motion, para. 61 (internal quotations omitted).

¹⁷⁴ First Gotovina Motion, para. 62.

¹⁷⁵ First Prosecution Response (Gotovina), paras 2, 7, 117.

¹⁷⁶ First Prosecution Response (Gotovina), para. 118 (internal quotations omitted). *See also Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Amended Joinder Indictment, 17 May 2007 (“Indictment”).

¹⁷⁷ First Prosecution Response (Gotovina), para. 119 (internal quotations omitted).

¹⁷⁸ First Gotovina Reply, para. 37.

¹⁷⁹ First Gotovina Motion, para. 67.

(ii) Credibility, Relevance, and Impact on the Verdict

52. The Appeals Chamber considers that the Regulation bears sufficient indicia of credibility, including official stamps and crests of Croatia.¹⁸² Consequently, the Appeals Chamber finds the Regulation to be *prima facie* credible for the purposes of being considered admissible as additional evidence on appeal pursuant to Rule 115 of the Rules. The Appeals Chamber is also satisfied that the exhibit is relevant to the ability of Gotovina to make public statements to deter or prevent criminal activity following the unlawful shelling.

53. The Appeals Chamber finds, however, that Gotovina has not demonstrated that the Regulation would have had an impact on the verdict if it had been admitted at trial. The Appeals Chamber observes that the Trial Chamber concluded that public statements were only one of several measures Gotovina could have taken in order “to make a serious effort to prevent and follow-up on crimes”.¹⁸³ In this context, Gotovina does not demonstrate that the Regulation would have affected the Trial Chamber’s relevant findings.

54. In view of the foregoing, the Appeals Chamber finds that Gotovina has failed to demonstrate that the Regulation would have affected the Trial Chamber’s verdict if it had been admitted at trial, and accordingly concludes that its exclusion would not result in a miscarriage of justice.

V. CONCLUSION

55. For the foregoing reasons, the Appeals Chamber **DENIES** the Prosecution’s Request to File Sur-Reply and **DISMISSES** the Rule 115 Motions in their entirety. The Appeals Chamber underscores that its findings pertain strictly to the admissibility of the proposed evidence and must not be interpreted as expressing any views on the merits of the parties’ appeals.

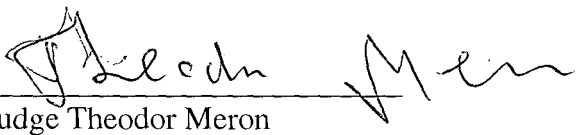
¹⁸⁰ See Indictment, para. 17(e); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Public Version of Pre-Trial Brief, 23 March 2007, para. 61.

¹⁸¹ See *supra* para. 10.

¹⁸² First Gotovina Motion, Confidential Exhibit 25, p. 1.

¹⁸³ See Trial Judgment, Volume II, para. 2370. See also Trial Judgement, Volume II, para. 2365.

Done in English and French, the English text being authoritative.



Judge Theodor Meron
Presiding

Dated this 2nd day of October 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]