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:	16 November 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**

Judgement of: **16 November 2012**

PROSECUTOR

v.

ANTE GOTOVINA
MLADEN MARKAČ

JUDGEMENT

The Office of the Prosecutor
Ms. Helen Brady
Mr. Douglas Stringer
Ms. Laurel Baig
Mr. Francois Boudreault
Ms. Ingrid Elliott
Mr. Todd Schneider
Ms. Saeeda Verrall
Mr. Matthew Cross

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Mr. Gregory Kehoe
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Mr. John Jones
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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 appeals by Ante Gotovina ("Gotovina") and Mladen Markač ("Markač") against the Judgement rendered by Trial Chamber I ("Trial Chamber") on 15 April 2011 in the case of *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06-90-T ("Trial Judgement").[1]

I. INTRODUCTION

A. Background

2. The events giving rise to this case occurred between at least July 1995 and 30 September 1995.[2] The Indictment alleged that, during this period, Croatian leaders and officials initiated "Operation Storm", a military action which aimed to take control of territory in the Krajina region of Croatia.[3] The major part of the military operation was conducted between 4 and 7 August 1995, while follow-up actions purportedly continued for several subsequent months.[4] The Indictment further alleged that before, during, and after Operation Storm, there was an orchestrated campaign to drive the Serbs from the Krajina region, and that during the Indictment period, Croatian leaders, officials, and forces persecuted the Krajina Serbs through: deportations and forcible transfers; destruction of Serb homes and businesses; plunder and looting of Serb property; murder; the shelling of civilians and cruel treatment; unlawful attacks on civilians and civilian objects; the imposition of restrictive and discriminatory measures; discriminatory expropriation of property; and unlawful detentions and disappearances.[5]

3. Gotovina was a Colonel General in the *Hrvatska Vojska* ("HV" or "Croatian Army") during the Indictment period.[6] Starting in 1992 he was the commander of the HV's Split Military District ("Split MD"), and was the overall operational commander of Operation Storm in the southern portion of the Krajina region.[7] The Trial Chamber found that Gotovina shared the objective of and significantly contributed to a joint criminal enterprise ("JCE"), whose common purpose was to

[1] For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.
[2] Indictment, para. 12; Trial Judgement, paras 1, 3.
[3] The Krajina region encompasses part of the area in Croatia that had been self-proclaimed as the Republic of Serbian Krajina ("RSK") and that was largely inhabited by Serbs. *See* Indictment, para. 13; Trial Judgement, para. 2.
[4] Indictment, paras 27-28, 30, 32; Trial Judgement, para. 3.
[5] Indictment, paras 29-35; Trial Judgement, para. 3.
[6] Trial Judgement, paras 72-73, 75, 96.
[7] Trial Judgement, paras 4, 72-73, 96.

permanently remove the Serb civilian population from the Krajina region, by ordering unlawful attacks against civilians and civilian objects in Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed against Serb civilians in the Split MD.[8] The Trial Chamber found Gotovina guilty, under the first form of JCE, of persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures) and deportation as crimes against humanity.[9] It also found him guilty, under the third form of JCE, of murder and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war,[10] either "on their own or as underlying acts of persecution".[11] Gotovina was sentenced to a single term of 24 years of imprisonment.[12]

4. Markač served as Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia throughout the Indictment period.[13] The Trial Chamber found that Markač shared the objective of and significantly contributed to a JCE, whose purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering an unlawful attack against civilians and civilian objects in Gračac, and by creating a climate of impunity through his failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians.[14] The Trial Chamber found Markač guilty, under the first form of JCE, of persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures) and deportation as crimes against humanity.[15] It also found him guilty, under the third form of JCE, of murder and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war,[16] either "on their own or as underlying acts of persecution".[17] Markač was sentenced to a single term of 18 years of imprisonment.[18]

5. The Trial Chamber acquitted Ivan Čermak of all charges against him.[19]

[8] Trial Judgement, paras 2369-2371.
[9] Trial Judgement, paras 2369-2371, 2375, 2619.
[10] Trial Judgement, paras 2372-2375, 2619.
[11] Trial Judgement, para. 2374.
[12] Trial Judgement, para. 2620.
[13] Trial Judgement, paras 6, 167, 194.
[14] Trial Judgement, paras 2579-2583.
[15] Trial Judgement, paras 2579-2583, 2587, 2622.
[16] Trial Judgement, paras 2584-2587, 2622.
[17] Trial Judgement, para. 2586.
[18] Trial Judgement, para. 2623.
[19] Trial Judgement, para. 2621.

B. The Appeals

6. Gotovina submits four grounds of appeal challenging his convictions and requests that the Appeals Chamber overturn his convictions in their entirety.[20] The Prosecution responds that all grounds of Gotovina's appeal should be dismissed.[21]

7. Markač submits eight grounds of appeal challenging his convictions.[22] He requests that the Appeals Chamber overturn his convictions in their entirety, or in the alternative, reduce his sentence.[23] The Prosecution responds that all grounds of Markač's appeal should be dismissed.[24]

8. The Appeals Chamber heard oral submissions regarding these appeals on 14 May 2012.[25] Pursuant to an order by the Appeals Chamber during the Appeal Hearing,[26] Gotovina filed a supplemental submission further elaborating his view that the Prosecution had impermissibly advanced new arguments in its oral submissions.[27] The Prosecution filed a response rejecting Gotovina's assertion.[28]

9. Following the Appeal Hearing, pursuant to an order by the Appeals Chamber,[29] the Prosecution filed supplemental submissions further elaborating its view that the Appeals Chamber could enter convictions against both of the Appellants under alternate modes of liability should it reverse the Trial Chamber's findings with respect to JCE.[30] Gotovina and Markač filed responses rejecting the Prosecution's relevant contentions.[31]

[20] Gotovina Appeal, paras 8, 361. The Appeals Chamber notes that the Gotovina Notice of Appeal originally included seven grounds but that Gotovina pursued only four of these grounds. *See* Gotovina Notice of Appeal; Gotovina Appeal.
[21] Prosecution Response (Gotovina), paras 4-7, 333.
[22] The Appeals Chamber notes that the Markač Notice of Appeal originally included twelve grounds but that Markač pursued only eight of these grounds. *See* Markač Notice of Appeal; Markač Appeal.
[23] Markač Appeal, paras 3, 417-418.
[24] Prosecution Response (Markač), paras 4-6, 273.
[25] AT. 14 May 2012 pp. 12-225.
[26] AT. 14 May 2012 p. 123.
[27] *See generally* Gotovina's First Supplemental Brief.
[28] Prosecution Response (Gotovina's First Supplemental Brief), paras 1-4, 27.
[29] Order for Additional Briefing, pp. 1-2.
[30] *See generally* Additional Prosecution Brief (Gotovina); Additional Prosecution Brief (Markač).
[31] *See generally* Gotovina Additional Response; Markač Additional Response.

II. STANDARD OF REVIEW

10. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute of the Tribunal ("Statute"). The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[32] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the trial judgement but that is nevertheless of general significance to the Tribunal's jurisprudence.[33]

11. Regarding errors of law, the Appeals Chamber has stated:

> A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the alleged error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude for other reasons that there is an error of law.[34]

12. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[35] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[36] It is necessary for any appellant claiming an error of law on the basis of lack of a reasoned opinion to identify the specific issues, factual findings, or arguments which an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision.[37]

13. Regarding errors of fact, the Appeals Chamber will apply a standard of reasonableness.[38] It is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber:

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[32] *Haradinaj et al.* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para. 9. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 15.
[33] *Haradinaj et al.* Appeal Judgement, para. 9; *Boškoski and Tarčulovski* Appeal Judgement, para. 9.
[34] *Haradinaj et al.* Appeal Judgement, para. 10 (internal citations omitted). *See also Boškoski and Tarčulovski* Appeal Judgement, para. 10; *Bagosora and Nsengiyumva* Appeal Judgement, para. 16.
[35] *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 17.
[36] *Haradinaj et al.* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 11. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 17.
[37] *Haradinaj et al.* Appeal Judgement, para. 10; *Boškoski and Tarčulovski* Appeal Judgement, para. 10; *D. Milošević* Appeal Judgement, para. 13.
[38] *Haradinaj et al.* Appeal Judgement, para. 12. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 13.

> In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. […] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[39]

14. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[40] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

15. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[42] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[43] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[44]

[39] *Haradinaj et al.* Appeal Judgement, para. 12 (internal citations omitted). *See also Boškoski and Tarčulovski* Appeal Judgement, paras 13-14; *Bagosora and Nsengiyumva* Appeal Judgement, para. 18.
[40] *Boškoski and Tarčulovski* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 19.
[41] *Boškoski and Tarčulovski* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 19.
[42] Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002, paras 1(c)(iii)-(iv), 4(b)(i)-(ii). *See also Boškoski and Tarčulovski* Appeal Judgement, para. 17; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; *Bagosora and Nsengiyumva* Appeal Judgement, para. 20.
[43] *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 20.
[44] *Boškoski and Tarčulovski* Appeal Judgement, para. 17; *D. Milošević* Appeal Judgement, para. 16. *See also Bagosora and Nsengiyumva* Appeal Judgement, para. 20.

III. ARGUMENTS ALLEGEDLY RAISED ONLY DURING THE APPEAL HEARING

16. Gotovina asserts that during the Appeal Hearing, the Prosecution raised certain new, and therefore inadmissible, arguments: i) that even artillery attacks on lawful military objectives in the towns of Knin, Benkovac, Obrovac, and Gračac ("Four Towns") could constitute the *actus reus* of deportation;[45] ii) that the use of artillery in the Four Towns constituted a disproportionate attack;[46] iii) that the use of certain artillery weapons was "inherently indiscriminate" in an urban environment;[47] and iv) that the Trial Chamber inferred a JCE to deport Serb civilians from a transcript of discussions by Croatian political and military leaders at a meeting held on 31 July 1995 in Brioni ("Brioni Transcript" and "Brioni Meeting" respectively).[48]

17. The Prosecution rejects Gotovina's assertion that it impermissibly raised new arguments during the Appeal Hearing.[49]

18. The Appeals Chamber recalls that "unless specifically authorised by the Appeals Chamber, parties should not raise new arguments during an appeal hearing that are not contained in their written briefs."[50] Where such arguments are raised, the Appeals Chamber may decline to consider them.[51]

19. In its oral submissions at the Appeal Hearing, the Prosecution argued that even artillery attacks on lawful military objectives in the Four Towns could constitute the *actus reus* of deportation.[52] The Prosecution did not, however, raise this argument in its written submissions on appeal; instead the Prosecution maintained that "[c]ivilians 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."[53] In these circumstances, the Appeals Chamber would normally decline to consider the Prosecution's contention regarding the potential for attacks on lawful military objectives to form the *actus reus* of deportation. The Appeals Chamber notes, however, that the Prosecution also raised this argument in its response to an Appeals Chamber request for additional

[45] Gotovina's First Supplemental Brief, paras 1, 3.
[46] Gotovina's First Supplemental Brief, paras 1, 16.
[47] Gotovina's First Supplemental Brief, paras 1, 20.
[48] Gotovina's First Supplemental Brief, paras 1, 22. *See also* Trial Judgement, para. 1970.
[49] Prosecution Response (Gotovina's First Supplemental Brief), paras 1-4, 19-27.
[50] *Haradinaj et al.* Appeal Judgement, para. 19.
[51] *See Haradinaj et al.* Appeal Judgement, para. 19.
[52] *See* AT. 14 May 2012 pp. 82-83, 94-98, 100-102, 178-179.
[53] Prosecution Response (Gotovina), para. 174 (citations omitted).

briefing and that the Appellants had the opportunity to respond to this argument.[54] The Prosecution's relevant contention will be addressed in the context of this additional briefing.

20. In its oral submissions at the Appeal Hearing, the Prosecution argued that the artillery attacks on the Four Towns, considered as a whole, were disproportionate.[55] However, in its written submission on appeal, the Prosecution limits its substantive discussion of disproportionate attacks to artillery strikes against Milan Martić, Commander-in-Chief of Serb forces in the area of the Four Towns.[56] In these circumstances, the Appeals Chamber will only consider the proportionality of artillery attacks insofar as this argument relates to Martić.

21. In its oral submissions at the Appeal Hearing, the Prosecution argued that the use of particular types of artillery weapons was inherently indiscriminate in an urban environment,[57] but did not raise this contention in its written submissions on appeal.[58] In these circumstances, the Appeals Chamber declines to consider this argument.

22. In its oral submissions at the Appeal Hearing, the Prosecution argued that the Trial Chamber inferred a JCE to deport Serb civilians from the Brioni Transcript.[59] The role of the Brioni Transcript in the Trial Chamber's analysis was discussed in the Prosecution's written submissions on appeal.[60] In these circumstances, the Appeals Chamber is satisfied that the Prosecution's relevant contentions at the Appeal Hearing were not new arguments. The Appeals Chamber will consider the particulars of these submissions, as relevant, below.

[54] *See* Additional Prosecution Brief (Gotovina), paras 5-23; Additional Prosecution Brief (Markač), paras 5-22; Order for Additional Briefing, pp. 1-2.
[55] *See* AT. 14 May 2012 pp. 83-84, 88, 90-91.
[56] Prosecution Response (Gotovina), paras 51, 152-155. The Prosecution submits, in a single footnote, that the artillery attacks as a whole were disproportionate. *See* Prosecution Response (Gotovina), para. 333 n. 1112. However the contention is unsubstantiated; accordingly the Appeals Chamber declines to consider this argument. *See supra*, para. 15.
[57] *See* AT. 14 May 2012 pp. 83, 88-90.
[58] The Prosecution's relevant references to artillery weapons in its submissions are so vague that they cannot qualify as separate arguments on the inherently indiscriminate nature of particular artillery weapons. *See* Prosecution Response (Gotovina), para. 82 n. 200. *See also supra*, para. 15.
[59] *See* AT. 14 May 2012 pp. 98-99, 170-171.
[60] Prosecution Response (Gotovina), paras 229, 237-239, 242-246.

IV. UNLAWFUL ARTILLERY ATTACKS AND EXISTENCE OF A JCE (GOTOVINA GROUNDS 1 AND 3, IN PART; MARKAČ GROUNDS 1 AND 2, IN PART)

A. Background

23. The Appeals Chamber recalls that the Trial Chamber concluded that Gotovina and Markač were members of a JCE, and pursuant to this mode of liability found them guilty of crimes against humanity and violations of the laws or customs of war. More specifically, the Trial Chamber found that, by the end of July 1995, and continuing throughout the period of the Indictment,[61] "members of the Croatian political and military leadership shared the common objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force".[62] It concluded that the means of removal "amounted to and involved persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures), deportation, and forcible transfer."[63] The Trial Chamber further concluded that pursuant to the third form of JCE, the Appellants were guilty of the deviatory crimes of murder and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war,[64] either "on their own or as underlying acts of persecution".[65] The Trial Chamber specified that members of the JCE included Gotovina, Markač, Croatian President Franjo Tuđman, Minister of Defence Gojko Šušak, a Deputy Prime Minister, Jure Radić, and others in Croatia's political and military leadership.[66]

24. The Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, including the Brioni Transcript, and evidence regarding laws and policies which discriminated against Serbs and prevented their return to the Krajina.[67] However, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that the touchstone of the Trial Chamber's analysis concerning the existence of a JCE was its conclusion that unlawful artillery attacks targeted civilians and civilian objects in the towns of Knin, Benkovac, Obrovac, and Gračac.[68] More specifically, the Trial Chamber stated that "[t]he failure by members of the Croatian political and military leadership to make the distinction between the civilian

[61] Trial Judgement, para. 2315.
[62] Trial Judgement, para. 2314.
[63] Trial Judgement, para. 2314. *See also* Trial Judgement, paras 2310-2312.
[64] Trial Judgement, paras 2372-2375, 2584-2587, 2619, 2622.
[65] Trial Judgement, paras 2374, 2586.
[66] Trial Judgement, paras 2316-2319, 2371, 2583.
[67] *See* Trial Judgement, paras 2310-2315.
[68] Trial Judgement, paras 2305, 2310, 2314.

population and the military goes to the very core of th[e] case."[69] It found that, pursuant to the JCE, removal "of the Krajina Serb population was to a large extent achieved through the unlawful attacks against civilians and civilian objects in Knin, Benkovac, Obrovac, and Gračac,"[70] and that these attacks promoted the JCE's goal of forcing "the Krajina Serbs from their homes."[71] The Trial Chamber determined that shelling incidents in the Four Towns constituted unlawful, indiscriminate attacks on civilians and civilian objects and resulted in the deportation of some 20,000 civilians.[72] While not finding that unlawful attacks were required as a matter of law to prove deportation,[73] the Trial Chamber, considering the factual context of the case, declined to characterise as deportation civilians' departures from settlements targeted by artillery attacks which the Trial Chamber did not characterise as unlawful.[74] Where civilian departures coincided with artillery attacks on settlements which the Trial Chamber did not consider had been proved to be unlawful, the Trial Chamber stated that it could not "conclusively establish that those who left [relevant] towns or villages were forcibly displaced, nor that those firing artillery at such towns had the intent to forcibly displace those persons."[75]

25. The Trial Chamber entered its findings concerning the lawfulness of artillery attacks on the Four Towns after explicitly considering a number of factors. The most significant of these was its analysis of individual impact sites within the Four Towns ("Impact Analysis"). The Trial Chamber's Impact Analysis was premised on its conclusion that "a reasonable interpretation of the evidence" was that an artillery projectile fired by the Croatian Army which impacted within 200 metres of a legitimate target was deliberately fired at that target ("200 Metre Standard").[76] Using the 200 Metre Standard as a yardstick, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack.[77] With respect to Knin, such impact sites included areas near: the European Community Monitoring Mission building; the UN Compound in the Southern Barracks; a building marked "L" in Prosecution Exhibit 681; the cemetery; and the railway fuel storage.[78] With respect to Benkovac, these sites included areas near: the Ristić pine woods, Ristić hamlet and Benkovačko Selo; Barice; and the Bagat and Kepol factories.[79] With respect to Gračac, these sites included areas near

[69] Trial Judgement, para. 2309.
[70] Trial Judgement, para. 2311.
[71] Trial Judgement, para. 2310. *See also* Trial Judgement, para. 2314.
[72] Trial Judgement, paras 1743-1745, 1911, 1923, 1935, 1943, 2305, 2311.
[73] *See* Trial Judgement, paras 1738-1741.
[74] Trial Judgement, paras 1754-1755. Judge Pocar dissents on the Appeals Chamber's assessment of the Trial Judgement.
[75] Trial Judgement, para. 1755. Judge Pocar dissents on the Appeals Chamber's assessment of the Trial Judgement.
[76] Trial Judgement, para. 1898.
[77] *See* Trial Judgement, paras 1903-1906, 1919-1921, 1932-1933, 1940-1941.
[78] Trial Judgement, paras 1903-1905. *See also* Trial Judgement, paras 1176-1398.
[79] Trial Judgement, paras 1920-1921. *See also* Trial Judgement, paras 1399-1430.

Prosecution Witness Herman Steenbergen's house and Prosecution Witness Vida Gačeša's house.[80] With respect to Obrovac, these sites included areas near a health clinic and the Trio factory.[81]

26. In addition to the Impact Analysis, the Trial Chamber also explicitly considered a number of other indicators with respect to the unlawful nature of the artillery attacks on the Four Towns. These factors included: Gotovina's 2 August 1995 order which directed the HV to, *inter alia*, shell the Four Towns ("2 August Order");[82] evidence relating to HV units' implementation of the 2 August Order;[83] evidence from witnesses who were in Knin during the artillery attacks;[84] and evidence about the proportionality of artillery attacks aimed at Martić.[85]

27. The Appellants submit that the Trial Chamber erred in finding that a JCE existed,[86] and further submit that the Trial Chamber erred in finding that the artillery attacks on the Four Towns were unlawful.[87] They contend that these errors invalidate their convictions.[88] In this section, the Appeals Chamber considers whether the Trial Chamber erred with respect to these findings.

B. Submissions

28. Gotovina submits, *inter alia*, that the Trial Chamber erred in finding that unlawful artillery attacks took place,[89] and that, "without a finding of unlawful attacks resulting in mass-deportation," the Trial Chamber's finding that a JCE existed should be reversed.[90] Markač joins Gotovina in these contentions.[91]

29. More specifically, Gotovina submits, *inter alia*, that the Trial Chamber erred in convicting him because the indiscriminate nature of the artillery attacks was not pled in the Indictment.[92] He asserts that he lacked notice of three material elements underlying the Trial Chamber's conclusions, namely: i) the presumption of unlawfulness with respect to shells falling more than 200 metres from a lawful target; ii) the projectile-by-projectile assessment of the artillery attacks rather than an assessment of the attacks as a whole; and iii) the conclusion that the HV was unable to fire at targets

[80] Trial Judgement, para. 1932. *See also* Trial Judgement, paras 1431-1464.
[81] Trial Judgement, para. 1940. *See also* Trial Judgement, paras 1465-1476.
[82] Prosecution Exhibit 1125, p. 14. *See also* Trial Judgement, para. 1893.
[83] *See, e.g.*, Trial Judgement, paras 1249, 1264, 1895-1896, 1911.
[84] *See, e.g.*, Trial Judgement, para. 1911.
[85] *See, e.g.*, Trial Judgement, para. 1910.
[86] Gotovina Notice of Appeal, pp. 13-15; Gotovina Appeal, paras 194-248; Markač Notice of Appeal, paras 9-17; Markač Appeal, paras 11-144.
[87] Gotovina Notice of Appeal, pp. 5-11; Gotovina Appeal, paras 9-141; Gotovina Reply, paras 10-66; Markač Notice of Appeal, paras 38-39; Markač Appeal, paras 257, 263.
[88] Gotovina Appeal, paras 141, 247; Markač Appeal, para. 254.
[89] Gotovina Appeal, paras 9-141.
[90] Gotovina Appeal, para. 196. *See also* Gotovina Appeal, paras 194-195, 197-248.
[91] *See* Markač Appeal, paras 257, 263; AT. 14 May 2012 pp. 125, 148.
[92] Gotovina Appeal, para. 93.

of opportunity.[93] Gotovina maintains that the Trial Chamber erred by not putting "its case" to the various expert witnesses appearing at trial and, accordingly, submits that he was deprived of the opportunity to challenge and fully litigate relevant issues related to the theory underpinning his convictions.[94]

30. Gotovina asserts that the Trial Chamber erred by replacing the Prosecution's theory of the case with one of its own making[95] based on a site-specific analysis of various artillery strikes.[96] More specifically, he maintains that the Trial Chamber erroneously determined that the range of error for all artillery projectiles fired at the Four Towns was 200 metres, despite reviewing no evidence suggesting such a range of error.[97] Gotovina contends that "[t]he only incidental testimony regarding an artillery error-range came from a Prosecution witness who stated that 400[metres] was an acceptable range for HV artillery on the first shot",[98] and maintains that the Trial Chamber unreasonably declined to rely on this testimony.[99]

31. Gotovina asserts that the Trial Chamber failed to address alternative explanations for why impact sites would be more than 200 metres from identified lawful targets, including negligence, the malfunctioning of weaponry or ammunition, or the existence of unidentified lawful targets.[100] He further asserts that the Trial Chamber erred in law in concluding that the HV did not have the ability to strike targets of opportunity.[101] Gotovina contends that the Trial Chamber heard testimony suggesting that HV observers could view targets of opportunity in Knin, notes evidence of military and police vehicles passing through the city, and suggests that the Trial Chamber reversed the burden of proof in not requiring the Prosecution to prove that there were no observable opportunistic targets in the Four Towns.[102]

32. Gotovina challenges the Trial Chamber's factual findings related to impact sites in the Four Towns. In this regard, he maintains that the Trial Chamber erred in assessing: the locations of the impact sites; the military advantage offered by striking them; the number or type of projectiles used; and the origin of the strikes.[103] More generally, Gotovina submits that the Trial Chamber reversed

[93] Gotovina Appeal, para. 11.
[94] Gotovina Appeal, para. 12. *See also* Gotovina Appeal, para. 13.
[95] Gotovina Appeal, paras 10-11, 13.
[96] Gotovina Appeal, para. 10.
[97] Gotovina Appeal, para. 16; AT. 14 May 2012 pp. 23-26.
[98] Gotovina Appeal, para. 16 (internal quotation omitted).
[99] Gotovina Appeal, para. 16.
[100] Gotovina Appeal, para. 18.
[101] Gotovina Appeal, paras 77-84. *See also* AT. 14 May 2012 pp. 35, 147.
[102] Gotovina Appeal, paras 77-84. *See also* AT. 14 May 2012 pp. 35-36, 147.
[103] Gotovina Appeal, paras 23-76.

the burden of proof in reaching findings regarding a variety of issues in relation to the impact sites, including the types of artillery used and the military character of targets.[104]

33. Gotovina submits that, absent this erroneous analysis, the Trial Chamber could not have concluded that the impact sites demonstrated that unlawful artillery attacks took place.[105] More specifically, he suggests that absent the assumptions implicit in the 200 Metre Standard, there is no relevant evidence on the record regarding attacks on the Four Towns, as the Prosecution failed to introduce evidence of civilian casualties or damage to civilian infrastructure in the Four Towns.[106] Gotovina further maintains that estimates of artillery ranges of error greater than 200 metres would result in many fewer areas being classified as "civilian" and suggests that this illustrates the problematic nature of the Trial Chamber's reliance on an arbitrary rule like the 200 Metre Standard.[107] He also asserts that using a 400 metre range of error, as suggested by Prosecution Witness Andrew Leslie, would result in only 13 of the identified impacts falling outside the permissible zone.[108]

34. Gotovina further challenges other evidence relied on by the Trial Chamber to conclude that he directed unlawful attacks against the Four Towns' civilian population, including, *inter alia*, the 2 August Order and evidence concerning the impact of shelling on the Four Towns.[109] With respect to the 2 August Order, he contends that Prosecution Witness Marko Rajčić and Defence Witness Geoffrey Corn did not consider that the only reasonable interpretation of the 2 August Order was to require an indiscriminate attack on the Four Towns.[110] With respect to implementation of the 2 August Order, Gotovina submits that the Trial Chamber concluded that evidence suggesting that artillery shells were fired in the general direction of the Four Towns rather than being specifically targeted was indicative of unlawful attacks only in the context of the Impact Analysis.[111] He maintains that witnesses who experienced the shelling of Knin offered only "vague impressions" and were not aware of all legitimate military objectives, which Gotovina asserts were located all over Knin.[112] Finally, Gotovina asserts that the Trial Chamber erred in finding that the artillery attacks in Knin aimed at Martić were disproportionate.[113]

[104] *See* Gotovina Appeal, para. 136.
[105] Gotovina Appeal, para. 19; AT. 14 May 2012 pp. 27-28.
[106] AT. 14 May 2012 pp. 28-29.
[107] AT. 14 May 2012 pp. 29-35.
[108] AT. 14 May 2012 p. 39.
[109] Gotovina Appeal, para. 103. *See also* Gotovina Appeal, paras 104-126.
[110] Gotovina Appeal, paras 105-109.
[111] Gotovina Appeal, paras 111-113.
[112] Gotovina Appeal, para. 115. *See also* Gotovina Appeal, para. 114; AT. 14 May 2012 p. 44.
[113] Gotovina Appeal, para. 86. *See also* AT. 14 May 2012 p. 44.

35. Gotovina submits that in view of the paucity of alternative evidence on the record, absent the Impact Analysis, it would not be possible to find that the artillery attacks on the Four Towns were unlawful.[114] More specifically, he maintains that the Trial Chamber's inferences regarding other relevant evidence relied almost entirely on assumptions drawn from the Impact Analysis.[115] For example, Gotovina contends that the number of projectiles falling more than 200 metres from legitimate targets was the basis upon which the Trial Chamber discounted Witness Rajčić's testimony that the 2 August Order did not direct unlawful artillery attacks,[116] and that HV artillery reports potentially suggestive of indiscriminate firing were interpreted in light of the Impact Analysis.[117]

36. Finally, both of the Appellants contend that, absent a finding that unlawful artillery attacks took place, it is not possible to uphold the Trial Chamber's findings regarding the JCE.[118] Gotovina asserts that the Trial Chamber specifically found that the JCE aimed to deport Serb civilians through unlawful artillery attacks, and that reversal of the Trial Chamber's findings concerning unlawful attacks would negate the *actus reus* of the JCE.[119] In this context, he maintains that the Trial Chamber declined to find that deportation occurred in settlements where it did not find that unlawful attacks took place.[120] Both of the Appellants submit that the Trial Chamber premised its findings regarding the intent of participants in the Brioni Meeting on the existence of unlawful artillery attacks,[121] and Gotovina further maintains that the Trial Chamber specifically found that the Appellants had no role in promoting discriminatory Croatian policies.[122]

37. The Prosecution responds that the Trial Chamber did not err in finding either that unlawful artillery attacks against the Four Towns took place or that a JCE existed.[123]

38. With respect to notice, the Prosecution contends that Gotovina was aware that the relevant issues were contested.[124] The Prosecution further contends that the Trial Chamber was entitled to weigh the evidence in the manner it believed fit.[125]

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[114] Gotovina Appeal, para. 19; AT. 14 May 2012 pp. 36-37.
[115] AT. 14 May 2012 pp. 37-45.
[116] *See* Gotovina Appeal, para. 19; AT. 14 May 2012 pp. 40-42.
[117] AT. 14 May 2012 pp. 42-43.
[118] Gotovina Appeal, paras 19, 196; AT. 14 May 2012 pp. 48, 125-147.
[119] AT. 14 May 2012 p. 50.
[120] AT. 14 May 2012 p. 50, *citing* Trial Judgement, paras 1754-1755, 1762.
[121] AT. 14 May 2012 p. 51, *citing* Trial Judgement, para. 2310; AT. 14 May 2012 pp. 131-142.
[122] AT. 14 May 2012 p. 54, *citing* Trial Judgement, paras 2325-2326, 2562-2563.
[123] Prosecution Response (Gotovina), paras 12, 226; Prosecution Response (Markač), paras 16, 161. *See also* AT. 14 May 2012 p. 94.
[124] Prosecution Response (Gotovina), paras 83-87.
[125] Prosecution Response (Gotovina), paras 88-91.

39. The Prosecution maintains, *inter alia*, that the Trial Chamber correctly concluded that Gotovina ordered artillery attacks on the Four Towns, which involved indiscriminate shelling.[126] The Prosecution submits that Gotovina overstates the significance of the 200 Metre Standard, and contends that, in any event, it was a reasonable finding based on the evidence before the Trial Chamber.[127] It maintains that the Trial Chamber noted evidence it received concerning margins of error for artillery weapons when it derived the 200 Metre Standard, including evidence from Witness Rajčić that the range of error for 130-millimetre guns was 70-75 metres and evidence from Prosecution Witness Harry Konings that artillery weapons similar to those used by the HV had margins of error between 18 and 60 metres.[128] The Prosecution further maintains that the Trial Chamber reasonably rejected Witness Leslie's testimony that HV projectiles would have a 400 metre range of error.[129] In this context, the Prosecution suggests that the Trial Chamber reasonably considered additional factors which could reduce accuracy, and on that basis created the 200 Metre Standard, a measure that functioned as "a presumption applied against the Prosecution that was generous and favourable to Gotovina."[130]

40. The Prosecution maintains that the Trial Chamber did not err in finding that mobile targets of opportunity could not explain impacts in areas more than 200 metres from identified targets. It further submits that the Trial Chamber reasonably concluded that the HV did not have the capability to identify relevant targets in the Four Towns, and that there was no or little evidence of opportunistic targets being present at or near relevant impact locations.[131]

41. The Prosecution further maintains that, even if the 200 Metre Standard is overturned, this does not undermine the Trial Chamber's Impact Analysis.[132] The Prosecution asserts that the broad spread of artillery impacts all over Knin demonstrates that the attack was indiscriminate.[133] It also contends that some shells impacted 700-800 metres from identified legitimate targets in the Four Towns and suggests that this would be an unreasonable margin of error.[134]

42. The Prosecution submits that even if the 200 Metre Standard and Impact Analysis were not reasonable, the Trial Chamber relied on a wide range of other mutually-corroborating evidence in

[126] Prosecution Response (Gotovina), paras 13-62.
[127] Prosecution Response (Gotovina), paras 63-65, 76-81; AT. 14 May 2012 p. 77.
[128] Prosecution Response (Gotovina), paras 77-78.
[129] Prosecution Response (Gotovina), para. 79.
[130] Prosecution Response (Gotovina), para. 81. *See also* Prosecution Response (Gotovina), para. 80.
[131] Prosecution Response (Gotovina), paras 145-151.
[132] AT. 14 May 2012 p. 64.
[133] AT. 14 May 2012 pp. 85-86.
[134] AT. 14 May 2012 pp. 89, 198-199.

finding that artillery attacks on the Four Towns targeted civilians and civilian objects.[135] The Prosecution notes in particular the 2 August Order, which it contends "indicates that the [F]our [T]owns themselves were among the approved targets", and submits that expert testimony from both Prosecution and defence witnesses suggested that the 2 August Order could be interpreted as directing indiscriminate attacks.[136] The Prosecution further contends that evidence on the record suggested that some artillery shelling was aimed at the general direction of the Four Towns, rather than being focused on specific lawful targets.[137] The Prosecution maintains that the Trial Chamber took into account extensive testimony by eyewitnesses in the Four Towns. In particular, the Prosecution notes that several witnesses in Knin believed that the shelling of the town was indiscriminate.[138] The Prosecution also asserts that the Trial Chamber's finding that disproportionate attacks took place against Martić serves as an additional indicator of indiscriminate attacks.[139] Finally, the Prosecution maintains that the absence of evidence of civilian casualties from the artillery attacks is a function of how the artillery attacks were charged in the Indictment, and suggests that witness evidence gives some indication that casualties resulted from the shelling.[140]

43. In addition to factors which were explicitly addressed by the Trial Chamber, the Prosecution suggests that the Trial Chamber considered the discussions at the Brioni Meeting in finding that unlawful attacks took place against the Four Towns. In particular, the Prosecution suggests that the Brioni Transcript helps confirm that Gotovina was interested "in bringing about the departure of the civilian population [in the Krajina] and demonstrate[s] the targeting capability of the HV artillery that Gotovina deployed in the subsequent attack."[141]

44. In reply, Gotovina reiterates, *inter alia*, that he lacked adequate notice of the crimes for which he was convicted.[142] He asserts that the Trial Chamber's finding of unlawful attacks relies on the Trial Chamber's conclusions regarding the 200 Metre Standard, contending that, without this guide, no "shell fired could be found unlawful".[143] Gotovina maintains that witness estimations regarding artillery guns' range of error depend on the particular conditions and types of artillery used, and that the distance of HV artillery from relevant targets would lead to a high margin of

[135] Prosecution Response (Gotovina), paras 63-65. *See also* AT. 14 May 2012 pp. 63-65, 200.
[136] Prosecution Response (Gotovina), para. 30. *See also* Prosecution Response (Gotovina), paras 34-35; AT. 14 May 2012 pp. 71-75.
[137] Prosecution Response (Gotovina), para. 37.
[138] Prosecution Response (Gotovina), paras 40-50; AT. 14 May 2012 p. 75.
[139] Prosecution Response (Gotovina), para. 51; AT. 14 May 2012 pp. 75-76.
[140] AT. 14 May 2012 pp. 78-79, 92.
[141] Prosecution Response (Gotovina), para. 28. *See also* Prosecution Response (Gotovina), para. 26, *citing* Brioni Transcript, p. 10; AT. 14 May 2012 pp. 65-68.
[142] Gotovina Reply, paras 13-15.
[143] Gotovina Reply, para. 41. *See also* Gotovina Reply, para. 42.

error.[144] Gotovina also asserts that the Trial Chamber did not discuss the Brioni Meeting in assessing whether unlawful artillery attacks against the Four Towns took place, and submits that, in any event, evidence from the Brioni Meeting does not indicate that unlawful artillery attacks were planned.[145]

C. Discussion

1. Notice

45. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pled with sufficient precision in an indictment so as to provide notice to the accused.[146] An indictment lacking sufficient precision in the pleading of material facts is defective; however, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[147]

46. The Indictment does not specifically describe the attacks against the Four Towns as indiscriminate. Instead, paragraph 28 of the Indictment alleges that "Croatian forces shelled civilian areas". Although this formulation is somewhat general, the Appeals Chamber considers that the Prosecution Pre-Trial Brief addressed any defect in the Indictment by providing additional specificity regarding the nature of the attack:

> In accordance with Gotovina's order, Knin, Benkovac, Obrovac, Gračac, and many other towns, villages and hamlets […] were struck repeatedly with artillery over two days despite having few or, as in almost all cases, no identifiable military targets. Residential areas of these towns, villages and hamlets were struck *as part of an indiscriminate shelling campaign* to achieve complete demoralisation.[148]

47. Gotovina also acknowledges that he was aware at trial that the Prosecution sought to hold him responsible for the indiscriminate shelling of the Four Towns.[149] In view of these facts, Gotovina has not demonstrated any uncured defect in the notice provided concerning the indiscriminate nature of the attacks.

48. The Appeals Chamber is also not persuaded that the Trial Chamber's assessment of the accuracy of the HV's weaponry and its application of these findings to each identifiable impact site

[144] Gotovina Reply, paras 44-46. *See also* AT. 14 May 2012 pp. 24-25.
[145] Gotovina Reply, paras 24-26; AT. 14 May 2012 pp. 112-113.
[146] *Kupreškić et al.* Appeal Judgement, para. 88; *Kalimanzira* Appeal Judgement, para. 46.
[147] *Kupreškić et al.* Appeal Judgement, para. 114; *Kalimanzira* Appeal Judgement, para. 46.
[148] Prosecution Pre-Trial Brief, para. 31 (internal citations and quotations omitted) (emphasis added).
[149] *See* Gotovina Appeal, para. 9 ("The Prosecution case [at trial] was that the HV artillery shelling was indiscriminate"). Indeed, one of Gotovina's arguments on appeal is that the Trial Chamber erred in changing the nature of the Prosecution's case of an indiscriminate attack, thereby depriving him of adequate notice. *See* Gotovina Appeal, paras 9-14.

involved information which should have been pled in the Indictment. The Trial Chamber's approach to assessing the evidence is not a material fact of the crimes charged.[150] It was also not incumbent on the Trial Chamber to make findings on relevant evidence during the course of the trial or to put any such findings to various witnesses for comment.

2. The Lawfulness of Artillery Attacks on the Four Towns

49. The Appeals Chamber recalls that the Trial Chamber's finding that unlawful artillery attacks were carried out against the Four Towns was heavily premised on its Impact Analysis.[151] The Trial Chamber also considered other evidence, including the 2 August Order and its implementation, witness testimony regarding the attacks on Knin, and the proportionality of attacks on Martić.[152] The Appeals Chamber will now consider whether the Trial Chamber erred in making these findings.

50. The Appeals Chamber further recalls that:

> [i]t is incumbent on the Trial Chamber to adopt an approach it considers most appropriate for the assessment of evidence. The Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted. However, the Appeals Chamber is aware that whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice.[153]

(a) Impact Analysis

51. The Trial Chamber heavily relied on the 200 Metre Standard to underpin its Impact Analysis[154] and in this context found that evidence on the record did not indicate that artillery attacks were aimed at mobile targets of opportunity, such as tanks and trucks.[155] The Trial Chamber also considered certain additional evidence in the Impact Analysis, including the spread of artillery impact sites, artillery firing reports, and the number of projectiles falling far from identified artillery targets.[156]

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[150] *Cf. Renzaho* Appeal Judgement, para. 53; *Kayishema and Ruzindana* Appeal Judgement, para. 119. *See also Aleksovski* Appeal Judgement, para. 63.
[151] *See* Trial Judgement, paras 1898-1945. *See also supra*, para. 25.
[152] *See* Trial Judgement, paras 1893-1896, 1910-1911, 1923, 1935, 1943.
[153] *Kayishema and Ruzindana* Appeal Judgement, para. 119. *See also Aleksovski* Appeal Judgement, para. 63.
[154] *See* Trial Judgement, paras 1892-1945. *See also supra*, para. 25.
[155] *See* Trial Judgement, paras 1907-1908, 1921, 1933, 1941.
[156] *See, e.g.*, Trial Judgement, para. 1906.

(i) The 200 Metre Standard

a. The Trial Chamber's Findings

52. The Trial Chamber observed that, in shelling Knin, the HV deployed 130-millimetre guns at distances of 25 to 27 kilometres from the town and 122-millimetre BM-21 Multi Barrel Rocket Launchers ("BM-21") at distances of 18 to 20 kilometres from the town. The Trial Chamber explicitly considered the testimony of three witnesses concerning the accuracy of this weaponry.[157] Witness Konings testified in his capacity as a Lieutenant Colonel in the Royal Netherlands Army and as an expert in the use of artillery in military operations.[158] Witness Rajčić testified in his capacity as the chief of artillery of the Split MD from April 1993 to June 1996. As part of his responsibilities in this role, he was involved in implementing the 2 August Order.[159] Witness Leslie testified in his capacity as Chief of Staff of UNCRO Sector South in Knin from 1 March 1995 to 7 August 1995 and as a military officer with extensive experience in artillery.[160]

53. More specifically, the Trial Chamber considered Witness Konings's evidence that, with respect to an unguided 155-millimetre shell fired from a distance of 14.5 kilometres, variations caused by internal factors can affect "locations of impacts of up to 55 metres in range and five metres in deflection; while a number of external factors (such as muzzle velocity, wind speed, air temperature and density) can lead to variations in the locations of impacts of between 18 and 60 metres per factor."[161] Witness Konings explained that guns firing 155-millimetre shells are comparable to those firing 130-millimetre shells.[162] The Trial Chamber noted Witness Konings's view that BM-21 launchers cover a broader area than 130-millimetre guns.[163] The Trial Chamber also noted Witness Konings's view that "probable errors increase the further the target is from the fire unit."[164]

54. The Trial Chamber summarised Witness Rajčić's relevant testimony as stating that a 130-millimetre gun at a distance of 26 kilometres "has an error range of about 15 metres along the axis, and about 70 to 75 metres in distance, with the normal scattering dispersion of a 130-millimetre shell being an area with a diameter of 35 metres."[165] The Trial Chamber further understood Witness Rajčić to have testified that BM-21 launchers cover a broader area than

[157] Trial Judgement, para. 1898.
[158] Trial Judgement, para. 1163.
[159] *See* Trial Judgement, paras 72, 1177, 1893-1894.
[160] Trial Judgement, para. 1167.
[161] Trial Judgement, para. 1898.
[162] Trial Judgement, para. 1164.
[163] Trial Judgement, para. 1898.
[164] Trial Judgement, para. 1165.
[165] Trial Judgement, para. 1898.

130-millimetre guns.[166] Additionally, the Trial Chamber noted Witness Leslie's view that "landing within a 400-metre radius of the target with the first shot" would be acceptable with respect to, *inter alia*, 130-millimetre guns and BM-21s.[167]

55. The Trial Chamber observed that it understood "primarily from [Witness] Konings's evidence that the variation in the locations of impacts of the artillery weaponry employed by the HV is difficult to delimit precisely, as it depends on a number of factors on which the Trial Chamber has not received detailed evidence."[168] The Trial Chamber further observed that Witness Leslie "was not called as an artillery expert" and that it was "not clear which of the factors described by [Witness] Konings [Witness] Leslie took into account."[169] The Trial Chamber concluded that a reasonable interpretation of this evidence was that "those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target."[170]

56. With respect to Benkovac, the Trial Chamber found that 130-millimetre guns and BM-21s were used at distances of approximately 19 kilometres.[171] With respect to Gračac, the Trial Chamber found that 130-millimetre guns were used at distances of approximately 23 kilometres.[172] Finally, with respect to Obrovac, the Trial Chamber made no findings as to the types of artillery used or the distance of artillery from the town.[173] The Trial Chamber explicitly recalled its prior findings on artillery range of error in the context of Knin's shelling in its analysis of the other three towns.[174]

57. The Trial Chamber's Impact Analysis never deviated from the 200 Metre Standard. With respect to all Four Towns, it found that all impact sites within 200 metres of a target it deemed legitimate could have been justified as part of an attack offering military advantage to HV forces. By contrast, the Trial Chamber found that all impact sites more than 200 metres from a target it deemed legitimate served as indicators of an indiscriminate artillery attack.[175]

[166] Trial Judgement, paras 1237, 1898.
[167] Trial Judgement, para. 1898 (internal quotations omitted). *See also* Trial Judgement, para. 1167.
[168] Trial Judgement, para. 1898.
[169] Trial Judgement, para. 1898.
[170] Trial Judgement, para. 1898.
[171] Trial Judgement, para. 1916.
[172] Trial Judgement, para. 1928.
[173] *See* Trial Judgement, paras 1938-1945.
[174] *See* Trial Judgement, paras 1914, 1916, 1926, 1928, 1938, 1943.
[175] *See* Trial Judgement, paras 1899-1906, 1917-1921, 1927-1933, 1939-1941.

b. Analysis

58. The Appeals Chamber observes that the Trial Chamber did not explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of evidence on the record.[176] The Trial Judgement contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error. The Trial Chamber appears to have accepted Witness Konings's testimony that the range of error for artillery weapons depends on a number of factors, such as wind speed and air temperature, but concluded that it did not receive detailed evidence on these factors.[177] However, the Trial Chamber made no attempt to justify the 200 Metre Standard with respect to the factors Witness Konings identified, despite rejecting Witness Leslie's proposed 400 metre range of error partly because it did not explicitly account for these factors.[178]

59. The Prosecution suggests that the Trial Chamber created the 200 Metre Standard as a maximum possible range of error based on the evidence before it.[179] However, the Trial Chamber did not justify the 200 Metre Standard on this basis.[180] In addition, absent any specific reasoning as to the derivation of this margin of error, there is no obvious relationship between the evidence received and the 200 Metre Standard. Witness Konings's testimony regarding the range of error of 155-millimetre guns is, on its face, of limited applicability to the shelling of the Four Towns. Witness Konings provided his estimates on the basis of a 14.5 kilometre distance case-study and explicitly stated that accuracy would decrease at greater distances.[181] In cases where the Trial Chamber entered findings on the distance of artillery guns from the towns they were shelling, these distances were between 3.5 and 12.5 kilometres greater than the range discussed by Witness Konings.[182] Witness Rajčić provided evidence concerning 130-millimetre guns, but the range of error estimates he provided vary widely from the 200 Metre Standard. In addition, he does not appear to have explicitly considered the factors identified by Witness Konings as affecting the range of error—a failure the Trial Chamber identified as one reason for discounting Witness Leslie's suggestion of a 400 metre range of error.[183] Finally, only Witness Leslie provided a range of error estimate for BM-21s, and the Trial Chamber declined to rely on this evidence.[184] Witnesses

[176] *See* Trial Judgement, para. 1898.
[177] *See* Trial Judgement, para. 1898.
[178] *See* Trial Judgement, para. 1898.
[179] *See* Prosecution Response (Gotovina), para. 81.
[180] *See* Trial Judgement, para. 1898.
[181] *See* Trial Judgement, paras 1165, 1898. The Appeals Chamber recalls that there was no indication that 155-millimetre guns were used by the HV against the Four Towns, but that Witness Konings testified that these guns were comparable to the 130-millimetre guns the Trial Chamber found were used. *See supra*, para. 53.
[182] *See* Trial Judgement, paras 1898, 1916, 1928.
[183] *See* Trial Judgement, para. 1898; T. 18 February 2009 pp. 16278-16289.
[184] *See* Trial Judgement, paras 1167, 1898.

Konings and Rajčić indicated that BM-21s were less precise than 130-millimetre guns, but did not specify to what extent they were less accurate than BM-21s.[185]

60. The Trial Chamber also failed to justify its decision to apply the 200 Metre Standard uniformly to artillery shelling in all Four Towns. This approach is not consistent with the Trial Chamber's apparent acceptance of Witness Konings's testimony that factors such as wind speed would affect range of error,[186] or its failure to make findings on these factors with respect to each of the Four Towns.[187] In addition, where the Trial Chamber made findings as to the distance of artillery weaponry from individual towns being shelled, its conclusions suggest that these distances varied by as much as eight kilometres between different towns.[188] The Appeals Chamber notes that the Trial Chamber appears to have accepted Witness Konings's view that increased distance from a target would increase range of error;[189] however this view is not consistent with the Trial Chamber's reliance on a single margin of error for the artillery shelling of all Four Towns.[190]

61. The Trial Chamber's failure to make crucial findings and calculations may be partially explained by its observation that it did not receive detailed evidence on the factors identified by Witness Konings as affecting artillery shells' range of error.[191] However, the Prosecution's failure to proffer relevant evidence did not justify the Trial Chamber's insufficient analysis in this regard. The Appeals Chamber finds that there was a need for an evidentiary basis for the Trial Chamber's conclusions, particularly because these conclusions relate to a highly technical subject: the margin of error of artillery weapons in particular conditions. However, the Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error. The impact, if any, of the Trial Chamber's errors will be considered later in this section.[192]

[185] *See supra*, paras 53-54.
[186] *See* Trial Judgement, para. 1898.
[187] *See generally* Trial Judgement, paras 1899-1945.
[188] *See* Trial Judgement, paras 1898, 1916, 1928.
[189] *See* Trial Judgement, paras 1165, 1898.
[190] In addition, the Appeals Chamber recalls that Witnesses Konings and Rajčić testified that BM-21s were found to have a broader range of error than 130-millimetre guns. The Trial Chamber's single range of error did not account for this testimony. *See supra*, paras 53-54.
[191] Trial Judgement, para. 1898.
[192] The Appeals Chamber notes that the preceding discussion is limited to analysing the specifics of the Trial Chamber's reasoning, rather than taking a position on whether use of weapons with specific ranges of error would be lawful in particular contexts.

(ii) Targets of Opportunity

62. The Trial Chamber found that there was limited evidence that HV forces could identify tactical targets of opportunity, such as police and military vehicles, or that such targets existed in the Four Towns.[193] The Trial Chamber identified several indicators suggesting that the HV was able to observe targets in Knin, including testimony that HV forces were observing the town with binoculars in the days prior to Operation Storm and the existence of 22 artillery observation points "from the Velebit to the Dinara Mountains."[194] However, the Trial Chamber focused on the fact that artillery reports and orders did not explicitly mention reports from artillery observers, and noted testimony suggesting there was no clear line of sight into Knin before Operation Storm. Relying on these factors, the Trial Chamber concluded that the "evidence does not establish whether the HV had artillery observers with a view of Knin" at relevant times.[195] In this context, the Trial Chamber observed that there was limited evidence of "police trucks, tanks or units" moving through Knin during the time artillery attacks were taking place, though it noted that HV artillery struck a police car, and that "SVK tanks and trucks passed the UN compound" on the second day artillery shelling took place.[196] The Trial Chamber came to similar conclusions with respect to Benkovac, Gračac, and Obrovac, finding no evidence of lawful mobile targets, and with respect to Benkovac, that no lines of sight existed on one of the days artillery shelling occurred.[197]

63. The Appeals Chamber finds no error in the Trial Chamber's conclusions regarding the existence of targets of opportunity in Benkovac, Gračac, and Obrovac. Absent any indication that targets of opportunity existed, the Appeals Chamber considers that the Trial Chamber was entitled to find that the specific impact sites identified in those three towns were not reasonably attributed to lawful attacks on opportunistic targets. However, with respect to Knin, which appears to have been the most heavily shelled town,[198] the Trial Chamber did not explicitly discount evidence that, at minimum, did not exclude the possibility that HV forces could observe movement in the town. It also acknowledged that HV artillery hit a car belonging to the police, and that targets of opportunity were moving through the town.[199] The Trial Chamber did not explain how, in these circumstances, it could exclude the possibility that HV artillery attacks were aimed at mobile targets of opportunity. The Appeals Chamber, recalling that the burden of proof properly falls on the

[193] Trial Judgement, paras 1907-1908, 1921, 1933, 1941.
[194] Trial Judgement, para. 1907.
[195] Trial Judgement, para. 1907.
[196] Trial Judgement, para. 1908.
[197] *See* Trial Judgement, paras 1921, 1933, 1941.
[198] *See* Trial Judgement, paras 1899, 1916, 1928, 1938-1940.
[199] *See* Trial Judgement, paras 1397, 1907-1908.

Prosecution rather than on the defence,[200] finds, Judge Agius and Judge Pocar dissenting, that it was unreasonable for the Trial Chamber to conclude that no artillery attacks on Knin were aimed at targets of opportunity. The impact of this error, if any, will be considered later in this section.

(iii) The Effect of the Trial Chamber's Errors

64. The Appeals Chamber recalls that the Trial Chamber considered a number of factors in assessing whether particular shells were aimed at targets that offered a definite military advantage,[201] including the broad spread of individual artillery impact sites and the number of projectiles falling far from identified artillery targets.[202] However, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that the distance between a given impact site and one of the artillery targets identified by the Trial Chamber was the cornerstone and the organising principle of the Trial Chamber's Impact Analysis.[203] In each of the Four Towns, the Trial Chamber found at least one target which the HV could have believed possessed military advantage.[204] With no exceptions, it concluded that impact sites within 200 metres of such targets were evidence of a lawful attack, and impact sites beyond 200 metres from such targets were evidence of an indiscriminate attack.[205] The Appeals Chamber recalls that it has found that the Trial Chamber failed to provide a reasoned opinion in deriving the 200 Metre Standard,[206] a core component of its Impact Analysis.[207] In view of this legal error, the Appeals Chamber will consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid.[208]

65. Absent an established range of error, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, cannot exclude the possibility that all of the impact sites considered in the Trial Judgement were the result of shelling aimed at targets that the Trial Chamber considered to be legitimate. The fact that a relatively large number of shells fell more than 200 metres from fixed artillery targets could be consistent with a much broader range of error. The spread of shelling across Knin is also plausibly explained by the scattered locations of fixed artillery targets,[209] along with the possibility of a higher margin of error. Although evidence on the record suggests that individual units of the HV aimed artillery in the general direction of the Four Towns rather than at

[200] *Cf. Zigiranyirazo* Appeal Judgement, paras 38, 42, 49 n. 136.
[201] *See* Trial Judgement, paras 1893-1945.
[202] *See, e.g.*, Trial Judgement, para. 1906.
[203] *See generally* Trial Judgement, paras 1898-1945.
[204] *See, e.g.*, Trial Judgement, paras 1899, 1917-1918, 1930-1931, 1939.
[205] *See supra*, para. 57.
[206] *See supra*, para. 61.
[207] *See supra*, para. 25.
[208] *See supra*, para. 12. *Cf. Kalimanzira* Appeal Judgement, paras 99-100, 199-200.
[209] *Cf.* Trial Judgement, paras 1899-1905.

specific targets, the Trial Chamber found that this evidence was not wholly conclusive when considered alone[210] and was indicative of an unlawful attack only in the context of the Trial Chamber's application of the 200 Metre Standard.[211] The Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that absent the 200 Metre Standard, this latter evidence is inconclusive.[212]

66. The Trial Judgement suggests that in Knin, a few impacts occurred particularly far from identified legitimate artillery targets, and could not be justified by any plausible range of error.[213] In view of its finding that the Trial Chamber erred in deriving the 200 Metre Standard,[214] however, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, does not consider that this conclusion is adequately supported. In any event, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that in Knin, the Trial Chamber erred in excluding the possibility of mobile targets of opportunity such as military trucks and tanks.[215] The possibility of shelling such mobile targets, combined with the lack of any dependable range of error estimation, raises reasonable doubt about whether even artillery impact sites particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place.

67. Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that after reviewing relevant evidence, the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained. The consequences of this holding will be considered later in this section.

(b) Other Evidence of Unlawful Artillery Attacks

68. The Trial Chamber's conclusion that the artillery attacks on the Four Towns were unlawful was to a large extent based on the Impact Analysis, which the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found to be erroneous. The Appeals Chamber now turns to the Trial Chamber's remaining analysis and will assess whether a reasonable trier of fact could have found that this evidence was sufficient to support the conclusion that unlawful artillery attacks against the Four Towns took place.

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[210] Trial Judgement, para. 1895.
[211] *See* Trial Judgement, paras 1895-1896, 1906, 1923.
[212] The Appeals Chamber notes that Gotovina claimed that, using the 400 metre range of error proposed by Witness Leslie, only 13 impacts would fall outside the range of error, and that the Prosecution did not rebut this claim. *Compare* AT. 14 May 2012 p. 39, *with* AT. 14 May 2012 pp. 62-103.
[213] *See* Trial Judgement, para. 1906.
[214] *See supra*, para. 61.
[215] *See supra*, para. 63.

(i) The Trial Chamber's Additional Findings on the Unlawfulness of the Attacks

69. In addition to the Impact Analysis, the Trial Chamber explicitly considered the following evidence in assessing whether unlawful artillery attacks took place: i) Gotovina's 2 August Order which directed the HV to shell, *inter alia*, the Four Towns;[216] ii) evidence relating to HV units' implementation of the 2 August Order;[217] iii) evidence from witnesses who experienced the shelling of Knin;[218] and iv) evidence about the proportionality of artillery attacks aimed at Martić.[219]

a. The 2 August Order and its Implementation

70. The Appeals Chamber notes that the 2 August Order included multiple pages of detailed technical instructions to military units.[220] With respect to the Four Towns, the 2 August Order instructed that units should organise "along the main attack axes, 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 […] Knin, Benkovac, Obrovac and Gračac under artillery fire."[221]

71. The Trial Chamber grounded its interpretation of the 2 August Order on its text and on the testimony of Witnesses Konings, Rajčić, and Corn.[222] The Appeals Chamber recalls that Witness Konings testified in his capacity as a Lieutenant Colonel in the Royal Netherlands Army and as an expert in the use of artillery in military operations, and that Witness Rajčić testified in his capacity as the chief of artillery of the Split MD from April 1993 to June 1996.[223] Witness Corn testified as an expert on the practical application of the laws of war in military operations.[224]

72. Witness Konings suggested that the 2 August Order's general instruction to shell the Four Towns risked being interpreted as ordering or permitting random artillery attacks.[225] Witness Rajčić testified that the language of the 2 August Order meant that previously identified targets in the Four Towns should be shelled.[226] Finally, Witness Corn testified that the 2 August Order "was open to several interpretations".[227] The Trial Chamber found that his testimony suggested that these

[216] Prosecution Exhibit 1125, p. 14. *See also* Trial Judgement, para. 1893.
[217] *See, e.g.*, Trial Judgement, paras 1249, 1264, 1895-1896, 1911.
[218] *See, e.g.*, Trial Judgement, paras 1895-1896, 1911, 1915, 1923.
[219] *See, e.g.*, Trial Judgement, paras 1899, 1910-1911.
[220] *See generally* Prosecution Exhibit 1125.
[221] Prosecution Exhibit 1125, p. 14. The Appeals Chamber notes that the 2 August Order numbers twenty pages in translation. Accordingly, only the relevant portions are quoted.
[222] Trial Judgement, para. 1893.
[223] *See supra*, para. 52.
[224] Trial Judgement, para. 1163.
[225] Trial Judgement, para. 1172.
[226] Trial Judgement, para. 1893.
[227] Trial Judgement, para. 1173.

interpretations included requiring shelling of the Four Towns as a whole or, alternatively, as ordering shelling of previously identified military targets located in the Four Towns.[228]

73. The Trial Chamber found that Witness Rajčić's explanation of the 2 August Order was inconsistent with the large number of impact sites found to be distant from lawful artillery targets in the Four Towns.[229]

b. Other Evidence

74. The Trial Chamber further considered HV units' implementation of the 2 August Order with respect to artillery attacks on the towns of Knin and Benkovac. It noted that some HV artillery reports suggested that certain HV units appeared to fire in the general direction of towns or areas that were predominantly civilian using less accurate artillery techniques or without focusing on specific targets.[230] However, the Trial Chamber held that HV artillery reports were sometimes incomplete and written in code, and on this basis declined to find that they, alone, indicated that the HV was conducting indiscriminate artillery attacks. Instead, the Trial Chamber decided to consider this evidence in the context of the Impact Analysis.[231]

75. The Trial Chamber also referred to evidence provided by Prosecution Witnesses Andries Dreyer, Alain Forand, Joseph Bellerose, Eric Hendriks, Alain Gilbert, Søren Liborius, and Stig Marker Hansen, which suggested that artillery shelling impacted areas all over Knin and was indiscriminate.[232] The Trial Chamber viewed this evidence cautiously, noting that many witnesses had little artillery training, may have had trouble assessing artillery impacts while under fire, and may have mistaken shelling outside of Knin for shelling inside the town.[233] The Trial Chamber relied on this evidence only in the context of other findings on the record.[234]

76. Finally, the Trial Chamber found that attacks on Martić were disproportionate, and that this constituted additional evidence suggestive of indiscriminate attacks against the Four Towns. More specifically, the Trial Chamber found that the risk of civilian casualties was excessive compared to the military advantage derived from shelling areas where Martić might have been present.[235]

(ii) Analysis

[228] Trial Judgement, para. 1173.
[229] *See* Trial Judgement, para. 1911.
[230] *See* Trial Judgement, paras 1249, 1264, 1895-1896, 1911, 1915, 1923.
[231] *See, e.g.*, Trial Judgement, paras 1895-1896, 1911.
[232] Trial Judgement, para. 1911. *See also* Trial Judgement, paras 1287-1359.
[233] Trial Judgement, paras 1366, 1372.
[234] *See* Trial Judgement, paras 1366, 1372, 1911.
[235] Trial Judgement, paras 1910-1911.

77. The Trial Chamber's Impact Analysis, which the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has now found to be erroneous,[236] was at the very core of its finding that the artillery attacks on the Four Towns were indiscriminate, and thus unlawful. The Trial Chamber deemed almost all the additional evidence of unlawful attacks as equivocal when considered independent of the Impact Analysis. More specifically, the Trial Chamber relied on the Impact Analysis to discount Witness Rajčić's assertion that the 2 August Order called for shelling only lawful military targets.[237] In addition, neither Witness Konings nor Witness Corn suggested that the only interpretation of the 2 August Order was as an instruction to commence indiscriminate attacks on the Four Towns.[238] Given that the relevant portion of the 2 August Order was relatively short, and did not explicitly call for unlawful attacks on the Four Towns, the text of the 2 August Order could not, alone, reasonably be relied upon to support a finding that unlawful artillery attacks took place.

78. The Trial Chamber also explicitly found that HV artillery reports suggesting that shells were fired in the general direction of towns, rather than specifically targeted, were so inconclusive that they could be so interpreted only in the context of the Impact Analysis.[239] Given the Trial Chamber's finding that certain HV artillery reports were incomplete or written in code,[240] the Appeals Chamber, Judge Agius and Judge Pocar dissenting, agrees that it would not be reasonable to rely on this evidence independent of the Impact Analysis.

79. Similarly, the Trial Chamber found that evidence from witnesses present in Knin during the artillery attacks was of limited value, and subsequently chose to consider this evidence only in conjunction with other evidence on the record.[241] The Trial Chamber cited a series of factors that undermined the reliability of such witness accounts, including many witnesses' lack of relevant artillery experience. In addition, with respect to Knin, the Trial Chamber noted that many witnesses could mistake impacts outside the town as taking place inside Knin, especially while attempting to avoid injury during an artillery attack.[242] In view of the foregoing, the Appeals Chamber holds that it would not be reasonable to rely on these testimonies independent of further supporting evidence.

80. In addition, the Appeals Chamber notes that the Trial Chamber's explicit reliance on individual witnesses' experience of artillery shelling was limited to Knin. Similarly, evidence about

[236] *See supra*, para. 67.
[237] *See* Trial Judgement, para. 1911.
[238] *See supra*, para. 72.
[239] *See supra*, para. 74.
[240] *See supra*, para. 74.
[241] *See* Trial Judgement, para. 1911.
[242] *See supra*, para. 75.

shelling aimed generally at towns, rather than specifically targeted shelling, related primarily to Knin and Benkovac.[243] It is unclear how this evidence applies to the artillery attacks on the other relevant towns.[244]

81. The Trial Chamber did not explicitly consider evidence drawn from the Brioni Meeting to support its finding that unlawful artillery attacks took place,[245] though it engaged in an extensive analysis of the Brioni Transcript.[246] Instead, it considered inferences drawn from the Brioni Meeting alongside its finding that unlawful artillery attacks took place in order to establish the existence and parameters of the JCE.[247] The background discussion at the Brioni Meeting of HV capabilities and goals, especially Gotovina's statement that "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours", provides some support for the inference that the artillery attacks on the Four Towns were unlawful.[248] However, the Brioni Transcript includes no evidence that an explicit order was given to commence unlawful attacks,[249] and Gotovina's statement regarding a strike on Knin could be interpreted as a description of HV capabilities rather than its aims, especially in the context of general planning for Operation Storm which took place at the Brioni Meeting.[250]

82. As set out above, the Trial Chamber assessed much of the other evidence on the record to be ambiguous and considered it indicative of unlawful artillery attacks only when viewed through the prism of the Impact Analysis.[251] The limited evidence not caveated in this way is also insufficient to uphold the finding that artillery attacks were unlawful. The Trial Chamber's analysis of the attacks on Martić involved a lawful military target, was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.[252] Especially when considered in the context of the Trial Chamber's errors with respect to the Impact Analysis,[253] this finding of a disproportionate attack was thus of limited value in demonstrating a broader indiscriminate attack on civilians in Knin. Similarly, the Brioni Transcript provides only limited

[243] *See* Trial Judgement, paras 1911, 1923, 1935-1936, 1943.
[244] The Appeals Chamber notes that witness testimony with respect to the impact of shelling on Benkovac, Gračac, and Obrovac was discussed in the Trial Judgement's factual findings section, but not in its relevant legal findings. *See* Trial Judgement, paras 1414, 1446, 1469, 1893-1945.
[245] *See* Trial Judgement, paras 1893-1945.
[246] *See* Trial Judgement, paras 1970-1996.
[247] *See* Trial Judgement, para. 2310.
[248] Brioni Transcript, p. 10. *See also* Brioni Transcript, pp. 1-9, 11-33.
[249] *See generally* Brioni Transcript.
[250] *See generally* Brioni Transcript. Judge Pocar dissents on this entire paragraph.
[251] *See supra*, paras 74-75.
[252] *See* Trial Judgement, paras 1910-1911. The Appeals Chamber notes, in this regard, that it need not consider Gotovina's assertion that the Trial Chamber erred in finding that the attack on Martić was disproportionate. The Appeals Chamber also notes that the Trial Chamber declined to determine the proportionality of the overall attack on Knin. *See* Trial Judgement, paras 1899 n. 931, 1910 n. 935.
[253] *See supra*, paras 64-67.

support to a finding of unlawful artillery attacks,[254] particularly in light of the Trial Chamber's failure to explicitly refer to this evidence in entering its conclusions concerning the nature of the artillery attacks.

83. In these circumstances, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that the reversal of the Impact Analysis undermines the Trial Chamber's conclusion that artillery attacks on the Four Towns were unlawful. The Trial Chamber's reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful. In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that no reasonable trier of fact could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks. The Appeals Chamber thus need not consider the Appellants' remaining arguments challenging the Trial Chamber's findings on the unlawful nature of artillery attacks against the Four Towns.

84. Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Gotovina's First Ground of Appeal, in part, and Markač's Second Ground of Appeal, in part, and reverses the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful.

3. Attribution of Liability Via JCE

85. The Trial Chamber found that the Appellants participated in a JCE whose common purpose was the permanent removal of Serb civilians from the Krajina by force or threat of force, involving the crimes of deportation/forcible transfer and persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures).[255] All of the Appellants' convictions rested on JCE as a mode of liability; the Trial Chamber concluded that "it [was] not necessary […] to make findings on the other modes of liability alleged in the Indictment."[256] The Appeals Chamber will consider whether, absent the finding that artillery attacks on the Four Towns were unlawful, the Trial Chamber could reasonably conclude that the circumstantial evidence on the record was sufficient to prove the existence of the JCE.

[254] *See generally* Brioni Transcript. Judge Agius and Judge Pocar dissent on this entire paragraph.
[255] Trial Judgement, paras 2314, 2368-2375, 2578-2587.
[256] Trial Judgement, paras 2375, 2587.

(a) The Trial Chamber's Relevant Findings

86. The Appeals Chamber recalls that, after entering legal findings concerning, *inter alia*, the launch of unlawful artillery attacks against the Four Towns,[257] the Trial Chamber concluded that at the Brioni Meeting "the importance of the Krajina Serbs leaving as a result and part of the imminent attack" was discussed,[258] and further concluded that both policy and legal tools were deployed to prevent the Krajina Serbs' return.[259] The Trial Chamber also found that, in the aftermath of Operation Storm, Tuđman made inflammatory speeches, and Croatian Forces committed crimes not involving artillery attacks which targeted Krajina Serbs.[260]

87. The Trial Chamber interpreted the discussions at the Brioni Meeting "in light of subsequent events," with a particular focus on the unlawful artillery attacks and discriminatory measures used to prevent Krajina Serbs' return.[261] The Trial Chamber explained that "[w]ithin days of the discussion at Brioni […] Operation Storm was launched [and] entire towns were treated as targets for the artillery."[262] As a result of these unlawful attacks, the Trial Chamber found that "large parts of the civilian population of Knin, Benkovac, Obrovac, and Gračac, amounting to at least 20,000 people, were forcibly displaced from their homes and fled across the border" and that this departure constituted deportation.[263] The Trial Chamber did not hold that unlawful attacks were required to show deportation as a matter of law.[264] However, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that in the factual context of Operation Storm, the Trial Chamber considered unlawful artillery attacks to be the core indicator that the crime of deportation had taken place. Thus the Trial Chamber held that Serb civilians' departures from settlements at the same time as or in the immediate aftermath of artillery attacks only constituted deportation where these artillery attacks were found to have been unlawful.[265]

88. On the basis of this analysis, the Trial Chamber found that members of Croatia's political and military elite, including the Appellants, had participated in a JCE whose common purpose was "the permanent removal of the Serb civilian population from the Krajina by force or threat of force".[266]

[257] *See* Trial Judgement, paras 1669-1947.
[258] Trial Judgement, para. 2310. *See also* Trial Judgement, paras 1970-1996.
[259] Trial Judgement, para. 2310. *See also* Trial Judgement, paras 1997-2098.
[260] *See* Trial Judgement, paras 2306-2307.
[261] Trial Judgement, para. 2305.
[262] Trial Judgement, para. 2305.
[263] Trial Judgement, para. 2305. Judge Pocar dissents on the Appeals Chamber's assessment of the Trial Judgement.
[264] *See* Trial Judgement, paras 1738-1741.
[265] *See* Trial Judgement, para. 1755. Judge Pocar dissents on the Appeals Chamber's assessment of the Trial Judgement.
[266] Trial Judgement, para. 2314.

(b) Analysis

89. The Appeals Chamber recalls that in order to find an individual liable for commission of a crime through the first form of JCE:

> [a] trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place. Where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member – when using the principal perpetrator – acted in accordance with the common plan. In establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[267]

90. In addition, the Appeals Chamber recalls that convictions for deviatory crimes that are not part of the JCE's common purpose are possible pursuant to the third or extended form of JCE. Convictions for such crimes require that additional deviatory crimes were a "foreseeable" possible consequence of carrying out "the *actus reus* of the crimes forming part of the common purpose", and "the accused, with the awareness that such a crime was a *possible* consequence of the implementation of th[e] enterprise, decided to participate in that enterprise."[268]

91. The Appeals Chamber observes that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, but that its findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns.[269] Having reversed the Trial Chamber's findings related to unlawful artillery attacks,[270] the Appeals Chamber, Judge Agius and Judge Pocar dissenting, cannot affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed.

92. More specifically, the Appeals Chamber, Judge Pocar dissenting, recalls that, in the context of Operation Storm, unlawful artillery attacks were identified by the Trial Chamber as the primary

[267] *Brdanin* Appeal Judgement, para. 430 (internal citations omitted). *See also Krajišnik* Appeal Judgement, para. 662.
[268] *Karadžić* Foreseeability Decision, para. 15. *See also Karadžić* Foreseeability Decision, paras 16-18.
[269] *See* Trial Judgement, paras 2310-2315.
[270] *See supra*, para. 84.

means by which the forced departure of Serb civilians from the Krajina region was effected. The Trial Chamber stated that the JCE involved treating "whole towns as target[s] for the initial artillery attack" in Operation Storm, that removal "of the Krajina Serb population was to a large extent achieved through the unlawful attacks against civilians and civilian objects in Knin, Benkovac, Obrovac, and Gračac,"[271] and that these attacks promoted the JCE's goal of forcing "the Krajina Serbs from their homes."[272] By contrast, the Appeals Chamber, Judge Pocar dissenting, observes that where artillery attacks on settlements were not deemed unlawful, the Trial Chamber was unwilling to characterise Serb civilians' concurrent departures as deportation.[273] The Trial Chamber explained that "[t]he failure by members of the Croatian political and military leadership to make the distinction between the civilian population and the military goes to the very core of th[e] case."[274]

93. Furthermore, the Appeals Chamber observes that, in considering whether a JCE existed, the Trial Chamber's analysis of the planning which preceded artillery attacks on the Four Towns was influenced by its findings that these attacks targeted civilians. Thus the Trial Chamber explicitly interpreted the Brioni Transcript "in light of subsequent events," in particular its findings of unlawful attacks against civilians and civilian objects in the Four Towns.[275] Considered outside this context, it was not reasonable to find that the only possible interpretation of the Brioni Transcript involved a JCE to forcibly deport Serb civilians. Portions of the Brioni Transcript deemed incriminating by the Trial Chamber[276] can be interpreted, absent the context of unlawful artillery attacks, as inconclusive with respect to the existence of a JCE, reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction. Thus discussion of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts.[277] Other parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the town of Knin, could be reasonably construed as using shorthand to describe the military forces stationed in an area, or intending to demonstrate potential military power in the context of planning a military operation.[278]

[271] Trial Judgement, para. 2311.
[272] Trial Judgement, para. 2310. *See also* Trial Judgement, para. 2314.
[273] *See* Trial Judgement, para. 1755.
[274] Trial Judgement, para. 2309.
[275] Trial Judgement, para. 2305. *See also* Trial Judgement, paras 2310-2312, 2315. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.
[276] *See* Trial Judgement, paras 1991-1994.
[277] *See* Trial Judgement, paras 1993-1994. *See also* Brioni Transcript, pp. 10, 15, 23, 29.
[278] *See* Trial Judgement, para. 1993; Brioni Transcript, p. 10. Judge Agius and Judge Pocar dissent on this paragraph.

94. Evidence of Tuđman's speeches and of Croatian Army and Special Police crimes after the artillery assault on the Four Towns is insufficient to support the finding that a JCE existed. In particular, it is unclear whether the goals and rhetoric of Tuđman's speeches can be attributed to the JCE's membership, or considered illustrative of its common purpose. In addition, whereas the artillery attacks ordered as part of Operation Storm can be tied directly to the planning discussions set out in the Brioni Transcript, non-artillery crimes committed by Croatian Forces following the artillery attacks in the first days of August 1995 cannot.[279] Indeed, the Trial Chamber found that acts of destruction and plunder committed by Croatian Forces in the Indictment period could not be tied to the Croatian military and political leadership or be considered part of the JCE's common purpose.[280] The Trial Chamber also explicitly considered its finding that unlawful artillery attacks on the Four Towns aimed to force the departure of Serb civilians in concluding that Croatian Forces undertook non-artillery crimes with the same aim.[281]

95. Evidence of policy and legal attempts to prevent the return of Serb civilians who had left the Krajina is also insufficient to justify the Trial Chamber's view that a JCE to permanently remove Serb civilians by force or threat of force existed.[282] The relevant probative power of this evidence depends on the core finding that large-scale deportation of Serb civilians preceded the adoption of discriminatory measures; this finding of large-scale deportation was in turn primarily premised on the existence of unlawful artillery attacks.[283] The fact that Croatia adopted discriminatory measures after the departures of Serb civilians from the Krajina does not demonstrate that these departures were forced. The Appeals Chamber also observes in this regard that the Trial Chamber did not find that Gotovina and Markač played a role in creating or supporting Croatia's discriminatory efforts in the Krajina.[284]

96. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, underscores again the centrality of unlawful artillery attacks on the Four Towns to the Trial Chamber's findings. The unlawfulness of these attacks constituted the core basis for finding that Serb civilians were *forcibly* displaced. Absent the finding of unlawful artillery attacks and resulting displacement, the Trial Chamber's conclusion that the common purpose crimes of deportation, forcible transfer, and related persecution took place cannot be sustained.[285] In this context, no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the

[279] *See* Trial Judgement paras 1970-1996; 2303-2321. *See generally* Brioni Transcript.
[280] Trial Judgement, para. 2313.
[281] *See* Trial Judgement, paras 1757, 2305, 2307. Judge Agius and Judge Pocar dissent on this paragraph.
[282] *See, e.g.*, Trial Judgement, para. 2310.
[283] *See supra*, para. 87.
[284] *See* Trial Judgement, paras 2325-2326, 2562-2563. Judge Agius and Judge Pocar dissent on this paragraph.
[285] *Cf. Stakić* Appeal Judgement, paras 278, 317.

existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force.

97. In view of the Appeals Chamber's reversal of the Trial Chamber's finding that a JCE existed, the Appellants' convictions for the common purpose crimes of deportation, forcible transfer, and persecution fall. The Appellants' remaining convictions for the crimes of plunder, wanton destruction, murder, inhumane acts, and cruel treatment, and associated convictions for persecution were entered via the third form of JCE.[286] The Trial Chamber, in convicting the Appellants for these deviatory crimes, found that the crimes "were a natural and foreseeable consequence of the JCE's implementation."[287] The Appeals Chamber recalls that liability for deviatory crimes attributed via the third category of JCE involves responsibility for crimes committed "beyond the common purpose, but which are nevertheless a natural and foreseeable consequence" of it.[288] Reversal of the Trial Chamber's finding that a JCE existed means that other crimes could not be a natural and foreseeable consequence of that JCE's common purpose. Accordingly, the Appellants' convictions for deviatory crimes entered via the third form of that JCE must also fall.[289]

D. Conclusion

98. In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Gotovina's First and Third Grounds of Appeal and Markač's First and Second Grounds of Appeal, in part, and reverses the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina by force or threat of force. It is therefore unnecessary to address the Appellants' remaining arguments regarding the JCE's existence. The Appeals Chamber notes that all of the Appellants' convictions were entered pursuant to the mode of liability of JCE. All of the Appellants' convictions are therefore reversed.

[286] Trial Judgement, paras 2372-2374, 2584-2586.
[287] Trial Judgement, paras 2374, 2586.
[288] *Kvočka et al.* Appeal Judgement, para. 83.
[289] *See supra*, paras 89-90. Judge Agius and Judge Pocar dissent on this paragraph.

V. CONVICTIONS UNDER ALTERNATE FORMS OF LIABILITY (GOTOVINA GROUNDS 1, 2, AND 4, IN PART, AND MARKAČ GROUNDS 1, 2, 3, 5, 6, 8, AND 9, IN PART)

99. The Appeals Chamber recalls that it has, Judge Agius and Judge Pocar dissenting, reversed the Trial Chamber's findings with respect to unlawful artillery shelling and the existence of a JCE and quashed all of the Appellants' convictions.[290] The Appeals Chamber further recalls that following the Appeal Hearing, it ordered the Prosecution to provide submissions on the possibility of entering convictions under alternate modes of liability, and ordered the Appellants to respond to these submissions.[291]

A. The Appeals Chamber's Jurisdiction to Enter Convictions Under Alternate Modes of Liability

1. Submissions

100. Gotovina, joined by Markač, challenges the Appeals Chamber's jurisdiction to enter convictions under alternate modes of liability and asserts that, in any event, the Prosecution waived its right to seek convictions under alternate modes of liability.[292] More specifically, Gotovina asserts, *inter alia*, that the Appeals Chamber would have jurisdiction to enter convictions pursuant to alternate modes of liability only if a party had challenged the Trial Chamber's failure to make relevant findings.[293] Gotovina submits that his grounds of appeal are limited to JCE findings and do not implicate alternate modes of liability.[294] Noting that the Prosecution did not appeal the Trial Judgement, he contends that, in these circumstances, convictions under other modes of liability are precluded.[295]

101. More generally, Gotovina maintains that the Appeals Chamber is precluded from entering additional convictions *per se*, as this would deprive appellants of their right to appeal these convictions.[296] He further maintains that entering convictions under alternate modes of liability for which the Trial Chamber did not enter explicit findings would violate his right to a reasoned opinion[297] and is precluded by the principles of *res judicata* and *non bis in idem*.[298] Gotovina also

[290] *See supra*, paras 84, 98.
[291] Order for Additional Briefing, pp. 1-2.
[292] *See generally* Alternate Liability Challenge; Markač Joinder.
[293] Alternate Liability Challenge, paras 3-14, 29.
[294] *See* Alternate Liability Challenge, para. 14.
[295] *See* Alternate Liability Challenge, paras 15-18, 32.
[296] Alternate Liability Challenge, para. 23; Alternate Liability Reply, paras 23-24.
[297] Alternate Liability Challenge, paras 19-23, 30.

submits that in previous cases where the Appeals Chamber entered convictions on the basis of alternate modes of liability, it did so after finding errors of law, rather than errors of fact.[299]

102. The Appellants further suggest that the magnitude of the Trial Chamber's errors on core issues should rebut any deference to its remaining findings, and note that in any event these findings appear to rest on the erroneous assumption that the Appellants ordered unlawful artillery attacks.[300] The Appellants also maintain that they have not been provided the opportunity to challenge factual findings of the Trial Chamber which were not relevant to JCE but may be relevant to assessment of their culpability with respect to other forms of liability.[301] Finally, the Appellants contend that the Prosecution erroneously raises new factual arguments and evidence from the trial record rather than relying on the Trial Chamber's specific findings.[302]

103. The Prosecution responds, *inter alia*, that the Appeals Chamber has entered convictions on the basis of alternate modes of liability on multiple occasions, even in the absence of explicit arguments by the Prosecution seeking such action.[303] The Prosecution submits that, in any event, it raised the possibility of convictions on alternate bases of liability early in the appeal, and asserts that the Appeals Chamber retains the power to enter such alternate convictions even without additional briefing by the parties.[304] More broadly, the Prosecution contends that the Appellants will not be prejudiced if convictions are entered against them under alternate modes of liability.[305] The Prosecution also submits that the Alternate Liability Challenge is procedurally defective on the basis of its excessive length, late filing, and failure to include certain sources in its annex.[306]

2. Analysis

104. As an initial matter, the Appeals Chamber holds that it is in the interests of justice and judicial economy to consider the Alternate Liability Challenge, the Additional Prosecution Brief (Gotovina), and the Additional Prosecution Brief (Markač) despite any procedural errors with respect to scope of argument, length, filing date, or inclusion of sources in annexes.[307]

105. Turning to the merits of the Appellants' submissions, the Appeals Chamber recalls that upon being seised of an appeal, it has the authority to identify errors by a trial chamber, set out the

[298] Alternate Liability Challenge, paras 24-29, 31.
[299] Alternate Liability Reply, paras 11-15.
[300] *See* Gotovina Additional Response, paras 2, 6, 28-30; Markač Additional Response, paras 4, 21-25.
[301] *See* Gotovina Additional Response, para. 5; Markač Additional Response, paras 8-16.
[302] *See* Gotovina Additional Response, para. 15; Markač Additional Response, paras 17-20.
[303] Prosecution Alternate Liability Response, paras 1-7.
[304] Prosecution Alternate Liability Response, para. 8.
[305] *See* Prosecution Alternate Liability Response, para. 11.
[306] Prosecution Alternate Liability Response, para. 3 n. 3.
[307] *Cf.* Decision on Proposed *Amicus* Brief, paras 4-5.

correct legal standard, consider evidence on the record in light of this standard, and, where appropriate, revise a trial judgement.[308] Article 25(2) of the Statute, in particular, provides that the "Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

106. The Appeals Chamber observes, Judge Pocar dissenting, that it has, on multiple occasions, entered convictions on the basis of alternate modes of liability.[309] In this respect, the Appeals Chamber notes that the plain text of Article 25(2) of the Statute, namely the power vested in the Appeals Chamber to "revise" a decision taken by a trial chamber, supports the Appeals Chamber's authority to enter convictions on the basis of alternate modes of liability. One meaning of the term revise is "to alter (an opinion, judgement, etc.) after reconsideration, or in the light of further evidence."[310] The practice of sustaining a conviction pursuant to an alternate mode of liability is effectively one such *alteration* to a trial chamber's legal reasoning. The Appeals Chamber further observes that appellate bodies of various national jurisdictions are also empowered to enter convictions on an alternate basis of liability. For example, Section 3 of the England and Wales Criminal Appeal Act 1968 allows an appellate court to substitute a conviction for an alternative offence.[311] Other national jurisdictions have instituted similar practices.[312]

107. The Appeals Chamber, Judge Pocar dissenting, is not convinced that the Appellants have presented cogent reasons requiring departure from the practice of entering convictions on the basis of alternate forms of liability in appeals in certain circumstances. The Appeals Chamber further underscores that its power to enter convictions on the basis of alternate modes of liability is not dependent on whether the Prosecution appeals.[313] Finally the Appeals Chamber recalls that it has, on multiple occasions, rejected, Judge Pocar dissenting, the proposition that additional convictions on appeal violate an appellant's right to a fair trial *per se*,[314] and notes that the Appellants do not

[308] *See supra*, paras 12-13. *See also* Article 25 of the Statute.
[309] *See, e.g.*, *D. Milošević* Appeal Judgement, paras 275-282, p. 128; *Simić* Appeal Judgement, paras 75-191, 301; *Stakić* Appeal Judgement, paras 58-98, 104, p. 141; *Krstić* Appeal Judgement, paras 135-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, 181, p. 60. *See also Rukundo* Appeal Judgement, paras 37, 39-115, 169-218, 269-270.
[310] Oxford English Dictionary (Oxford English Dictionary Online, September 2012, Oxford University Press).
[311] Criminal Appeal Act 1968 (England and Wales), Section 3.
[312] *See* Criminal Appeals Act 2004 (Western Australia), Section 30(5); Code of Criminal Procedure, Sections 265, 322, 328 (Germany); Criminal Code (R.S.C., 1985, c. C-46, § 686(1)(*b*)(i)) (Canada); Code of Criminal Procedure, Article 597(2)(a) (Italy).
[313] *Cf.* Article 25 of the Statute. *See generally Simić* Appeal Judgment; *Vasiljević* Appeal Judgement (in which the Appeals Chamber entered convictions on the basis of alternate modes of liability despite absence of any Prosecution appeal).
[314] *See Šljivančanin* Reconsideration Decision, pp. 2-3. *See also Galić* Appeal Judgement (*compare* majority opinion, pp. 1-185, *with* partially dissenting opinion of Judge Pocar, pp. 186-188); *Semanza* Appeal Judgement (*compare* majority opinion, pp. 1-127, *with* dissenting opinion of Judge Pocar, pp. 131-133); *Rutaganda* Appeal Judgement (*compare* majority opinion pp. 1-169, *with* dissenting opinion of Judge Pocar, pp. 1-4).

raise new arguments that justify reconsideration of this position.[315] Accordingly, the Appeals Chamber denies the Alternate Liability Challenge.

108. Having dismissed the Appellants' challenge to its general power to enter convictions on the basis of alternate modes of liability, the Appeals Chamber recalls that its exercise of this power is subject to the Statute's fundamental protections of the rights of the accused.[316] The Appeals Chamber further recalls that, as set out in the Statute, its jurisdiction is focused on reviewing the findings of trial chambers for errors of law which invalidate a decision and errors of fact which occasion a miscarriage of justice.[317] The Appeals Chamber will not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute.[318]

109. In this appeal, as in others where convictions on the basis of alternate modes of liability have been entered, the Appeals Chamber has identified errors of law by the Trial Chamber which require reversal of the Appellants' convictions,[319] but has not reversed all of the Trial Chamber's factual findings. In addition, the Appeals Chamber notes that it has provided the Appellants with the opportunity to respond to additional Prosecution submissions concerning the possibility of entering convictions pursuant to alternate modes of liability pled in the Indictment.[320] Before deciding whether to enter convictions on the basis of alternate modes of liability, the Appeals Chamber will consider the remaining evidence and factual findings on the record.

110. The Appeals Chamber notes that in considering whether to enter convictions pursuant to alternate modes of liability, it will assess the Trial Chamber's findings and other evidence on the record *de novo*. The Trial Chamber's analysis was focused on whether particular factual findings on the record were sufficient to enter convictions pursuant to JCE as a mode of liability, and did not consider alternate modes of liability charged in the Indictment.[321] Accordingly, the Appeals Chamber will consider but will not defer to the Trial Chamber's relevant analysis.

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[315] *Compare* Alternate Liability Challenge, paras 23-24, *with Šljivančanin* Reconsideration Decision, pp. 2-3; *Galić* Appeal Judgement (*compare* majority opinion, pp. 1-185, *with* partially dissenting opinion of Judge Pocar, pp. 186-188); *Semanza* Appeal Judgement (*compare* majority opinion, pp. 1-127, *with* dissenting opinion of Judge Pocar, pp. 131-133); *Rutaganda* Appeal Judgement (*compare* majority opinion, pp. 1-169, *with* dissenting opinion of Judge Pocar, pp. 1-4).
[316] *See* Article 21 of the Statute. *See also* Articles 20, 23, 25 of the Statute.
[317] Article 25 of the Statute. *Cf.* Articles 20, 23 of the Statute; *Orić* Appeal Judgement, para. 11.
[318] *Cf.* Articles 21, 25 of the Statute.
[319] *See supra*, para. 98.
[320] *See* Order for Additional Briefing, pp. 1-2.
[321] *See* Trial Judgement, paras 2375, 2587.

B. The Trial Chamber's Remaining Findings and the Appellants' Liability

1. The Appellants' Liability for Artillery Shelling

111. The Prosecution contends, *inter alia*, that even if the artillery attacks on the Four Towns are not considered unlawful in themselves, the Appeals Chamber should find Gotovina and Markač guilty of aiding and abetting deportation and persecution (deportation) for their role in these artillery attacks.[322] More specifically, the Prosecution maintains that the Appellants were aware of a plan by Croatia's "senior leadership[]", including Tudman, to pursue ethnic cleansing in the Krajina.[323] The Prosecution further submits that fear of artillery attacks was a primary reason for civilian departures from the Four Towns, and that Gotovina and Markač planned and ordered artillery attacks on, respectively, the Four Towns and Gračac, knowing that these attacks would substantially contribute to deportation of the civilian population.[324]

112. Gotovina responds, *inter alia*, that the Trial Chamber explicitly found that where it could not establish that artillery attacks were unlawful, it could not conclude that civilian departures constituted deportation, or that those engaged in the artillery attacks aimed to deport civilians.[325]

113. Markač responds, *inter alia*, that the Trial Chamber's findings on deportation depended on its finding that unlawful artillery attacks took place, and that absent this finding, no conviction for deportation is justified.[326]

114. The Appeals Chamber recalls the Trial Chamber's determination that in the context of the specific factual circumstances before it, including Croatian military operations against the *Srpska Vojska Krajine* (Serbian Army of Krajina or "SVK"),[327] it would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians.[328] The Appeals Chamber further recalls that it has, Judge Agius and Judge Pocar dissenting, reversed the Trial Chamber's determination that artillery attacks against the Four Towns were unlawful.[329] In these factual circumstances, the Trial Chamber's reasoning would preclude finding that departures from the Four Towns concurrent with lawful artillery attacks constituted

[322] Additional Prosecution Brief (Gotovina), paras 5-23; Additional Prosecution Brief (Markač), paras 5-22. *See also* AT. 14 May 2012 pp. 94-98, 100-102, 178-179.
[323] Additional Prosecution Brief (Gotovina), para. 15; Additional Prosecution Brief (Markač), para. 15. *See also* Additional Prosecution Brief (Gotovina), paras 5-14, 16-20; Additional Prosecution Brief (Markač), paras 5-14, 16-18.
[324] Additional Prosecution Brief (Gotovina), paras 21-23; Additional Prosecution Brief (Markač), paras 19-20.
[325] Gotovina Additional Response, paras 8-14.
[326] *See* Markač Additional Response, paras 21-25.
[327] *See, e.g.*, Trial Judgement, para. 1990.
[328] *See* Trial Judgement, para. 1755.
[329] *See supra*, para. 84.

deportation. Having assessed the evidence, the Appeals Chamber agrees with the relevant analysis of the Trial Chamber, and finds that in the factual context of this case, departures of civilians concurrent with lawful artillery attacks cannot be qualified as deportation.[330]

115. The Appeals Chamber further observes that given its reversal of the finding that a JCE existed and absent a finding of unlawful attacks, the Trial Judgement does not include any explicit alternative findings setting out the requisite *mens rea* for deportation which could be ascribed to the Appellants on the basis of lawful artillery attacks.[331] In these circumstances, the Appeals Chamber is not satisfied that the artillery attacks the Appellants were responsible for are sufficient to prove them guilty beyond reasonable doubt for deportation under any mode of liability pled in the Indictment.

116. The Appeals Chamber recalls that Gotovina has asserted that the Prosecution introduced new arguments at the Appeal Hearing with respect to artillery shelling of lawful military targets.[332] However, in view of the foregoing analysis, the artillery attacks which took place during Operation Storm do not form a basis upon which criminal liability can be ascribed to the Appellants. Accordingly, Gotovina's argument need not be considered by the Appeals Chamber.[333]

2. Additional Trial Chamber Findings Regarding Gotovina's Actions

(a) Background

117. The Indictment alleged that Gotovina was liable for charged crimes based on the modes of liability of JCE, planning, instigating, ordering, aiding and abetting, and superior responsibility.[334] The Appeals Chamber recalls that the Trial Chamber found Gotovina guilty, pursuant to the mode of liability of JCE, of deportation, persecution, murder, and inhumane acts as crimes against humanity and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war.[335] The Trial Chamber declined to enter findings on modes of liability other than JCE.[336]

118. The Appeals Chamber recalls that it has, Judge Agius and Judge Pocar dissenting, reversed the Trial Chamber's finding that Gotovina made a significant contribution to the JCE by ordering

[330] The Appeals Chamber notes that this analysis is limited to the specific factual findings of the Trial Chamber, and does not address the broader question of whether attacks on lawful military targets could ever constitute a basis for ascribing criminal liability.
[331] *See supra*, para. 98. *See generally* Trial Judgement.
[332] *See* Gotovina's First Supplemental Brief, paras 1, 3-4.
[333] *See supra*, para. 14. Judge Agius and Judge Pocar dissent on the conclusion of this paragraph.
[334] Indictment, paras 37-47.
[335] Trial Judgement, paras 2375, 2619.
[336] Trial Judgement, para. 2375.

unlawful artillery attacks on civilians and civilian objects in Benkovac, Knin, and Obrovac on 4 and 5 August 1995.[337] However, the Trial Chamber found that Gotovina made a second significant contribution to the JCE: failing to make a "serious effort" to ensure that reports of crimes against Serb civilians in the Krajina were followed up and future crimes were prevented, thus promoting an atmosphere of impunity with respect to such crimes in the Split MD ("Failure to Take Additional Measures").[338] More specifically, the Trial Chamber found that in the period before and after artillery attacks were launched against the Four Towns, Gotovina was "aware of crimes allegedly being committed which required investigating or processing separate from disciplinary proceedings."[339] The Trial Chamber reasoned that given this awareness, Gotovina should have readjusted his priorities to ensure that "crimes were followed up", and specifically noted three additional steps he could have taken: i) contacting and seeking assistance from "relevant people"; ii) making public statements; and iii) diverting "available capacities" towards following up on these crimes ("Additional Measures").[340]

119. The Appeals Chamber observes that the Trial Chamber reached its conclusions regarding Gotovina's Failure to Take Additional Measures "in light of" its finding that he ordered unlawful artillery attacks.[341] The Appeals Chamber also recalls its previous determination that superior responsibility and aiding and abetting were the two modes of liability relevant to any substitution of the modes of liability underlying Gotovina's convictions.[342]

(b) Submissions

120. The Prosecution contends, *inter alia*, that should the Appeals Chamber set aside Gotovina's convictions pursuant to JCE, it should find him liable under alternate forms of liability for crimes that took place after the artillery attacks on the Four Towns, including deportation, murder, other inhumane acts and cruel treatment, wanton destruction, plunder, and persecutions.[343] The Prosecution submits that Gotovina was aware of the high likelihood that Croatian Forces would commit crimes, based on: his experience from prior operations; the region's history of conflict; the vulnerability of Serb civilians who remained in the Krajina; and warnings from Šušak.[344] More specifically, the Prosecution maintains that the Trial Chamber correctly found that Gotovina's failure to prevent and follow up on crimes substantially contributed to commission of crimes by

[337] *See supra*, para. 84.
[338] Trial Judgement, para. 2370.
[339] Trial Judgement, para. 2365.
[340] Trial Judgement, para. 2365.
[341] Trial Judgement, para. 2370.
[342] Order for Additional Briefing, p. 1.
[343] Additional Prosecution Brief (Gotovina), para. 51. *See also* Additional Prosecution Brief (Gotovina), paras 24-50.
[344] Additional Prosecution Brief (Gotovina), paras 31-34.

both HV and Special Police forces.[345] The Prosecution further maintains that Gotovina possessed effective control over HV forces,[346] knew or had reason to know of their crimes,[347] and failed to prevent or punish relevant crimes by HV forces.[348] On these bases, the Prosecution asserts that the Trial Chamber made all necessary findings to enter a conviction against Gotovina for aiding and abetting or as a superior.[349]

121. More specifically, the Prosecution asserts that the Trial Chamber did not err in finding that Gotovina was responsible for the Failure to Take Additional Measures.[350] It submits that the Trial Chamber's analysis and discussion of the Additional Measures followed from the information provided in the Indictment and the Prosecution's arguments at trial and that the Trial Chamber made reasonable and specific findings as to Gotovina's mental state.[351] The Prosecution also maintains that the Trial Chamber was entitled to ignore the expert testimony of Defence Witness Anthony R. Jones, a retired United States Lieutenant General, who opined that Gotovina's actions were appropriate and sufficient.[352] The Prosecution contends that this evidence was based on "hypothetical or inaccurate factual assumptions".[353]

122. The Prosecution maintains that the Trial Chamber correctly found that even when Gotovina was physically in BiH, he retained control over his subordinates in the Krajina given his position as commander of the Split MD.[354] The Prosecution further maintains that the Trial Chamber was presented with "ample evidence" of Gotovina's continued control over the Split MD after the conclusion of Operation Storm[355] and asserts that the Trial Chamber found that he was present in Knin on several dates in August, September, and October 1995.[356] The Prosecution also submits that Gotovina was on notice that his subordinates were not adequately preventing and punishing relevant crimes, and that if particular responses to crimes were found to be ineffective, he was obliged to take other measures, even if these additional measures were beyond his formal authority.[357]

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[345] Additional Prosecution Brief (Gotovina), para. 35, *citing, inter alia*, Trial Judgement, para. 2370. *See also* Additional Prosecution Brief (Gotovina), paras 24-25, 36-39.
[346] Additional Prosecution Brief (Gotovina), paras 41-43.
[347] Additional Prosecution Brief (Gotovina), paras 44-45.
[348] Additional Prosecution Brief (Gotovina), paras 46-49.
[349] Additional Prosecution Brief (Gotovina), paras 28, 40, 50.
[350] Prosecution Response (Gotovina), paras 279-311.
[351] Prosecution Response (Gotovina), paras 281, 308-310.
[352] Prosecution Response (Gotovina), para. 311. *See also* T. 31 August 2009 pp. 20892, 20938, 20968-20969.
[353] Prosecution Response (Gotovina), para. 311.
[354] Prosecution Response (Gotovina), paras 287, 300-301.
[355] Prosecution Response (Gotovina), para. 302.
[356] Prosecution Response (Gotovina), para. 304.
[357] Prosecution Response (Gotovina), paras 298, 306-307.

123. Finally, the Prosecution contends, with minimal elaboration, that Trial Chamber findings establishing Gotovina's liability for aiding and abetting are also sufficient to establish additional modes of liability, namely planning, ordering, and instigating.[358]

124. Gotovina asserts that the Trial Chamber's conclusions are insufficient to support his conviction under alternate modes of liability for crimes against Serb civilians committed by Croatian Forces in the Krajina.[359] He contends, *inter alia*, that the Trial Chamber's conclusions in regard to his actions were premised on the finding that he ordered unlawful artillery attacks, and that absent this finding, the Trial Chamber's conclusions are no longer valid.[360] Gotovina submits that the Trial Chamber's findings regarding his impact on the general atmosphere of HV forces are insufficient to constitute a substantial contribution to the crime of aiding and abetting.[361] With respect to his liability as a superior, Gotovina asserts that the Trial Chamber's findings do not demonstrate that he exercised effective control over perpetrators,[362] do not prove his knowledge that subordinates were about to commit or had committed crimes,[363] and do not demonstrate that he failed to take necessary and reasonable measures to prevent or punish any such crimes.[364]

125. More specifically, Gotovina submits that the Trial Chamber erred in fact and law by finding that he was responsible for the Failure to Take Additional Measures.[365] Gotovina asserts, *inter alia*, that the Trial Chamber failed to provide a reasoned opinion regarding the impact of any failures to act on his part, and contends that he lacked notice regarding the Trial Chamber's finding that he should have adopted the Additional Measures.[366] Gotovina contends that, to his knowledge and as relevant, all subordinates legally charged with preventing crimes were appropriately alerted as to their responsibilities and effectively carried out their tasks.[367]

126. Gotovina further submits that the Trial Chamber failed to sufficiently credit the actions he took in order to prevent and punish crimes.[368] In this respect, he asserts that, according to evidence on the record, disciplinary measures increased 151 percent in the period during Operation Storm.[369]

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[358] Additional Prosecution Brief (Gotovina), para. 4 n. 11.
[359] Gotovina Additional Response, paras 16-58.
[360] Gotovina Additional Response, paras 28-30, 36, 53.
[361] Gotovina Additional Response, paras 31-35.
[362] Gotovina Additional Response, paras 40-47.
[363] Gotovina Additional Response, paras 48-50.
[364] Gotovina Additional Response, paras 52-56.
[365] *See* Gotovina Appeal, paras 279-334; Gotovina Reply, paras 114-141.
[366] Gotovina Appeal, paras 279-290. *See also* Gotovina Reply, paras 118-119, 134-136.
[367] *See* Gotovina Appeal, paras 302-304, 310-316.
[368] Gotovina Appeal, paras 296-300, 333; Gotovina Reply, paras 120-123, 127-128.
[369] Gotovina Appeal, para. 298.

He also contends that the Trial Chamber erred by failing to consider the testimony of Witness Jones.[370]

(c) Analysis

127. The Appeals Chamber first recalls, as relevant, that for an individual to be held liable for aiding and abetting, he must have substantially contributed to a crime and must have known that the acts he performed assisted the principal perpetrator's crime.[371] This substantial contribution does not necessarily require a positive act; it may be accomplished through omission.[372]

128. The Appeals Chamber further recalls, as relevant, that for an individual to be held liable as a superior under Article 7(3) of the Statute, the existence of a superior-subordinate relationship between the accused and the direct perpetrators of the crimes must be established beyond reasonable doubt. In addition, it must be proved that the superior knew or had reason to know of the crime, and that he failed to take necessary or reasonable measures to prevent or punish subordinates' crimes.[373]

129. The Appeals Chamber notes that the Trial Chamber premised its conclusions regarding Gotovina's Failure to Take Additional Measures on evidence that from July to October 1995 Gotovina received various reports from subordinates and international observers about the occurrence and magnitude of crimes taking place in areas his troops controlled.[374] The Trial Chamber reasoned that based on reports he received and "what was otherwise known to him from other sources and what he must have seen when travelling" in the relevant area, Gotovina realised that comparably few of these crimes were being actively processed and prosecuted, especially those targeting Serbs.[375] Relying on its view that the effectiveness of preventative measures depended on "the stringency of enforcing follow-up measures",[376] the Trial Chamber concluded that once Gotovina realised that subordinates were not properly carrying out their duties with respect to military discipline, he should have intervened.[377] Instead, the Trial Chamber found that Gotovina rarely used his authority over military policy to initiate crime investigations and processing, and that he failed to have subordinates punished for crimes committed.[378] On these bases, the Trial Chamber concluded that Gotovina failed to make a "serious effort to prevent and follow-up on

[370] *See* Gotovina Appeal, paras 283-284; Gotovina Reply, para. 126.
[371] *See Blagojević and Jokić* Appeal Judgement, para. 127.
[372] *Mrkšić and Šljivančanin* Appeal Judgement, para. 134.
[373] *See Orić* Appeal Judgement, para. 18.
[374] Trial Judgement, para. 2363.
[375] Trial Judgement, para. 2363.
[376] Trial Judgement, para. 2364.
[377] Trial Judgement, para. 2365.
[378] Trial Judgement, para. 2365.

crimes" reported to him, thus impacting the "general atmosphere towards crimes in the Split MD."[379]

130. The Appeals Chamber observes that the Trial Chamber's conclusions concerning Gotovina's Failure to Take Additional Measures rest on two additional findings: that Gotovina had ordered unlawful artillery attacks[380] and that Gotovina should have undertaken extra efforts similar to the Additional Measures outlined by the Trial Chamber.[381] The Appeals Chamber recalls that it has, Judge Agius and Judge Pocar dissenting, reversed the Trial Chamber's finding that unlawful artillery attacks took place.[382] The Appeals Chamber also considers, Judge Agius dissenting, that the Trial Chamber's description of the Additional Measures, and the analysis of their impact, was so terse, limited to six lines of text, that it failed to address critical issues.[383] Specifically, the Trial Chamber did not explain which "relevant people" Gotovina should have contacted, what assistance he should have requested from them, or why this step was important.[384] Nor did the Trial Chamber describe the content of additional public statements it believed Gotovina should have made, identify their target audience, or differentiate them from statements Gotovina did make.[385] The Trial Chamber also failed to describe what kind of "available capacities" Gotovina should have diverted towards preventing and following up on crimes.[386] More broadly, the Trial Chamber's discussion of the Additional Measures did not specifically identify how they would have addressed Gotovina's perceived shortcomings in following up on crimes.[387]

131. The Appeals Chamber further observes that the Trial Chamber failed to address the evidence of Witness Jones.[388] Witness Jones testified that he possessed considerable knowledge concerning the responsibilities of military commanders in terms of maintaining military discipline, that he had led investigations of commanders whose troops were involved in criminal/undisciplined conduct, and that he had specific experience interacting with military forces in the former Yugoslavia.[389] Assessing Gotovina's actions, Witness Jones noted, *inter alia*, that after the shelling of the Four Towns, Gotovina was leading military operations in BiH.[390] In this context, he considered that Gotovina took all necessary and reasonable measures to ensure that his subordinates

[379] Trial Judgement, para. 2370.
[380] Trial Judgement, para. 2370.
[381] Trial Judgement, para. 2365.
[382] *See supra*, para. 84.
[383] Trial Judgement, para. 2365.
[384] Trial Judgement, para. 2365.
[385] Trial Judgement, para. 2365. *See also* Trial Judgement, paras 2337-2338.
[386] Trial Judgement, para. 2365.
[387] *See* Trial Judgement, para. 2365.
[388] *See* Trial Judgement, paras 2322-2374. *See also generally* Trial Judgement.
[389] T. 31 August 2009 pp. 20893-20898.
[390] *See* T. 31 August 2009 pp. 20916, 20952-20953.

in the Krajina enforced appropriate disciplinary measures.[391] Witness Jones further testified that he could not identify any additional steps which Gotovina should have taken.[392]

132. The Appeals Chamber recalls that "a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Such disregard is shown when evidence which is clearly relevant […] is not addressed by the Trial Chamber's reasoning."[393] The Appeals Chamber considers that in the context of evaluating whether Gotovina's actions were appropriate, expert testimony from a retired general familiar with the responsibilities of military commanders was directly relevant and thus finds, Judge Agius dissenting, that the Trial Chamber erred by not addressing Witness Jones's testimony in its analysis.

133. The Trial Chamber's error in failing to address Witness Jones's testimony is particularly striking given its acknowledgement of evidence indicating that Gotovina adopted numerous measures to prevent and minimise crimes and general disorder following the artillery attacks, including crimes against Serb civilians.[394] This evidence included Gotovina: approving plans to familiarise soldiers with proper conduct in occupied settlements, including information concerning the application of relevant rules set out by the Geneva Conventions;[395] ordering that commanders at any level and military police be responsible for preventing disruptive conduct;[396] ordering that particular operational groups limit movements of Croatian soldiers in occupied areas so as to prevent theft or undisciplined conduct;[397] and ordering that particular commanders collect and store weapons that were reportedly being used to fire on inhabited settlements.[398] In addition, the Trial Chamber noted evidence that Gotovina: harshly criticised commanders when he observed their troops acting in an undisciplined manner;[399] emphasised the rule of law regardless of nationality;[400] suggested he was not pleased by the knowledge that crimes were being committed by Croatian Forces;[401] and referred complaints about the behaviour of troops to Čermak, who was portrayed as the commander in charge of the region.[402] Finally, the Trial Chamber also reviewed evidence

[391] T. 31 August 2009 p. 20696.
[392] *See* T. 31 August 2009 pp. 20968-20971.
[393] *Limaj et al.* Appeal Judgement, para. 86 (internal quotations and citation omitted).
[394] *See generally* Trial Judgement, paras 2329-2362.
[395] Trial Judgement, para. 2330.
[396] Trial Judgement, para. 2331.
[397] Trial Judgement, para. 2332.
[398] Trial Judgement, para. 2357.
[399] Trial Judgement, paras 2337-2338.
[400] Trial Judgement, para. 2347.
[401] Trial Judgement, para. 2345.
[402] Trial Judgement, para. 2340.

suggesting that there was a large increase in the number of HV prosecutions for disciplinary infractions during Operation Storm.[403]

134. The Trial Chamber found that Gotovina received notice of crimes being committed against Serb civilians in areas under the control of his troops[404] and that his orders do not appear to single out Serb civilians for special protection.[405] However, the Appeals Chamber considers that evidence on the record demonstrates that Gotovina undertook extensive measures to promote discipline among forces under his command, and that his subordinates in the Krajina were enforcing disciplinary measures.[406] This evidence is contextualised and bolstered by Witness Jones's expert testimony and by the fact that disciplinary measures increased significantly during Operation Storm.[407] In these circumstances, the Appeals Chamber, Judge Agius dissenting, considers that there exists reasonable doubt about whether any failure to act on Gotovina's part was so extensive as to constitute a substantial contribution to crimes committed by Croatian Forces or a failure to take necessary and reasonable measures to prevent and punish crimes committed by his HV subordinates.[408]

135. The Appeals Chamber recalls again that the Trial Chamber found that Gotovina incurred criminal liability on the basis of two sets of actions: i) unlawful artillery attacks on the towns of Knin, Obrovac, and Benkovac; and ii) the Failure to Take Additional Measures.[409] The Appeals Chamber has now reversed, Judge Agius and Judge Pocar dissenting, the Trial Chamber's conclusion that artillery attacks on the Four Towns were unlawful,[410] determined that Gotovina's Failure to Take Additional Measures does not give rise to criminal liability,[411] and found that Gotovina cannot be held liable for deportation.[412] In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would constitute the *actus reus* supporting a conviction pursuant to an alternate mode of liability for the crimes Gotovina was convicted of: deportation, persecution, murder, and inhumane acts as crimes against humanity, and

[403] T. 25 November 2008 pp. 12575-12576. *See also* Trial Judgement, para. 2359.
[404] *See* Trial Judgement, para. 2363.
[405] *See* Trial Judgement, paras 2329-2364.
[406] *See supra*, para. 133.
[407] *See supra*, paras 131, 133.
[408] Having found that aiding and abetting liability is not established, the Appeals Chamber need not consider other modes of liability that the Prosecution claims are established on the same factual basis. *See* Additional Prosecution Brief (Gotovina), para. 4 n. 11.
[409] *See* Trial Judgement, paras 2365, 2370.
[410] *See supra*, para. 84.
[411] *See supra*, para. 134.
[412] *See supra*, para. 115.

plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war.[413]

(d) Conclusion

136. Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Gotovina on the basis of alternate modes of liability. Gotovina's remaining arguments and grounds of appeal are therefore moot and will not be considered.

3. Additional Trial Chamber Findings Regarding Markač's Actions

(a) Background

137. The Indictment alleged that Markač was responsible for charged crimes based on the modes of liability of JCE, planning, instigating, ordering, aiding and abetting, and superior responsibility.[414] The Appeals Chamber recalls that the Trial Chamber found Markač guilty, pursuant to the mode of liability of JCE, of deportation, persecution, murder, and inhumane acts as crimes against humanity and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war.[415] The Trial Chamber declined to enter findings on modes of liability other than JCE.[416]

138. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, has reversed the Trial Chamber's finding that Markač made a significant contribution to the JCE through ordering unlawful artillery attacks on civilians and civilian objects in the town of Gračac on 4 and 5 August 1995.[417] However, the Trial Chamber also found that Markač made a second significant contribution to the JCE by taking no steps to prevent or punish criminal acts by members of the Special Police ("Failure to Act"), citing as examples crimes committed in Gračac between 5 and 6 August 1995, and in Donji Lapac between 7 and 8 August 1995.[418] The Trial Chamber further found that members of the Special Police committed killings in Oraovac (Scheduled Killing No. 10) on 7 August 1995, as well as killings and arson in Grubori, and arson in Ramljane, on 25 and 26 August 1995.[419] The Trial Chamber reasoned that Markač should have ordered investigations that would have resulted in the removal of undisciplined elements from relevant forces and clearly

[413] Trial Judgement, para. 2619.
[414] Indictment, paras 37-47.
[415] Trial Judgement, paras 2587, 2622.
[416] Trial Judgement, para. 2587.
[417] *See supra*, para. 84; Trial Judgement, paras 2580, 2582.
[418] Trial Judgement, para. 2581.
[419] Trial Judgement, para. 2581.

signaled that criminal acts would be punished.[420] The Trial Chamber concluded that Markač's Failure to Act created a "climate of impunity which encouraged the commission of further crimes against Krajina Serbs", including Scheduled Killing No. 10, murders, and property destruction in the villages of Grubori and Ramljane.[421]

139. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, observes that the Trial Chamber reached its conclusions regarding Markač's Failure to Act in the context of its finding that the artillery attacks on Gračac were unlawful.[422] The Appeals Chamber also recalls its previous determination that superior responsibility and aiding and abetting were the two modes of liability relevant to any substitution of the modes of liability underlying Markač's conviction.[423]

(b) Submissions

140. The Prosecution contends, *inter alia*, that should the Appeals Chamber set aside Markač's convictions pursuant to JCE, it should find him liable as an aider and abettor and also as a superior for crimes committed after the artillery attacks on the Four Towns, including deportation, persecutions (deportation), plunder, destruction, and murder.[424] The Prosecution submits that Markač was aware of the high likelihood that Croatian Forces would commit crimes, on the basis of the region's history of conflict, warnings from Šušak, the vulnerability of remaining Serb civilians, Markač's physical presence at crime sites, and his receipt of frequent reports on the progress of relevant operations.[425] More specifically, the Prosecution maintains that Markač possessed effective control over Special Police forces,[426] knew or had reason to know of their crimes,[427] and failed to prevent or punish those crimes.[428] On these bases, the Prosecution submits that the Trial Chamber made all findings necessary to enter a conviction against Markač as a superior.[429]

141. More specifically, the Prosecution contends that the Trial Chamber did not err in finding Markač liable for the Failure to Act.[430] It asserts that Markač was present in Gračac while houses were destroyed there,[431] and that he was aware of crimes committed in Donji Lapac but failed to

[420] Trial Judgement, para. 2581.
[421] Trial Judgement, para. 2581.
[422] Trial Judgement, paras 2580-2583.
[423] Order for Additional Briefing, pp. 1-2.
[424] *See* Additional Prosecution Brief (Markač), paras 21-49.
[425] Additional Prosecution Brief (Markač), paras 29-34.
[426] Additional Prosecution Brief (Markač), paras 40-42.
[427] Additional Prosecution Brief (Markač), para. 43.
[428] Additional Prosecution Brief (Markač), paras 44-48.
[429] Additional Prosecution Brief (Markač), paras 25, 49.
[430] Prosecution Response (Markač), para. 98.
[431] Prosecution Response (Markač), para. 99.

take any action to ascertain if his subordinates were responsible for those crimes.[432] The Prosecution asserts that the Trial Chamber properly considered and discounted evidence concerning Markač's measures to prevent crimes.[433] In particular, the Prosecution dismisses his instructions regarding the laws of war, provided prior to Operation Storm, as "*ex ante*" and "vague".[434] More broadly, the Prosecution submits that Markač's efforts to prevent potential crimes were "obviously insufficient" to address the risks posed by Croatian Forces' desire for revenge against Serbs.[435]

142. Finally, the Prosecution also contends, with minimal elaboration, that the findings which establish Markač's aiding and abetting liability are sufficient to establish additional modes of liability: namely planning, ordering, and instigating.[436]

143. Markač asserts, *inter alia*, that the Trial Chamber's finding of unlawful artillery attacks was a prerequisite to its findings on crimes against humanity and its general findings in relation to his failure to prevent and punish.[437] He further asserts that the Trial Chamber did not make relevant findings on superior responsibility, including whether he possessed effective control over his subordinates,[438] and that the Trial Chamber did not find that he knew about the murders in Oraovac or the plunder of Gračac.[439] Markač maintains that the Trial Chamber did not explain what steps he should have taken to prevent or punish crimes in Donji Lapac and Ramljane and that the measures the Trial Chamber did propose were speculative.[440]

144. Markač submits, *inter alia*, that with respect to aiding and abetting, the Trial Chamber's findings are insufficient to establish either that he possessed the requisite *mens rea* or that his actions were specifically directed towards carrying out relevant crimes.[441]

145. Markač also contends that the Trial Chamber failed to adequately consider exculpatory evidence, noting, *inter alia*, his orders that civilians be treated fairly and that the laws of war be respected.[442]

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[432] Prosecution Response (Markač), paras 100-105.
[433] Prosecution Response (Markač), paras 121-123.
[434] Prosecution Response (Markač), para. 122.
[435] Prosecution Response (Markač), para. 123.
[436] Additional Prosecution Brief (Markač), para. 4 n. 11.
[437] Markač Additional Response, paras 21-25, 45-46.
[438] Markač Additional Response, paras 4, 35-44.
[439] Markač Additional Response, para. 4.
[440] Markač Additional Response, para. 4.
[441] *See* Markač Additional Response, paras 4, 26-31.
[442] Markač Appeal, paras 182-185.

(c) Analysis

146. Having reversed, Judge Agius and Judge Pocar dissenting, the Trial Chamber's finding that unlawful artillery attacks took place and that a JCE existed,[443] the Appeals Chamber will consider whether, based on the Trial Chamber's factual findings regarding crimes committed after the artillery attacks on Gračac and other evidence on the record, Markač should be found guilty beyond reasonable doubt on the basis of alternate forms of liability pled in the Indictment.

147. As an initial matter, the Appeals Chamber underscores that the liability ascribed to Markač on the basis of his Failure to Act was premised on particular actions committed by members of the Special Police, rather than by Markač personally.[444] Thus, in order to link Markač to the crimes of persecution, murder, inhumane acts, plunder of public and private property, wanton destruction, or cruel treatment, his relationship to the Special Police must be established. The Appeals Chamber again recalls that the modes of liability most relevant to the findings of the Trial Chamber are superior responsibility and aiding and abetting.[445] In this context, the Appeals Chamber recalls applicable elements of these modes of liability[446] and also observes that findings sufficient to demonstrate a significant contribution to JCE are not necessarily sufficient to support convictions under alternate forms of liability.[447]

148. Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač.[448] However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors."[449]

149. With respect to aiding and abetting, the Appeals Chamber notes that the Trial Chamber did not explicitly find whether Markač made a "substantial contribution" to relevant crimes by the Special Police.[450] While the Trial Chamber concluded that the evidence it considered proved that

[443] *See supra*, paras 84, 98.
[444] *See* Trial Judgement, para. 2583.
[445] *See* Trial Judgement, paras 2329-2375. *See also* Indictment, paras 45-47; Order for Additional Briefing, pp. 1-2.
[446] *See supra*, paras 127-128.
[447] *Cf. Krajišnik* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, para. 104; *Vasiljević* Appeal Judgement, para. 102.
[448] Trial Judgement, para. 194.
[449] Trial Judgement, para. 198. *See generally* Trial Judgement. Judge Agius dissents in relation to this paragraph.
[450] *See generally* Trial Judgement.

Markač's Failure to Act constituted a significant contribution to the JCE,[451] the Appeals Chamber has held that the threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting.[452] Thus the Trial Chamber's finding of a significant contribution is not equivalent to the substantial contribution required to enter a conviction for aiding and abetting.

150. As set out above, the Trial Chamber did not make explicit findings sufficient, on their face, to enter convictions against Markač based on the two alternate modes of liability deemed relevant by the Appeals Chamber.[453] In the absence of such findings, and considering the circumstances of this case, including the full context of the arguments presented by the parties at trial and on appeal, the Appeals Chamber, Judge Agius dissenting, declines to analyse the Trial Chamber's remaining findings and evidence on the record in order to determine whether Markač's actions were sufficient to satisfy the elements of alternate modes of liability. To undertake such an investigation in this case would require the Appeals Chamber to engage in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising Markač's fair trial rights.

151. More specifically, the Appeals Chamber recalls that JCE and unlawful artillery attacks have been the central issues in the parties' arguments since the beginning of this case. The Prosecution's Pre-Trial[454] and Final Trial[455] Briefs consistently focus on the existence of unlawful attacks and a JCE.[456] On appeal, the Prosecution devoted a single footnote to alternate modes of liability in each of its response briefs[457] and referred to the matter only briefly during oral arguments.[458]

152. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, also notes that JCE and unlawful artillery attacks underpin all of the material findings of the Trial Judgement. Indeed, the Trial Chamber emphasised its focus on JCE by explicitly declining to enter findings on the Appellants' culpability under alternate modes of liability pled in the Indictment.[459] The Trial Chamber underscored its dependence on unlawful artillery attacks by relying on these attacks as a prism through which to interpret the Appellants' other relevant actions, explicitly stating that it was considering the Appellants' actions "[i]n light" of its finding that they had ordered unlawful

[451] *See supra*, para. 138.
[452] *See Kvočka et al.* Appeal Judgement, para. 97; *Tadić* Appeal Judgement, para. 229. Judge Agius dissents in relation to this paragraph.
[453] *See supra*, paras 148-149.
[454] *See* Prosecution Pre-Trial Brief, paras 16-51, 127-130.
[455] *See* Prosecution Final Trial Brief, paras 121-133, 383-400, 477-479.
[456] Prosecution Final Trial Brief, paras 124-133, 387-400.
[457] Prosecution Response (Gotovina), para. 333 n. 1112; Prosecution Response (Markač), para. 273 n. 958.
[458] *See* AT. 14 May 2012 p. 102.
[459] *See* Trial Judgement, paras 2375, 2587. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.

artillery attacks.[460] More broadly, the Trial Chamber repeatedly recalled the existence of unlawful attacks in framing its discussion of Markač's liability.[461]

153. In these circumstances, any attempt by the Appeals Chamber to derive inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether Markač's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial.

154. The Appeals Chamber observes that in the context of this case, drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber to enter additional convictions. The Appeals Chamber notes that Markač was provided the opportunity to discuss whether the Trial Chamber's findings implicate alternate forms of liability.[462] However the scope of this additional briefing did not extend to challenging evidence presented to the Trial Chamber.[463] Even if the Appeals Chamber had exceptionally authorised Markač to challenge evidence not related to his convictions, the very large scale of potentially relevant evidence on the record would render any submissions by Markač voluminous and speculative. In addition, Markač would almost certainly have been left uncertain about the scope of the case against him on appeal.[464]

155. The Appeals Chamber notes that the foregoing analysis does not *per se* preclude replacing convictions based on JCE with convictions based on alternate modes of liability. Indeed, the Appeals Chamber has on certain occasions revised trial judgements in this way. However the Appeals Chamber notes that in each of these appeals, the trial chamber's errors had a comparatively limited impact.[465] Thus in the *Simić* Appeal Judgement, the Appeals Chamber entered a conviction on the basis of aiding and abetting after finding that the indictment failed to plead participation in a JCE as a mode of liability.[466] In both the *Vasiljević* Appeal Judgement and the *Krstić* Appeal

[460] Trial Judgement, paras 2370, 2583. Judge Agius and Judge Pocar dissent on the Appeals Chamber's assessment of the Trial Judgement.
[461] *See* Trial Judgement, paras 2580-2587.
[462] *See* Order for Additional Briefing, pp. 1-2.
[463] *See* Order for Additional Briefing, pp. 1-2.
[464] The foregoing discussion also applies to other modes of liability that the Prosecution claims are incurred on the same factual basis. *See* Additional Prosecution Brief (Markač), para. 4 n. 11. Judge Agius and Judge Pocar dissent on this entire paragraph.
[465] *See Simić* Appeal Judgement, paras 74-191, 301; *Krstić* Appeal Judgement, paras 134-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[466] *See Simić* Appeal Judgement, paras 74-191, 301.

Judgement, the Appeals Chamber entered a conviction on the basis of aiding and abetting after finding that the trial chamber erred in concluding that the relevant appellant shared the common purpose of the JCE.[467] In none of these judgements was the trial chamber's analysis concerning the factual basis underpinning the existence of a JCE materially reversed.[468] By contrast, in the present case, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that the Trial Chamber committed fundamental errors with respect to its findings concerning artillery attacks and by extension JCE, which stood at the core of findings concerning the Appellants' criminal responsibility.[469]

156. The Appeals Chamber recalls again that the Trial Chamber found that Markač incurred criminal liability on the basis of two sets of actions: i) unlawful artillery attacks on Gračac; and ii) the Failure to Act. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, has now reversed the Trial Chamber's conclusion that artillery attacks on Gračac were unlawful;[470] found that Markač's Failure to Act does not, in itself, satisfy the elements of aiding and abetting or superior responsibility;[471] determined that it is inappropriate, in the circumstances of this case, to make additional inferences from the findings of the Trial Chamber and evidence on the record;[472] and concluded that Markač cannot be held liable for deportation.[473] In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would allow a conviction pursuant to an alternate mode of liability for the crimes Markač was convicted of: deportation, persecution, murder, and inhumane acts as crimes against humanity, and plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war.[474]

(d) Conclusion

157. Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Markač on the basis of alternate modes of liability. Markač's remaining arguments and grounds of appeal are therefore moot and will not be considered.

[467] *See Krstić* Appeal Judgement, paras 134-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[468] *See Simić* Appeal Judgement, paras 74-191, 301; *Krstić* Appeal Judgement, paras 135-144, p. 87; *Vasiljević* Appeal Judgement, paras 115-135, 139-143, 147, p. 60.
[469] *See supra*, paras 84, 98.
[470] *See supra*, para. 84.
[471] *See supra*, paras 148-149.
[472] *See supra*, para. 150.
[473] *See supra*, para. 115.
[474] Trial Judgement, paras 2587, 2622.

VI. DISPOSITION

158. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 14 May 2012;

SITTING in open session;

GRANTS, Judge Agius and Judge Pocar dissenting, Ante Gotovina's First Ground of Appeal and Third Ground of Appeal, in part; **REVERSES**, Judge Agius and Judge Pocar dissenting, Ante Gotovina's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and **ENTERS**, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Ante Gotovina's remaining grounds of appeal;

GRANTS, Judge Agius and Judge Pocar dissenting, Mladen Markač's First and Second Grounds of Appeal, in part; **REVERSES**, Judge Agius and Judge Pocar dissenting, Mladen Markač's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and **ENTERS**, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Mladen Markač's remaining grounds of appeal;

ORDERS in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Ante Gotovina and Mladen Markač, and **DIRECTS** the Registrar to make the necessary arrangements.

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

_____	_____
Judge Theodor Meron, Presiding	Judge Carmel Agius

_____	_____	_____
Judge Patrick Robinson	Judge Mehmet Güney	Judge Fausto Pocar

Judge Theodor Meron appends a separate opinion.

Judge Carmel Agius appends a dissenting opinion.

Judge Patrick Robinson appends a separate opinion.

Judge Fausto Pocar appends a dissenting opinion.

Dated this 16th day of November 2012,

At The Hague, The Netherlands

VII. SEPARATE OPINION OF JUDGE THEODOR MERON

1. While I join the Majority's analysis as set out in the Appeal Judgement, I write separately primarily to explain my views on the Appeals Chamber's jurisprudence with respect to convictions pursuant to alternate modes of liability.

2. As an initial matter, I observe that the bench is unanimous in holding that the Trial Chamber erred in deriving the 200 Metre Standard. While not all my Colleagues join the Majority view on the consequences of this error, there is no dispute over its existence.[1]

3. I further observe that the Appeal Judgement makes two clear advances to the criminal procedure precedent of the Tribunal. For the first time, a panel considering entering convictions pursuant to an alternate mode of liability requested explicit briefing from parties on this issue. The Appeal Judgement also helps clarify our jurisprudence by setting out in more detail the judicial rationale underlying the Appeals Chamber's power to enter convictions pursuant to alternate modes of liability.

4. I join the Majority in holding that the Appeals Chamber possesses the power to enter convictions pursuant to alternate modes of liability. However, I would underscore that this authority does not constitute a panacea to address any and all errors by the Prosecution or a trial chamber. Instead, I believe that this power should only be exercised selectively, where: i) any additional inferences from findings set forth in a relevant trial judgement are restricted; and ii) any differences between the convictions that appellants initially appealed and convictions entered on appeal are limited. Otherwise, the Appeals Chamber risks undermining appellants' fair trial rights, or conducting a second trial rather than reviewing the trial chamber's alleged errors.[2]

5. Whether it is warranted to enter convictions pursuant to alternate modes of liability in a given appeal constitutes a fact-specific question best left to individual benches. But as a general matter, I do not believe that the Appeals Chamber's authority serves as a licence for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber. In this context, I recall that our jurisprudence has consistently indicated that sudden, significant alterations in the scope of a case may deny individuals their fair trial rights. Thus, for example, in the *Kupreškić et al.* Appeal Judgement, the Appeals Chamber found that two appellants had been unacceptably prejudiced by the "drastic change" in the Prosecution's case of which they had no

[1] *See* Appeal Judgement, para. 61.
[2] I would underscore that this discussion refers to convictions pursuant to alternate means of liability which are not requested in an appeal by the Prosecution.

effective notice.[3] Similarly, I note that in past cases where the Appeals Chamber entered convictions pursuant to alternate modes of liability, changes to the structure of the case faced by appellants were limited in nature. For example, the Appeals Chamber entered such convictions to address technical but effectively non-substantive errors in indictments,[4] or after finding that appellants aided a JCE but were not proved to share its common purpose.[5]

6. In the present Appeal Judgement, I am satisfied that the Majority acts prudently and fairly in not entering additional convictions. I also agree with the Majority's logic in addressing those findings with respect to each Appellant which were not reversed. However, were I solely responsible for the Appeal Judgement, I would not have undertaken this latter analysis. In this regard, I first recall that in the Appeal Judgement, the Majority reverses the fundamental conclusions of the Trial Chamber, including the finding that a JCE existed.[6] I also note that discussion of modes of liability other than JCE was almost entirely absent from core trial and appeal briefing.[7] In circumstances like these, while fully supporting the Appeal Judgement, I do not believe the Appeals Chamber should enter convictions pursuant to alternate modes of liability. Such convictions would, in my view, necessarily involve unfairness to the Appellants, who would be found guilty of crimes very different from those they defended against at trial or on appeal.[8] Accordingly, I consider that analysis of the Trial Chamber's "remaining findings",[9] like that

[3] *Kupreškić et al.* Appeal Judgement, para. 121. *See also Kupreškić et al.* Appeal Judgement, para. 122; *Ntagerura et al.* Appeal Judgement, paras 146-150, 164.
[4] *See, e.g.*, *Rukundo* Appeal Judgement, paras 37, 115 (In which the Appeals Chamber replaced Rukundo's conviction for committing certain crimes with convictions for aiding and abetting these same crimes based on its finding that commission as a mode of liability was not pled in the indictment).
[5] *See, e.g.*, *Krstić* Appeal Judgement, paras 135-144 (In which the Appeals Chamber found that Krstić did not possess the intent to commit genocide, but instead possessed knowledge of the exact same set of crimes, and did not reverse the finding that a JCE existed); *D. Milošević* Appeal Judgement, paras 275-282 (In which the Appeals Chamber found that the evidence did not establish that Dragomir Milošević ordered numerous shelling incidents but was responsible as a superior for those crimes). I note that in the *Simić* Appeal Judgement, in which the Appeal Chamber entered an alternate conviction for aiding and abetting after reversing a finding that a JCE existed, the Appeals Chamber underscored that aiding and abetting liability had been extensively discussed both at trial and on appeal. *See Simić* Appeal Judgement paras 74-191, 301.
[6] Appeal Judgement, paras 84, 98.
[7] The Prosecution's arguments at trial and on appeal focused on the existence of a JCE involving unlawful artillery attacks. While the Indictment charged the Appellants with, *inter alia*, aiding and abetting and superior responsibility, Indictment, paras 36-37, 45-46, post-Indictment proceedings provided only limited indications that the Prosecution was pursuing these alternate forms of liability. The Prosecution's Pre-Trial Brief and Final Trial Brief consistently focus on the existence of unlawful attacks and a JCE. *Compare* Prosecution Final Trial Brief, paras 1-123, 383-386, 477-660 (outlining the existence of a JCE and the centrality of the unlawful attacks), *with* Prosecution Final Trial Brief, paras 124-132, 387-399 (addressing alternate modes of liability). *See also* Prosecution Pre-Trial Brief, paras 127-132. Even the Prosecution's brief discussions of other modes of liability often include references to unlawful attacks. *See* Prosecution Final Trial Brief, paras 124-133, 387-400. On appeal, the Prosecution devoted only a single footnote to alternate modes of liability in each of its appeal response briefs, *see* Prosecution Response (Gotovina), para. 333 n. 1112; Prosecution Response (Markač) para. 273 n. 958, and referred to the matter only in passing during the Appeal Hearing, *see* AT. 14 May 2012 p. 102. *See also* Trial Judgement, paras 2375, 2587.
[8] In this regard I note that I join the Majority in finding that in the circumstances of this case, supplementary briefing would not cure such unfairness. *See* Appeal Judgement, para. 154.
[9] Appeal Judgement, para. 150.

undertaken by the Appeal Judgement,[10] is unnecessary, as the Tribunal's commitment to fair trial rights should, in this case, foreclose the possibility of convictions pursuant to alternate modes of liability.

7. I reiterate that, in appropriate circumstances, the Appeals Chamber's power to enter convictions pursuant to alternate forms of liability can be deployed to serve the interests of justice. This authority must, however, be wielded sparingly, in appropriate circumstances, and only where its exercise does not impinge on the rights of appellants. The Appeal Judgement's holding respects this principle, and this is the basis on which I join the Majority.

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

_____
Judge Theodor Meron

Dated this 16th day of November 2012,

At The Hague,

The Netherlands.

[Seal of the Tribunal]

[10] *See* Appeal Judgement, paras 111-155.

VIII. DISSENTING OPINION OF JUDGE CARMEL AGIUS

1. For the reasons set out below, I respectfully but strongly disagree with almost all of the conclusions reached by the Majority in this Appeal Judgement. Furthermore, I wish to register my disagreement with the approach taken by the Majority throughout the Appeal Judgement, and to distance myself from that approach.

A. Unlawful Artillery Attacks and Existence of a JCE

2. According to the Majority, the Trial Chamber erred in two respects in undertaking its analysis of individual impact sites within the Four Towns. The first error related to the Trial Chamber's adoption of the 200 Metre Standard,[1] and the second error was found in the Trial Chamber's conclusion that no artillery attacks on Knin were aimed at targets of opportunity.[2] In the Majority's view, these two errors are "sufficiently serious" as to undermine the conclusions of the Trial Chamber's Impact Analysis.[3] In turn, because in its view the Impact Analysis was crucial to the Trial Chamber's conclusions that the attacks on the Four Towns were unlawful, the Majority finds that those broader conclusions of the Trial Chamber also cannot be sustained.[4] According to the Majority, the remaining evidence "does not definitively demonstrate that artillery attacks against the Four Towns were unlawful".[5] On this basis, it concludes that no reasonable trial chamber could conclude beyond reasonable doubt that the Four Towns were subject to unlawful attack.[6] I agree with the Majority that the Trial Chamber erred in relation to the 200 Metre Standard. I also agree with the Majority that the Trial Chamber did not err when concluding that no evidence existed of targets of opportunity in Benkovac, Gračac and Obrovac.[7] However, I disagree that the Trial Chamber erred in relation to targets of opportunity in Knin, and with all of the other conclusions I have just set out. Furthermore, I strongly disagree with the approach taken by the Majority.

3. My overriding concern with the Majority's approach is that it seems to lose sight of the essential question in this appeals case, being whether, based on the *totality* of the evidence, it was reasonable for the Trial Chamber to conclude that the attacks on the Four Towns were unlawful. At every turn, rather than looking at the totality of the evidence and findings, the Majority takes an overly compartmentalised and narrow view. It examines separate component parts of the Trial

[1] Appeal Judgement, para. 61.
[2] Appeal Judgement, para. 63.
[3] Appeal Judgement, para. 67.
[4] Appeal Judgement, para. 83.
[5] Appeal Judgement, para. 83.
[6] Appeal Judgement, para. 83.
[7] *See* Appeal Judgement, para. 63.

Chamber's conclusions in isolation, identifies one as the underpinning piece and denounces its validity, and discards the rest, one by one, by finding that their evidentiary value depends on the underpinning piece, with the knock-on effect that the entire Trial Judgement falls.

4. Using this approach, the Majority erroneously regards the 200 Metre Standard as the critical piece underpinning all of the Trial Chamber's findings regarding the unlawfulness of the attacks on the Four Towns.[8] On this basis, it concludes that the Trial Chamber's error in respect of the 200 Metre Standard, together with its error in relation to targets of opportunity in Knin, undermines all of the Trial Chamber's relevant findings with regard to the Impact Analysis,[9] and in turn undermines the Trial Chamber's broader findings that the attacks on the Four Towns were unlawful.[10] In this way, the 200 Metre Standard becomes fatal to the whole Trial Judgement. I find this approach to be artificial and defective, and, in my opinion, it has led to an incorrect result in this case. I also consider the Majority's analysis to be flawed in numerous respects, as set out below.

1. 200 Metre Standard

5. I turn first to the Majority's treatment of the Trial Chamber's error with respect to the 200 Metre Standard, as this is at the core of the Majority's position.[11] The Majority considers that the Trial Chamber erred in: (i) adopting a margin of error that was not linked to any evidence it received; and (ii) failing to provide any explanation as to the basis for the margin of error it adopted and therefore failing to provide a reasoned opinion.[12] I agree with the Majority that the Trial Chamber erred in these respects. However, I fundamentally disagree with the Majority in relation to the fatal impact of this error, and I find the Majority's approach and analysis to be confusing and extremely problematic.

6. While I note that the Majority does not characterise the Trial Chamber's initial error in adopting the 200 Metre Standard either as an error of fact or as an error of law,[13] it appears to regard the Trial Chamber's second error in relation to the 200 Metre Standard – namely, its failure to provide a reasoned opinion – as a legal error.[14] The Majority recalls that it: "has found that the Trial Chamber failed to provide a reasoned opinion in deriving the 200 Metre Standard, a core

[8] *See* Appeal Judgement, paras 64-67, 83-84.
[9] Appeal Judgement, paras 64-67.
[10] Appeal Judgement, paras 83-84.
[11] *See* Appeal Judgement, paras 64-67, 83-84.
[12] Appeal Judgement, para. 61.
[13] Appeal Judgement, paras 61, 64.
[14] Appeal Judgement, para. 64.

component of its Impact Analysis."[15] It then states that "[i]n view of this legal error, the Appeals Chamber will consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid."[16]

7. In my view, the approach taken by the Majority, once it has stated its intention to undertake a *de novo* review on the basis of a legal error, is extremely confusing and in no way resembles an application of the proper standard of review applicable to errors of law – or indeed any recognisable standard of review.

8. I recall that, as set out earlier in this Appeal Judgement:

> [w]here the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[17]

9. In this case, the Majority has not identified any error of law "arising from the application of an incorrect legal standard".[18] It has simply identified an error of law in the Trial Chamber's failure to provide a reasoned opinion,[19] and such a failure is clearly not an error of law arising from the application of an incorrect legal standard. Thus, as I see it, without identifying any other error arising from the application of an incorrect legal standard, the Majority is simply not entitled to conduct a *de novo* review of the evidence on the basis of the Trial Chamber's failure to provide a reasoned opinion.

10. If the Majority considers instead that the Trial Chamber's initial error in "adopting a margin of error that was not linked to any evidence it received"[20] constituted an error of law arising from the application of an incorrect legal standard (which would then permit it to proceed with a *de novo* review), then it ought to have clearly explained why this was the case. It has not done so. More importantly, however, even if it had so identified the Trial Chamber's first error, the Majority would not be permitted to proceed with its current approach.

11. Returning to the above standard of review applicable to errors of law, the Majority may only review the relevant factual findings of the Trial Chamber once it has articulated "the correct legal

[15] Appeal Judgement, para. 64.
[16] Appeal Judgement, para. 64.
[17] Appeal Judgement, para. 12.
[18] Appeal Judgement, para. 12.
[19] Appeal Judgement, para. 64.
[20] Appeal Judgement, para. 61.

standard".[21] Having done so, it should then apply that standard to the facts of this case and determine whether, based on that standard, the attacks were unlawful. Here, the Majority simply commences its purported *de novo* review by stating that "[a]bsent an established range of error, the Appeals Chamber […] cannot exclude the possibility that all of the impact sites considered in the Trial Judgement were the result of shelling aimed at targets that the Trial Chamber considered to be legitimate."[22] The Majority thus patently fails to even attempt to articulate any legal standard with which to replace the 200 Metre Standard - assuming it considers the 200 Metre Standard to be an incorrect legal standard, and that is certainly not indicated anywhere in its analysis. Strictly speaking, therefore, it was not entitled to review the relevant factual findings in the absence of such a standard.

12. However, the failure to set an alternative standard aside, it is the Majority's purported review itself which is more disturbing. Before proceeding further, I should mention that I find the fact that the Majority feels it can conduct a *de novo* review and come to its conclusions within just three paragraphs of the Appeal Judgement[23] to be quite staggering, and, in my view, unfairly dismissive of the Trial Chamber's findings. I note that the Trial Judgement totals over 1300 pages, with the evidence and Trial Chamber's findings on the unlawfulness of the attacks on the Four Towns set out over 200 pages.[24]

13. The Majority finds that, absent the 200 Metre Standard: (i) the fact that a relatively large number of shells fell more than 200 metres from fixed artillery targets "could be consistent with a much broader range of error";[25] (ii) the spread of shelling across Knin is "plausibly explained by the scattered locations of fixed artillery targets, along with the possibility of a higher margin of error";[26] (iii) evidence of HV units having aimed artillery in the general direction of the Four Towns is "inconclusive" in the absence of the 200 Metre Standard;[27] and (iv) the Trial Chamber's conclusion that impacts in Knin occurring particularly far from legitimate targets could not be justified by any plausible range of error, is not "adequately supported", in view of its errors with respect to the 200 Metre Standard and targets of opportunity.[28] On these bases, therefore, the Majority proceeds to discard *all evidence on the record* with respect to the impact sites.[29]

[21] Appeal Judgement, para. 12.
[22] Appeal Judgement, para. 65.
[23] Appeal Judgement, paras 65-67.
[24] Trial Judgement, pp. 594-777, 957-981.
[25] Appeal Judgement, para. 65.
[26] Appeal Judgement, para. 65.
[27] Appeal Judgement, para. 65.
[28] Appeal Judgement, para. 66.
[29] *See* Appeal Judgement, paras 67-68.

14. I find this an extraordinary approach to take. Not only is it unacceptably speculative, it also fails to comport with any recognisable standard of review. If the Majority is proceeding on the basis of a legal error found in the margin of error adopted by the Trial Chamber, it has the duty to formulate its own margin of error or other standard with which to assess the evidence regarding impact sites and thus the lawfulness of the artillery attacks. The Majority cannot simply discard all of the evidence with respect to impact sites on the basis that there is no longer an "established range of error", and essentially substitute its own finding to the effect that all shelling *may* have been lawful. In doing so, the Majority has impermissibly tied all of the Trial Chamber's findings to the 200 Metre Standard, and then simply dismissed them, when it should instead have formulated and applied its own legal standard. It has thus clearly failed in its duty to correct the – as yet, unidentified – error of law.

15. Having criticised the Majority for its failure to follow the correct standard of review applicable to errors of law, it is possible that there may be another – admittedly, generous – way in which to interpret the Majority's approach. Given that the Majority clearly: (i) declines to characterise the Trial Chamber's first error in "adopting a margin of error that was not linked to any evidence it received" as an error of fact or of law; (ii) fails to identify the 200 Metre Standard as an incorrect legal standard; (iii) shuns any responsibility for articulating a correct legal standard before undergoing its review of the evidence; and (iv) fails to otherwise indicate any clear jurisprudential basis for the particular course taken, one could perhaps imply from this that the Majority instead regards that first error as one of fact.[30] However, I find it is impossible to know exactly what the Majority is thinking in this respect, given its confusing, and confused, analysis.

16. Nevertheless, assuming the Majority were proceeding on the basis of regarding the adoption of the 200 Metre Standard as a factual error, despite having announced its intention to undertake a *de novo* review, then it also clearly fails to apply the correct standard of review with respect to errors of fact.[31] At no time does the Majority appear to assess whether a reasonable trial chamber

[30] I note here that the Majority indeed recalls, at the beginning of its analysis of the Trial Chamber's findings relating to the unlawfulness of the attacks on the Four Towns, that: "[i]t is incumbent on the Trial Chamber to adopt an approach it considers most appropriate for the assessment of evidence. The Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted. However, the Appeals Chamber is aware that whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice." Appeal Judgement, para. 50.

[31] *See* Appeal Judgement, para. 13, recalling that: "[r]egarding errors of fact, the Appeals Chamber will apply a standard of reasonableness. It is well established that the Appeals Chamber will not lightly overturn findings of fact made by the trial chamber: 'In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. […] Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.'"

could conclude that the artillery attacks were unlawful on the basis of the evidence regarding impact sites, notwithstanding the error in the 200 Metre Standard. Instead, it uses the language of *de novo* review,[32] and concludes by simply stating that, given the seriousness of the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity, the "conclusions of the Impact Analysis cannot be sustained."[33] I will demonstrate below that, even if the Majority is proceeding on the basis of a factual error, its approach to the task at hand – *i.e.* in assessing the impact of that error – is fundamentally flawed, just as its approach on the basis of a legal error is fundamentally flawed.

17. With all due respect, the first error of the Majority in this context lies in its conclusion that, once it is agreed that the Trial Chamber erred in applying the 200 Metre Standard, there is therefore no "established margin of error", with the result that all evidence regarding impact sites is discarded.[34] According to the Majority, all such evidence is thus intrinsically tied to the 200 Metre Standard and must fall, with the result that the entire Trial Judgement also falls.[35] In this way, the Majority is able to discard the Trial Judgement in one fell swoop. Further, in so doing the Majority misinterprets the Trial Judgement, because, as will be explained, it is simply not correct to say that the Trial Chamber tied all of its conclusions on the unlawfulness of the attacks to the 200 Metre Standard, or that the remaining evidence regarding impact sites does not provide sufficient indications of unlawfulness in the absence of the 200 Metre Standard.

18. In my opinion, the Majority's reasoning is defective, just as the Trial Chamber's decision to adopt the 200 Metre Standard was defective. In the absence of the 200 Metre Standard, there remains evidence on the record from Witnesses Konings,[36] Leslie[37] and Rajčić[38] regarding the accuracy of the weaponry used by the HV in shelling the Four Towns, and other evidence relating to the HV's capability in controlling the margin of error for its weaponry.[39] The Majority completely disregards this evidence and assumes that it loses all evidentiary value outside the context of the 200 Metre Standard.[40] This is simply not the case. Short of a decision by the Majority

[32] *See* Appeal Judgement, para. 65: "The Appeals Chamber considers that absent the 200 Metre Standard, *this latter evidence is inconclusive*" (emphasis added); para. 66: "The possibility of shelling such mobile targets, combined with the lack of any dependable range of error estimation, *raises reasonable doubt* about whether even artillery impact sites particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate unlawful shelling" (emphasis added).
[33] Appeal Judgement, para. 67.
[34] Appeal Judgement, para. 65.
[35] Appeal Judgement, paras 65-67, 83, 96.
[36] *See* Appeal Judgement, paras 52-53, 55. *See also* Trial Judgement, paras 1163-1165, 1167-1169, 1171, 1174, 1898.
[37] *See* Appeal Judgement, paras 52, 54, 55. *See also* Trial Judgement, paras 1167, 1898.
[38] *See* Appeal Judgement, paras 52, 54. *See also* Trial Judgement, paras 1237, 1898.
[39] *See* Trial Judgement, para. 1898.
[40] I note here also that the majority does not in any event address the evidence regarding the HV's "ten digit coordinate system" referred to in Trial Judgement, para. 1898. *See infra*, para 21. *See also* Appeal Judgement, paras 52-57.

to appoint its own artillery expert, the underlying evidence regarding margins of error stands, and cannot be ignored by the Majority, particularly when in relation to Knin, at least 900 projectiles fell all over the town in just one and a half days,[41] and there are no findings of any resistance coming from the town.[42] This underlying evidence, which itself has never been called into question, must therefore be taken into account by the Majority in determining whether a reasonable trier of fact could conclude that the attacks were unlawful, despite the error in the 200 Metre Standard.

19. At the very minimum, the evidence given by Witnesses Konings, Rajčić and Leslie suggests that the further away an impact site from a legitimate target, the higher the probability that the relevant projectile was not fired at that legitimate target.[43] Further, it suggests that the chance of projectiles falling more than 400 metres from a legitimate target as a result of the inaccuracy of the HV weaponry is extremely small.[44] In my opinion, a reasonable trier of fact could thus clearly rely on this evidence in assessing the unlawfulness of the attacks, despite the absence of the 200 Metre Standard.

20. For this reason, the Majority's conclusion is also defective because, in its view, if there is no established margin of error, then even impacts which were more than 400 metres distant from the nearest military target would still have to be ignored.[45] This conclusion thus allows the Majority to avoid considering evidence of *any* artillery impacts further than 400 metres from the nearest military target, and therefore outside the highest possible range of error given at trial, which I emphasise was given by Witness Leslie in respect of "**a first shot**".[46] It thus has the effect of rendering, in the Majority's view, all artillery impacts potentially lawful,[47] when – as I see it – there are clear indications to the contrary which could be taken into account by a reasonable trier of fact.[48]

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[41] Trial Judgement, para. 1899.
[42] *See* Trial Judgement, paras 1893-1912.
[43] *See* Trial Judgement, para. 1898.
[44] I note that both **Witness Konings** and **Witness Rajčić** gave evidence of margins of error less than 400 metres. *See supra*, fns 36, 38. **Witness Leslie** indicated that a maximum error of 400 metres "for a first shot" for both the 130-milimetre guns and the BM-21s used by the HV was acceptable. Trial Judgement, para. 1898. The Majority finds that "only Witness Leslie provided a range of error estimate for BM-21s, and the Trial Chamber declined to rely on this evidence". Appeal Judgement, para. 59. However, although the Trial Chamber declined to adopt 400 metres as the margin of error for the HV's artillery weaponry, the Trial Chamber did not dismiss this evidence itself. Trial Judgement, para. 1898. On the contrary, the Trial Chamber specifically considered Witness Leslie's testimony on the accuracy of the HV's artillery weaponry in determining "whether the artillery impacts on civilian sites at distances of 300 to 700 metres from the nearest military targets could have been results of errors or inaccuracies in the HV's artillery fire". Trial Judgement, para. 1906.
[45] *See* Appeal Judgement, paras 65-66.
[46] Trial Judgement, para. 1898. *See also supra*, fns 37, 44.
[47] *See* Appeal Judgement, paras 65-66.
[48] *See supra*, para. 18, and *infra*, para 21.

21. In my opinion, the Majority is not entitled to effectively raise the margin of error *ad infinitum*, as it does here. With its reasoning, it would practically be impossible to classify any attack as indiscriminate on the basis of evidence regarding impact sites, in the absence of an established margin of error. I find this approach to be most disturbing, particularly in the circumstances of this case, where: (i) there is evidence of projectiles falling further than 400 metres from the nearest military target,[49] and thus beyond the maximum range of error given at trial, which I emphasise again was for **a first shot**;[50] (ii) at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any resistance coming from the town;[51] (iii) the Trial Chamber found that that the HV artillery lists in evidence indicated that the HV used a ten-digit coordinate system, "which would enable it to plot its target with the accuracy of up to one metre";[52] and (iv) Witness Rajčić himself, the chief of artillery of the Split MD (of which Gotovina was commander), gave a margin of error less than the 200 Metre Standard adopted by the Trial Chamber.[53]

22. I also strongly disagree with the Majority's decision to specifically write off the Trial Chamber's findings regarding the limited instances of impacts in Knin occurring "particularly far from identified artillery targets".[54] According to the Majority, the Trial Chamber's conclusion in this respect is "not adequately supported", in view of the Majority's findings of errors based on the 200 Metre Standard and the presence of targets of opportunity in Knin.[55] In its opinion, these two factors combined "raise reasonable doubt about whether even artillery impacts particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate unlawful shelling".[56] I cannot agree with the Majority on this. I refer to my arguments above and to my conclusion on targets of opportunity below, and add that the evidence that the Majority chooses to write off as insufficient is, in my opinion, very relevant for establishing the unlawfulness of the attacks notwithstanding the error of the Trial Chamber in adopting the 200 Metre Standard.

23. Finally, I refer to the following findings by the Trial Chamber, which I consider to be significant in indicating the indiscriminate nature of the attacks despite the absence of the 200 Metre Standard. According to the Majority, all of these findings can be ignored:

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[49] *See infra*, para. 23.
[50] Trial Judgement, para. 1898. *See also* s*upra*, fns 37, 44.
[51] In addition, the Trial Chamber found that at least 150 projectiles fell on Benkovac and its immediate vicinity on 4 and 5 August 1995 (Trial Judgement, para. 1916) and that no fewer than 150 projectiles fell on Gračac and its immediate vicinity on 4 August 1995; Trial Judgement, para. 1928. The Trial Chamber also made no findings of resistance coming from Benkovac, Gračac and Obrovac. *See* Trial Judgement, paras 1914-1945.
[52] Trial Judgement, para. 1898, *referring to* Exhibits P1271, P1272.
[53] *See supra*, fn. 38.
[54] Appeal Judgement, para. 66.
[55] Appeal Judgement, para. 66.
[56] Appeal Judgement, para. 66.

- In relation to Knin, the evidence showed that the HV did not target St Anne's Monastery (KV-110) and the Southern Barracks (KV-210), but this notwithstanding, on the morning of 4 August 1995, the HV fired at least three artillery projectiles at three separate times which impacted in a field in front of the UN Compound in the Southern Barracks.[57]

- The HV did not consider the railway fuel storage located in the area east of Knin to be an artillery target, nor was it used by the SVK. Yet, on 4 August 1995, at least one projectile was fired upon it by the HV.[58]

- On 4 and/or 5 August 1995, the HV fired at least four artillery projectiles which impacted in the immediate vicinity of the hospital in Knin, which was approximately 450 metres from the nearest artillery target.[59]

- On 4 and/or 5 August 1995, the HV also fired at least one projectile which impacted near the Knin cemetery, which was approximately 700 metres from the nearest artillery target identified by Witness Rajčić.[60]

- In the opinion of the Trial Chamber, at least 50 projectiles – which it considered to be a significant number – landed in areas of impact 300 to 700 metres from identified artillery targets. Furthermore, these areas were spread out across Knin to its southern, eastern and northern outskirts.[61]

- As regards Benkovac, the Trial Chamber found that on 4 August 1995, HV forces fired shells which impacted on the Bagat and Kepol factories and cool storage located approximately 700 metres south of the nearest artillery target.[62]

- On the same day, the HV also fired shells which impacted on at least three areas in the Ristić Pine Woods, at least 500 metres away from the nearest artillery target, and in the hamlets of Ristić and Benkovačko Selo.[63]

- As regards Gračac, the Trial Chamber found that on 4 August 1995, artillery projectiles landed near Steenbergen's house, which was located approximately 800 metres from the nearest artillery target in Gračac.[64]

[57] Trial Judgement, para. 1904.
[58] Trial Judgement, para. 1905.
[59] Trial Judgement, para. 1905.
[60] Trial Judgement, para. 1906.
[61] Trial Judgement, para. 1906.
[62] Trial Judgement, para. 1920.
[63] Trial Judgement, para. 1920.

- As regards Obrovac, the Trial Chamber found that the HV deliberately fired projectiles on the Trio factory, which was approximately 450 metres from the nearest artillery target.[65]

24. In all of these instances, the Trial Chamber came to the conclusion that it could not consider it a reasonable interpretation of the evidence that the projectiles impacted in these areas incidentally as a result of errors or inaccuracies in the artillery fire, and it found that the HV had deliberately fired artillery projectiles targeting these areas.[66] Having carefully examined the Trial Judgement, I can find no reason why a reasonable trial chamber could not have reached these conclusions, and I consider that the Majority cannot simply ignore such evidence.

25. In conclusion, I cannot agree with the Majority in its decision to effectively write off these and other significant findings, as outlined above. Such evidence can and must be taken into account in assessing whether, based on the evidence regarding impact sites, a reasonable trier of fact could conclude that the artillery attacks were unlawful despite the error in the 200 Metre Standard. In my opinion, a reasonable trier of fact could certainly so conclude.

26. Apart from being completely unjustified, the Majority's approach also amounts to an unjustified departure from the jurisprudence of the Tribunal, which establishes that factual findings of a trial chamber should not be lightly disturbed.[67] The Majority, which – unlike the Trial Chamber – did not have the benefit of hearing all of the evidence, simply discards the considerations and assessments of the Trial Chamber in a manner which I consider to be unorthodox and unacceptable.

27. As shown above, regardless of whether the Majority considers the Trial Chamber's error with the respect to the 200 Metre Standard to be an error of law or of fact, its approach to that error is extremely unclear and patently fails to accord with any standard of review. Further, the Majority's conclusions in respect of the impact of the error are, in my opinion, untenable.

2. Targets of Opportunity

28. The Majority concludes that the Trial Chamber erred when finding that no artillery attacks were aimed at targets of opportunity in Knin.[68] As indicated earlier, I disagree with this conclusion,

[64] Trial Judgement, para. 1932.
[65] Trial Judgement, para. 1940.
[66] *See supra*, fns 48-58. *See also* Trial Judgement, para. 1909, where the Trial Chamber stated that it "considers that the number of civilian objects or areas in Knin deliberately fired at by the HV may appear limited in view of the total of at least 900 projectiles fired at the town on 4 and 5 August 1995. However, the Trial Chamber recalls that it was able to conclusively determine the precise locations of impact for only some of these 900 projectiles. Of the locations of impact which the Trial Chamber was able to establish, a considerable portion are civilian objects or areas."
[67] Appeal Judgement, para. 13.
[68] Appeal Judgement, para. 63.

although I agree with the Majority that the Trial Chamber did not err when concluding that no evidence existed of targets of opportunity in Benkovac, Gračac and Obrovac.[69]

29. The Majority reaches its conclusion regarding targets of opportunity in Knin on the bases that, *inter alia*: (i) a police car was in fact hit; (ii) there is evidence of targets of opportunity moving through the town during the artillery attack;[70] and (iii) the Trial Chamber did not explicitly exclude the possibility that HV forces could observe movements of targets of opportunity in Knin.[71]

30. In my opinion, the Majority misrepresents the relevant findings of the Trial Chamber. The Trial Chamber in fact found, *inter alia*, that: (i) Rajčić testified that there was no clear line of sight from the HV positions to the settlement of Knin before Operation Storm; (ii) HV artillery reports and orders do not mention the use of artillery observers in Knin; and (iii) the evidence does not establish whether the HV had artillery observers with a view of Knin at any point during 4 August 1995.[72] The Trial Chamber further reasoned that if the HV did not have artillery observers, they would have been unable to spot, report on, and then direct fire at SVK or Police units or vehicles at least on 4 August 1995.[73] It added that if the HV did have artillery observers with a view of Knin on 4 and 5 August 1995, apart from the only police car hit, the limited evidence of SVK or police movements did not relate to the areas of the ECMM building, the hospital, the area on Knin's eastern outskirts, or the field across from the UN Compound.[74]

31. Based on this, I consider the Trial Chamber's conclusion that there is no evidence that the HV aimed at targets of opportunity in Knin to be entirely reasonable, and it therefore should not have been disturbed by the Majority.

32. In addition, I note more broadly that the Majority fails to realise that, in its approach and conclusions regarding targets of opportunity, it falls into a blatantly unfortunate contradiction, as follows. With respect to the one police car that was hit in Knin, the Majority assumes that HV artillery weaponry could be so accurate as to obtain a direct hit, but with regard to all of the military targets which had been pre-established with proper co-ordinates, the Majority effectively gives the HV the benefit of the doubt *ad infinitum*. I would be enlightened by an explanation from the Majority as to how, if the HV could be so accurate with regard to a moving object, it could miss military targets by hundreds of metres?

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[69] Appeal Judgement, para. 63.
[70] Appeal Judgement, para. 63. *See also* para. 62.
[71] Appeal Judgement, para. 62.
[72] Trial Judgement, para. 1907.
[73] Trial Judgement, para. 1907.
[74] Trial Judgement, para. 1908.

3. Other Evidence of Unlawful Artillery Attacks

33. In my opinion, the Majority inflates, beyond any reasonable proportion, the importance of the Trial Chamber's so-called error in respect of targets of opportunity in Knin. It then uses that error, together with the 200 Metre Standard error, the import of which has also been greatly exaggerated, to undermine the Trial Chamber's Impact Analysis in what I consider to be a most artificial way. Having neatly disposed of the Impact Analysis, the Majority then considers whether a reasonable trial chamber could have found that the remaining evidence was sufficient to support the conclusion that unlawful artillery attacks against the Four Towns took place.[75] In turn, given the "significance" of the Trial Chamber's reliance on the Impact Analysis, it concludes – inevitably – that no reasonable trial chamber could have so found.[76]

34. According to the Majority, the Trial Chamber deemed "almost all" of the additional evidence it considered as "equivocal", absent the results of the Impact Analysis.[77] In this line of reasoning, the Majority basically writes off the Trial Chamber's conclusions regarding: (i) Gotovina's 2 August Order, which directed the HV to shell, *inter alia*, the Four Towns; (ii) evidence relating to HV units' implementation of the 2 August Order; (iii) evidence from witnesses on the shelling of Knin; (iv) the Brioni Meeting; and (v) evidence about the proportionality of artillery attacks aimed at Martić's residence.[78] Once more, I strongly disagree with the Majority's approach and conclusions.

(a) The 2 August Order

35. The Majority maintains that, given that the relevant portion of the text of the 2 August Order was relatively short and did not explicitly call for unlawful attacks on the Four Towns, the text of the 2 August Order, alone, could not reasonably be relied upon to support a finding that unlawful artillery attacks took place.[79] The Majority also states that the Trial Chamber "relied on the Impact Analysis to discount Witness Rajčić's assertion that the 2 August Order called for shelling only lawful military targets".[80]

36. I consider the Majority's language here to be very revealing. The question is not whether the text of the 2 August Order, "alone", could reasonably be relied upon, but whether, given the *totality* of the remaining evidence, including the 2 August Order, it was reasonable for the Trial Chamber to

[75] *See* Appeal Judgement, paras 68-82.
[76] Appeal Judgement, para. 83.
[77] Appeal Judgement, para. 77.
[78] Appeal Judgement, paras 77-83.
[79] Appeal Judgement, para. 77.
[80] Appeal Judgement, para. 77.

conclude that the attacks were unlawful. Secondly, however, in my opinion the relevant part of the Trial Judgement referred to by the Majority does not assist the Majority's reasoning in the least.[81] Contrary to what the Majority holds, the Trial Chamber's analysis goes to prove that the Trial Chamber itself clearly did not consider the 2 August Order in isolation. In reaching its conclusion that the shelling of Knin on 4 and 5 August 1995 constituted an indiscriminate – and therefore unlawful – attack, the Trial Chamber dealt with a multiplicity of findings, several of which are not necessarily tied to the 200 Metre Standard.[82] The Trial Chamber clearly went beyond the Impact Analysis and considered, *inter alia*, the testimony of several witnesses, as well as its finding on the disproportionate firing at two locations where the HV believed Martić could be found. It considered the 2 August Order in light also of those findings. I therefore cannot agree with the Majority in respect of the 2 August Order.

(b) HV Units' Implementation of the 2 August Order

37. In relation to the HV units' implementation of the 2 August Order, the Majority considers that the Trial Chamber "explicitly found that HV artillery reports suggesting that shells were fired in the general direction of towns, rather than specifically targeted, were so inconclusive that they could be so interpreted only in the context of the Impact Analysis".[83]

38. It is true that the Trial Chamber considered these reports as inconclusive, and that it would further evaluate them in light of its findings on the locations of artillery impacts in Knin.[84] When the Trial Chamber so evaluated the reports, it found that they supported the interpretation of the HV artillery orders as being orders to treat whole towns, including Knin, as targets.[85] Importantly, however, it found that this interpretation was also supported by other evidence, including evidence unrelated to the Impact Analysis, such as the evidence of the witnesses and its finding of disproportionate attack, as mentioned above.[86] On the basis of all of these factors, it reached the conclusion mentioned above, namely that the attack on Knin was indiscriminate, and thus unlawful.[87] A careful reading of the relevant part of the Trial Judgement thus indicates that the Trial Chamber did not simply evaluate the reports in light of its findings on the locations of artillery impacts in Knin, but had regard to several other factors. I therefore disagree with the Majority's

[81] *See* Appeal Judgement, para. 77, fn. 237, *referring to* Trial Judgement, para. 1911.
[82] Trial Judgement, para. 1911.
[83] Appeal Judgement, para. 78.
[84] Trial Judgement, paras 1895, 1896.
[85] Trial Judgement, para. 1911.
[86] *See supra*, para. 36. *See also* Trial Judgement, para. 1911.
[87] Trial Judgement, para. 1911.

reasoning, and its conclusion that the evidence relating to the HV units' implementation may not reasonably be relied upon independent of the Impact Analysis.[88]

(c) Evidence from Witnesses on the Shelling of Knin

39. I also disagree with the Majority's reasoning in relation to the evidence of witnesses present in Knin during the artillery attacks. The Majority states that the Trial Chamber viewed the evidence of Witnesses Dreyer, Forand, Bellerose, Hendriks, Gilbert, Liborius and Stig Marker Hansen "cautiously, noting that many witnesses had little artillery training, may have had trouble assessing artillery impacts while under fire, and may have mistaken shelling outside of Knin for shelling inside the town."[89] On this basis, it reasons that "the Trial Chamber found that evidence from witnesses present in Knin during the artillery attacks was of limited value, and subsequently chose to consider this evidence only in conjunction with other evidence on the record."[90]

40. I disagree with this representation of the Trial Chamber's findings. It is true that the Trial Chamber was cautious in assessing the testimony of the "relatively large number"[91] of witnesses present in Knin during the attacks.[92] However, the Majority fails to mention that the Trial Chamber did affirm that it took into account the testimony of, amongst others, Witnesses Dreyer, Forand, Bellerose, Hendricks, Gilbert, Liborius and Stig Marker Hansen, all of whom were present in Knin in the midst of the shelling, and who testified that the shelling impacted all over Knin and was indiscriminate.[93] Upon reading the Trial Judgement, it is obvious that the Trial Chamber's comments with respect to witnesses' lack of artillery training and difficulty assessing artillery impacts *etc.* related to the entire pool of witnesses who had been present in Knin during the attacks,[94] and that, having treated the evidence with all due care and caution, the Trial Chamber was willing to rely on the seven witnesses mentioned above, amongst others.[95] Even here, therefore, I cannot but disagree with the Majority's assessment that "it would not be reasonable to rely on these testimonies independent of further supporting evidence".[96]

41. Furthermore, it is apparent from the Majority's conclusion that it again fails to focus on the totality of the remaining evidence. As I see it, not only may these witnesses' testimonies already be regarded as mutually supportive or corroborative in many respects, but they must in any case be

[88] Appeal Judgement, para. 78.
[89] Appeal Judgement, para. 75.
[90] Appeal Judgement, para. 79.
[91] Trial Judgement, para. 1365.
[92] Trial Judgement, paras 1366, 1372.
[93] Trial Judgement, para. 1911.
[94] Trial Judgement, paras 1366, 1372.
[95] Trial Judgement, para. 1911.
[96] Appeal Judgement, para. 79.

considered in the context of *all* of the other evidence that remains on the record. In my opinion, that remaining evidence clearly constitutes the "further supporting evidence" required by the Majority.

(d) Brioni Meeting

42. Similarly, the Majority appears quick to dismiss the evidence drawn from the Brioni Meeting. It notes that the Trial Chamber considered such evidence, together with its finding that unlawful artillery attacks took place, in order to establish the existence of a JCE, and states that the Brioni Transcript "includes no evidence that an explicit order was given to commence unlawful attacks".[97] This is indeed true. However, the Majority also acknowledges that "the background discussion at the Brioni Meeting of HV capabilities and goals, especially Gotovina's statement that 'if there is an order to strike at Knin, we will destroy it in its entirety in a few hours', provides some support for the inference that the artillery attacks on the Four Towns were unlawful".[98] I could not agree more. In my view, this evidence, when considered as part of the totality of the remaining evidence, is indeed relevant in indicating the unlawfulness of the attacks.

(e) Evidence Regarding the Proportionality of Artillery Attacks Aimed at Martić's Residence

43. Having found that the Trial Chamber considered much of the other evidence on the record to be ambiguous, and indicative of unlawful artillery attacks "only when viewed through the prism of the Impact Analysis", the Majority then turns to consider the "limited evidence not caveated in this way".[99] It concludes that such evidence, including evidence relating to the targeting of Martić's residence, is also insufficient to uphold the finding that artillery attacks were unlawful.[100] According to the Majority, the Trial Chamber's finding that the targeting of Martić's residence was disproportionate was of "limited value in demonstrating a broader indiscriminate attack on civilians in Knin".[101] In particular, the Majority criticises this finding of the Trial Chamber because it was not based on a concrete assessment of comparative military advantage, and did not make any findings on resulting damages or casualties.[102] I respectfully, but completely, disagree with the Majority.

44. The Trial Chamber found that the HV reported firing a total of 12 shells of 130 millimetres at Martić's apartment on two occasions on 4 August 1995.[103] Furthermore, also on 4 August 1995,

[97] Appeal Judgement, para. 81.
[98] Appeal Judgement, para. 81.
[99] Appeal Judgement, para. 82.
[100] Appeal Judgement, para. 82.
[101] Appeal Judgement, para. 82.
[102] Appeal Judgement, para. 82.
[103] Trial Judgement, para. 1910.

the HV fired an unknown number of 130 millimetre shells at another location where they believed Martić to be present.[104] At no time did the Trial Chamber doubt the legitimacy of targeting Martić's residence, however it came to the conclusion that the attack was disproportionate because of the number of shells fired, the kind of artillery used, the distance from where the shells were fired, the location of both residences within a residential area, and the times when the shells were fired.[105] In my view, given these findings, the Trial Chamber did not necessarily need to tie its finding that the shelling was disproportionate to any findings on resulting damages or casualties. The Majority may only reach a decision to overturn the Trial Chamber's finding of disproportionality if it is clear that no reasonable trial chamber could reach that decision. In my opinion, this is certainly not the case. I therefore cannot agree with the Majority. I also disagree with the Majority that the decision reached by the Trial Chamber was of "limited value" in establishing that there was a broader indiscriminate attack. In my view, this evidence is indeed revealing and a reasonable trier of fact could attach importance to it.

4. Conclusion on the Unlawfulness of the Artillery Attacks

45. In conclusion, I respectfully but strongly disagree with the Majority that reversal of the Impact Analysis undermines the Trial Chamber's conclusion that artillery attacks on the Four Towns were unlawful. I simply cannot agree with the Majority in holding that the Trial Chamber's reliance on the Impact Analysis was so significant that, even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful. As I have demonstrated above, the Majority misinterprets and/or ignores and/or dismisses without adequate justification all of the relevant findings of the Trial Chamber in respect of the remaining evidence.

46. Further, rather than actually considering the *totality* of the remaining evidence, as it purports to do,[106] the Majority once again compartmentalises and discards those findings one by one. In addition, it filters and diminishes the importance of the remaining evidence on the basis of its previous conclusions that the Trial Chamber erred. I cannot agree with this approach, and I certainly cannot concur with the Majority in its finding that a reasonable trial chamber could not conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks. The Majority has simply failed to demonstrate why this is the case. In my view, considering all of the

[104] Trial Judgement, para. 1910.
[105] Trial Judgement, para. 1910.
[106] Appeal Judgement, para. 83: "[t]he Trial Chamber's reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful."

remaining findings and evidence set out above – together with the remaining evidence regarding impact sites that is not tied to the 200 Metre Standard, and which is not mentioned by the Majority[107] – the scenario is so obvious that no reasonable trier of fact could conclude differently from the Trial Chamber.

5. JCE

47. The Majority reverses the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina by force or threat of force.[108] It reasons that, absent a finding that artillery attacks on the Four Towns were unlawful, no reasonable trial chamber could conclude that the only interpretation of circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb population from the Krajina by force or threat of force existed.[109] In reaching this conclusion, the Majority finds that the Trial Chamber tied all of its conclusions regarding the existence of such a JCE to its erroneous conclusion that the attacks on the Four Towns were unlawful.[110]

48. Given my fundamental disagreement with the Majority's conclusions regarding the unlawfulness of the attacks on the Four Towns, as set out above, I simply cannot concur with the conclusion of the Majority in relation to the existence of a JCE. In my opinion, the Trial Chamber's finding that the attacks were unlawful should stand, and therefore its finding that a JCE existed should also stand.

49. Further, I wish to emphasise that it is clear from the Trial Judgement that the Trial Chamber clearly did not limit itself to considering the unlawfulness of the artillery attacks in arriving at its conclusion on the existence of a JCE, but took into account all of the other evidence which the Majority chooses to discard.[111]

50. I do not wish to comment further on this issue, save to say that I fully endorse the relevant reasons and opinion of Judge Pocar set out in his Dissenting Opinion with respect to the existence of the JCE.

[107] *See supra*, paras 18, 21.
[108] Appeal Judgement, para. 98.
[109] Appeal Judgement, paras 91, 96.
[110] *See* Appeal Judgement, paras 91-96.
[111] Trial Judgement, Part 6.2, pp 992-1177.

B. Alternate Modes of Liability

51. I have set out above the reasons for my disagreement with the Majority's approach and conclusions regarding the unlawfulness of the attacks on the Four Towns, with the consequent effect that I also disagree with its conclusion in relation to the existence of a JCE. I therefore disagree with the Majority that the convictions entered against Gotovina and Markač on the basis of JCE liability should be quashed. Accordingly, in my view, the question of whether convictions may be entered against Gotovina and Markač on the basis of alternate modes of liability ought never to have arisen.

52. However, given the circumstances with which I am now faced, rather than stay out of this particular debate, I feel I have the duty to express my opinions on whether such convictions ought to be entered in this case. Those opinions may be summed up as follows: while I agree with the conclusion of the Majority to dismiss Gotovina's and Markač challenges to the Appeals Chamber's general power to enter convictions on the basis of alternate modes of liability,[112] I disagree with the conclusions of the Majority not to enter convictions against the two Appellants on the basis of alternate modes of liability.[113] Furthermore, I once again disagree with the Majority's approach.

1. Gotovina

53. The Majority sets out that the Trial Chamber in this case found that Gotovina made a significant contribution to the JCE by: (i) ordering unlawful artillery attacks on civilians and civilian objects in Benkovac, Knin and Obrovac on 4 and 5 August 1995; and (ii) failing to make a serious effort to ensure that reports of crimes against Serb civilians in the Krajina were followed up and future crimes prevented, thus promoting an atmosphere of impunity.[114] Having recalled its reversal of the Trial Chamber's findings of significant contribution to the JCE based on ordering unlawful attacks, the Majority then proceeds to examine whether convictions on the basis of aiding and abetting or superior responsibility may nevertheless be entered against Gotovina in respect of his Failure to Take Additional Measures.[115]

54. The Majority concludes that Gotovina's Failure to Take Additional Measures does not give rise to alternate criminal liability,[116] for (it appears) three main reasons: (i) the Trial Chamber's findings regarding Gotovina's Failure to Take Additional Measures were made "in light of", and

[112] Appeal Judgement, paras 106-107.
[113] Appeal Judgement, paras 136, 157.
[114] Appeal Judgement, para. 118. Gotovina's second contribution in this respect is the "Failure to Take Additional Measures" referred to by the Majority throughout the Appeal Judgement.
[115] Appeal Judgement, paras 118-119, 127-135.
[116] Appeal Judgement, para. 135.

rested in part upon, its findings that Gotovina had ordered unlawful attacks;[117] (ii) the Trial Chamber's description of the Additional Measures that Gotovina ought to have taken was inadequate and failed to address critical issues;[118] and (iii) the Trial Chamber failed to address the evidence of Witness Jones.[119] However, in my view, none of these reasons adequately shows why the Trial Chamber's findings on the Failure to Take Additional Measures (i) were unreasonable, and (ii) therefore could not support a conviction on the basis of aiding and abetting or superior responsibility, or indeed undermines those findings.[120] On the contrary, in my opinion there is ample evidence in the Trial Judgement to support a conviction for superior responsibility, in particular.[121]

(a) Findings on Gotovina's Failure to Take Additional Measures

55. At the outset, I note that the Majority simply asserts, but provides no explanation of the significance of, the fact that the Trial Chamber's findings regarding Gotovina's Failure to Take Additional Measures were made "in light of" its finding that Gotovina had ordered unlawful attacks. In my view, this fact does not of itself undermine the findings on Gotovina's Failure to Take Additional Measures to the extent that they could not support an alternate conviction, Indeed, the Trial Chamber's findings on Gotovina's Failure to Take Additional Measures refer to a range of crimes being committed against Serb civilians both during Operation Storm and its aftermath[122] and, as I see it, therefore do not depend on any finding that Gotovina had ordered unlawful attacks.

56. I note further that the Majority falls into a slight contradiction in its analysis. While the Majority initially strives to affirm that Gotovina took all the measures available,[123] and apparently allows for no shortcomings on his part, it then acknowledges that there may in fact have been shortcomings, when concluding that there exists "reasonable doubt about *whether any failure to act* on Gotovina's part was so extensive as to constitute a substantial contribution to the crimes

[117] Appeal Judgement, para 119. *See also* Appeal Judgement, para. 130.
[118] Appeal Judgement, para. 130.
[119] Appeal Judgement, paras 131-134.
[120] The majority states that it will assess the Trial Chamber's findings and other evidence on the record *de novo*. Appeal Judgement, para. 110. However, given that the majority attacks the Trial Chamber's findings on Gotovina's Failure to Take Additional Measures and states that the Trial Chamber has "failed to address critical issues", I consider that I must first assess whether the Trial Chamber did indeed so err, and thus come to a conclusion on the reasonableness of those findings, before then considering whether they may be relied upon to support a conviction for alternate modes of liability.
[121] *Infra*, para. 70.
[122] Trial Judgement, paras 2363-2365. *See also* Trial Judgement, paras 2341, 2343-2344. I note also that while Trial Judgement para. 2363 includes "firing artillery at civilians" in its examples of crimes, this paragraph also refers to "destruction, looting, and killings" and "murders", and does not refer to the unlawfulness of the attacks on the Four Towns themselves.
[123] Appeal Judgement, paras 131, 133-134.

committed by Croatian Forces or a failure to take necessary and reasonable measures to prevent and punish crimes by his HV subordinates".[124]

57. I take particular issue with the Majority's treatment of the Trial Chamber's description of the Additional Measures that Gotovina ought to have taken. The Majority criticises the Trial Chamber's description of the Additional Measures and its analysis of their impact as being very "terse", limited to six lines of text and failing to address critical issues.[125] In addition, it criticises the Trial Chamber for, *inter alia*: (i) failing to explain which "relevant" people Gotovina should have contacted, the type of assistance he should have requested from them, or why this step was important; (ii) failing to describe the content of additional public statements it believed Gotovina should have made, identify their target audience, or differentiate them from statements Gotovina did make; (iii) failing to describe the kind of "available capacities" Gotovina should have diverted towards preventing and following up on crimes; and (iv) failing to specifically identify how the Additional Measures would have addressed Gotovina's perceived shortcomings in following up on crimes.[126]

58. In my view, these criticisms of the Trial Chamber are not only unwarranted and petty, but are also completely unjustified and unfair to the Trial Chamber. First, I simply do not agree with the Majority when it states that the Trial Chamber reached its conclusion that Gotovina should have taken Additional Measures in just six lines of "terse" text. The six lines referred to by the Majority are but a conclusion, based on pages upon pages of detailed analysis of evidence concerning, *inter alia*, Gotovina's powers[127] and his lack of adequate action or intervention in respect of preventing and following up on crimes committed by his subordinates.[128] Indeed, the Trial Chamber in its Judgement dedicated 21 pages[129] to explaining in detail, *inter alia*: (i) precisely what Gotovina knew about the crimes that had been committed;[130] (ii) what Gotovina did and did not do in relation to the extensive information he had received about these crimes;[131] (iii) how on more than one occasion Gotovina refused to acknowledge the involvement of the forces under his command in the crimes committed;[132] (iv) how even Čermak stated that Gotovina had knowledge of crimes committed by his subordinates;[133] and (v) how Gotovina had in fact commended and praised his

[124] Appeal Judgement, para. 134. Emphasis added.
[125] Appeal Judgement, para. 130.
[126] Appeal Judgement, para. 130.
[127] Trial Judgement, Part 3.1.1, Part 3.1.2, pp 37-73.
[128] Trial Judgement, Part 6.3.5, pp. 1179-1198.
[129] Trial Judgement, pp 1180-1201, paras 2230-2375.
[130] Trial Judgement, paras 2334-2352, 2363.
[131] Trial Judgement, paras 2330-2333, 2353-2362, 2364-2366.
[132] Trial Judgement, para. 2349-2350.
[133] Trial Judgement, para. 2351.

subordinates and their conduct in Operation Storm when he knew that crimes had been committed.[134] In this way, I find the Majority's criticism of the Trial Chamber unacceptable.

59. Secondly, in criticising the Trial Chamber for failing to provide examples and further description of the Additional Measures Gotovina ought to have taken, the Majority obviously ignores relevant parts of the Trial Judgement containing this type of information. For example, in Part 3.1.2 of the Trial Judgement, the Trial Chamber went into great detail in explaining Gotovina's powers as a commander and how he fit into the chain of command.[135] Significantly, this part of the Trial Judgement answers the Majority's criticism that the Trial Chamber failed to explain which "relevant" people Gotovina should have contacted in respect of ensuring that crimes were followed up.[136] Part 3.1.2 also adequately answers the Majority's criticism that the Trial Chamber failed to explain what Gotovina should have requested from those "relevant" people.[137] This is further demonstrated in Part 6.3.5 of the Trial Judgement.[138] In addition, the Majority's criticism of the Trial Chamber for failing to explain why "this step was important" is incomprehensible, since we are dealing in this context with the issue of crimes committed by Gotovina's subordinates, which of course would have necessitated investigation and possible prosecution.

60. I also fail to understand why the Majority criticises the Trial Chamber for not explaining the kind of additional statements Gotovina could have made, who the audience would have been, and how those statements would have differed from statements that Gotovina did make.[139] The Trial Chamber explained very well that Gotovina, who after all was a Colonel General of the HV, knew, *inter alia*, what his position entailed, what his responsibilities were, who the actors in the theatre of war were, and who he needed to address to ensure compliance with the laws of war.[140] It is my considered belief that the Majority is expecting the Trial Chamber to spell out the obvious, and what Gotovina himself would clearly have known.

61. In my opinion, considering the totality of the evidence, the Trial Chamber could reasonably find, and rightly found, that Gotovina was duly informed of the crimes committed by his subordinates and did not do enough to either punish those crimes or prevent further crimes. I would have come to the same conclusion.

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[134] Trial Judgement, para. 2355.
[135] Trial Judgement, paras 101-146.
[136] Trial Judgement, paras 134, 144. Here, the Trial Chamber noted and set out evidence relating to Gotovina's powers and obligations vis-à-vis crimes and disciplinary infractions committed by units under his command.
[137] Trial Judgement, paras 133, 134.
[138] Trial Judgement, paras 2358-2360, 2363-2365.
[139] *See* Appeal Judgement, para. 130.
[140] *See supra*, para. 59. *See also* Trial Judgement, paras 69-146.

62. I therefore consider that the Majority's criticisms of the Trial Chamber's treatment of the Additional Measures fail to show why the Trial Chamber's extensive findings on Gotovina's Failure to Take Additional Measures cannot be relied upon, and thus could not support a conviction on the basis of superior responsibility, in particular.

(b) Witness Jones

63. I also disagree with the Majority's conclusion that the Trial Chamber erred in failing to address the evidence of Witness Jones. The Majority appears to base this conclusion on the fact that Witness Jones made three particular statements, which, in its view, the Trial Chamber ought to have taken into account in making its findings on Gotovina's Failure to Take Additional Measures: (i) that after the shelling of the Four Towns, Gotovina was leading military operations in BiH; (ii) that, in Witness Jones' view, Gotovina took all necessary and reasonable measures to ensure that his subordinates in the Krajina enforced appropriate disciplinary measures; and (iii) that he could not identify any additional steps Gotovina should have taken.[141] In my opinion, the Trial Chamber did not err when it decided not to make any specific reference to the testimony of Witness Jones.

64. With regard to Gotovina's relocation to BiH after the shelling of the Four Towns, I note that the Trial Chamber in fact addressed the issue of Gotovina's continued responsibility following his relocation. It found, based on exhibit D1538 and other evidence, that the geographical absence of Gotovina from areas of the Split MD where combat operations no longer required his presence did not *per se* affect Gotovina's obligation to retain control over subordinate units in those areas.[142] In my opinion, having already dealt with this issue, the Trial Chamber could therefore rightly ignore Witness Jones' statement in that regard as it obviously considered it irrelevant.

65. In relation to Witness Jones' other statements, I note that the Trial Chamber, in Part 6.3 of the Trial judgement, having recalled its previous findings regarding Gotovina's responsibilities,[143] took pains to explain in detail, *inter alia*: the information Gotovina received in relation to crimes committed by his subordinates; the measures he took to prevent and to follow up on such crimes before, during, and after the attacks on the Four Towns; and how Gotovina failed to take or resisted taking further measure when asked to do so.[144] Reading through this part of the Trial Judgement, it is obvious that the Trial Chamber thoroughly considered all of the issues raised by, *inter alia*, Witness Jones, and that its findings cover the totality of those issues. As I see it, the Trial Chamber obviously, and rightly, did not agree with Witness Jones when he stated that Gotovina had taken all

[141] Appeal Judgement, para. 131.
[142] Trial Judgement, para. 144.
[143] Trial Judgement, para. 2324, *referring to* Trial Judgement, Part 3.1.1 and Part 3.1.2.
[144] Trial Judgement, paras 2330-2365.

necessary measures. In my view, therefore, given the thoroughness of the Trial Chamber's examination of such issues, the Trial Chamber was not required to also specifically refer to Witness Jones' evidence.

66. In sum, although Witness Jones was not mentioned by the Trial Chamber or his testimony dealt with separately, the relevant points made by him were all matters at the core of the analysis undertaken by the Trial Chamber in trying to establish whether Gotovina had failed to prevent and punish crimes committed by his subordinates. In my view, therefore, his not being mentioned by the Trial Chamber changes nothing, and the Majority's focus on this issue is unwarranted. The Majority fails to understand that the Trial Chamber was in a much better position to assess the evidence than Witness Jones, who, unlike the Trial Chamber, did not have all the evidence before him, and who took into account far fewer facts than did the Trial Chamber. The Majority's conclusion that the Trial Chamber should have specifically considered his testimony is thus unjustified, and does not conform to the jurisprudence of this Tribunal, namely, that the factual findings of the Trial Chamber should not be lightly overturned.[145]

67. For these reasons, I do not agree that the Trial Chamber erred in failing to address the evidence of Witness Jones. I therefore disagree with the Majority that the Trial Chamber's failure to consider his evidence undermines its findings on Gotovina's Failure to Take Additional Measures.

(c) Conclusion

68. In my opinion, the conclusion of the Majority that "there exists reasonable doubt about whether any failure to act on Gotovina's part was so extensive as to constitute a substantial contribution to the crimes committed by the Croatian Forces or a failure to take necessary and reasonable measures to prevent and punish crimes committed by his HV subordinates",[146] is based upon exactly the same evidence that the Trial Chamber considered and reasonably found did not exculpate Gotovina.

69. In the absence of any error on the part of the Trial Chamber, I therefore strongly disagree with the Majority that the Trial Chamber's extensive findings on Gotovina's Failure to Take Additional Measures could not be relied upon to support a conviction on the basis of superior responsibility, in particular.

[145] *See* Appeal Judgement, para. 13.
[146] Appeal Judgement, para. 134.

70. Further, in my opinion the totality of the evidence and the Trial Chamber's findings would indeed support the entering of a conviction against Gotovina on the basis of superior responsibility.[147] I consider that the findings of the Trial Chamber set out in Part 3.1 and Part 6.3 of the Trial Judgement clearly establish that: (i) a superior-subordinate relationship existed between Gotovina and those under his command;[148] (ii) Gotovina was duly informed of the crimes committed by his subordinates;[149] and (iii) Gotovina failed to take adequate measures to punish or prevent crimes.[150]

71. I therefore respectfully, but completely, disagree with the reasoning and conclusions of the Majority and with its consequent failure to enter convictions against Gotovina on the basis of alternate modes of liability.

2. Markač

72. I also respectfully, but strongly, disagree with the Majority in declining to enter convictions against Markač on the basis of alternate modes of liability. At the outset, I must admit that I am at a loss to understand the Majority's approach and conclusions in respect to Markač. As I see it, the Majority ignores very clear findings on the part of the Trial Chamber in relation to Markač's effective control over the Special Police, and also whether Markač made a substantial contribution to relevant crimes by the Special Police. Having found an absence of "explicit findings" by the Trial Chamber, the Majority makes matters worse by simply declining to assess the remaining findings and evidence on the record.[151] I cannot agree with this approach. In my opinion, there is sufficient – indeed, very strong – evidence upon which one could enter an alternate conviction against Markač, particularly on the basis of superior responsibility,[152] and the Majority ought to have entered such a conviction.

73. Further, there is a glaring difference between the Majority's approach to considering Gotovina's potential responsibility on the basis of alternate modes of liability and its approach with respect to Markač's potential responsibility. In relation to Gotovina, the Majority appears at least willing to examine the Trial Chamber's findings.[153] Indeed, it is quick to find fault with the Trial Chamber and to state that its findings could not give rise to convictions on the basis of alternate

[147] *See* Appeal Judgement, para. 128.
[148] Trial Judgement, paras 69-146, 2323-2324.
[149] Trial Judgement, paras 2334-2352, 2363.
[150] Trial Judgement, paras 2364-2365; *see also supra*, paras 58-61.
[151] Appeal Judgement, para. 150.
[152] *See infra*, para. 81.
[153] *See* Appeal Judgement, paras 129-135.

modes of liability.[154] With respect to Markač, however, the Majority does not entertain the idea of assessing the relevant findings, but simply dismisses such findings for lack of explicit statements by the Trial Chamber that Markač had effective control and/or made a substantial contribution.[155] I note, however, that the Trial Chamber also made no such explicit findings in relation to Gotovina.

74. When the Trial Chamber has made similar findings with respect to both Gotovina and Markač – or, rather, when it has not made "explicit findings" in respect of either appellant – on what basis does the Majority consider it is entitled to adopt two completely divergent approaches? I cannot fathom any justifiable basis for such inconsistent treatment.

(a) Superior Responsibility

75. Turning now to consider the Majority's various conclusions with respect to Markač, the first conclusion with which I take issue is "that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police, and in particular, was unclear about the parameters of Markač's power to discipline Special Police members noting that he could make requests and referrals but that 'crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors'".[156] I am particularly surprised by these statements as they misrepresent the findings of the Trial Chamber, and I cannot but respectfully disagree with the Majority.

76. In my view, even if the Trial Chamber did not explicitly use the words "Markač possessed effective control over the Special Police", it cannot be doubted that the Trial Chamber found that a superior-subordinate relationship existed between Markač and members of the Special Police, and that Markač possessed effective as well as *de jure* control over the Special Police.

77. In this respect, I note the Trial Chamber's findings in Part 3.3 of the Trial Judgement that Markač was appointed Assistant Minister of Interior in charge of Special Police matters, and was also Operation Commander of the Collective Special Police Forces.[157] The Trial Chamber also found that the commanders of Special Police units engaged in Operation Storm and the operations that followed "were subordinated to and answered to Markač, and not to the Chiefs of the Police Administrations to which they normally belonged".[158] In addition, it found that, while units of the Special Police operated on the ground during Operation Storm, Markač "was kept regularly

[154] *See* Appeal Judgement, paras 130-135.
[155] Appeal Judgement, paras 148-150.
[156] Appeal Judgement, para. 148, *referring to* Trial Judgement, para. 198.
[157] Trial Judgement, para. 194.
[158] Trial Judgement, para. 194.

informed by his subordinates of the developments in the field."[159] The Trial Chamber also determined that, "considering Markač's position as Operation Commander for the Special Police forces", the artillery assets were under his command and control.[160] Further, it determined that, if Markač received information concerning crimes allegedly committed by his subordinates, he was duty bound to forward the information to the criminal police for further investigation.[161] In addition, while crimes committed by members of the Special Police forces fell under the jurisdiction of the State Prosecutors, this did not exclude the initiation of parallel disciplinary proceedings against the same perpetrators.[162] Finally, the Trial Chamber found that Markač "could request the suspension of a Special Police member from his duty"[163] and later found that he had at times threatened subordinates with disciplinary action.[164]

78. In Part 6.5 of the Trial Judgement, the Trial Chamber reiterated its findings that during the Indictment period, Markač was Assistant Minister of Interior in charge of Special Police matters and the Operations Commander of the Collective Special Police Forces, which he commanded during Operation Storm and throughout the Indictment period.[165] It also repeated its findings that, by virtue of his position, Markač commanded the Collective Special Police Forces' artillery assets and that he issued orders to those forces during Operation Storm and the related search operations carried out in its aftermath.[166] The Trial Chamber noted evidence that the Chief of Artillery acted under the orders of Markač in ordering an artillery and rocket attack.[167] Additionally, it noted further evidence that Markač had "planned, directed and coordinated the activities of the Special Police during the search operations conducted in the aftermath of Operation Storm".[168] The Trial Chamber also referred to its previous findings regarding Markač's position in the sentencing part of the Trial Judgement.[169]

79. In addition to all of these findings, the Trial Chamber found that, "by virtue of his position and powers, either personally or though his commanders, Markač could have taken appropriate measures to address his subordinates' crimes as they were being committed".[170] It further found that

[159] Trial Judgement, para. 195.
[160] Trial Judgement, para. 196.
[161] Trial Judgement, para. 198.
[162] Trial Judgement, para. 198.
[163] Trial Judgement, paras 198, 2570.
[164] Trial Judgement, para. 1077.
[165] Trial Judgement, para. 2554.
[166] Trial Judgement, para. 2554.
[167] Trial Judgement, para. 2555.
[168] Trial Judgement, para. 2556.
[169] Trial Judgement, para. 2605.
[170] Trial Judgement, para. 2581.

Markač "could also have ordered an investigation which could have resulted in the suspension of Special Police members and their referral to the criminal police for further investigation".[171]

80. It is my firm opinion that, considered in their totality, these findings are more than sufficient to remove any doubt that the Trial Chamber affirmatively found that Markač exercised effective as well as *de jure* control over the Special Police in the Krajina during Operation Storm and its aftermath. I must therefore register my strong disagreement with the reasoning and decision of the Majority in this regard.

81. Given the views I have expressed above, it is my belief that the Majority should have proceeded to assess whether the remaining elements necessary to establish individual criminal responsibility under Article 7(3) of the Statute had been met.[172] In my view, there is evidence on the record to indicate that those elements have indeed been met. Markač was in a superior-subordinate relationship with members of the Special Police and exercised effective control over them.[173] Despite knowing of crimes by members of the Special Police in Gračac, Donji Lapac and Romljane,[174] he failed to punish them.[175] By failing to punish crimes by his subordinates in Gračac prior to 8 August 1995, Markač knowingly allowed undisciplined members of the Special Police to continue committing crimes and signalled tolerance for these crimes.[176]

(b) Aiding and Abetting

82. I also disagree with the Majority's treatment of Markač's potential liability on the basis of aiding and abetting. The Majority states that the Trial Chamber did not explicitly find whether Markač made a "substantial contribution" to relevant crimes committed by the Special Police.[177] It then concludes that, while the Trial Chamber found that the evidence proved that Markač's Failure to Act constituted a significant contribution to the JCE, such a finding is not equivalent to the substantial contribution necessary to enter a conviction for aiding and abetting.[178] While I do not dispute the jurisprudence regarding the thresholds for "significant contribution" and "substantial

[171] Trial Judgement, para. 2581.
[172] *See* Appeal Judgement, para. 128.
[173] *See supra*, paras 77-78; Trial Judgement, paras 193-198.
[174] Trial Judgement, para. 2570, *referring to* Trial Judgement Part 3.3; para. 2571; para. 2573, *referring to* Trial Judgement Part 3.3; para. 2576, *referring to* Trial Judgement Part 6.2.6; para. 2302.
[175] Trial Judgement, para. 2569, *referring to* Trial Judgement Part 4.2.7 (Gračac town), Part 4.2.4 (Donji Lapac town), Part 6.2.6; para. 2572; para.2574, *referring to* Trial Judgement Part 4.2.4 (Donji Lapac town); para. 2575, *referring to* Trial Judgement Part 4.1.4 (Marko Ilić and others – Schedule no. 10); para. 2576, *referring to* Trial Judgement Part 6.2.6; para. 2302.
[176] Trial Judgement, para. 2570, *referring to* Trial Judgement Part 3.3; paras 2571; para. 2572; para. 2573, *referring to* Trial Judgement Part 3.3; para. 2576, *referring to* Trial Judgement Part 6.2.6; para. 2581.
[177] Appeal Judgement, para. 149.
[178] Appeal Judgement, para. 149.

contribution", I respectfully disagree with the Majority that the Trial Chamber's findings would not support a finding of substantial contribution in this case.

83. In Part 6.5 of the Trial Judgement, the Trial Chamber undoubtedly included findings in relation to Markač's alleged contribution to the JCE, which overlapped in substance in the context of his overall criminal responsibility for the crimes committed by the Special Forces.[179] However, in assessing Markač's alleged contribution to the JCE, the Trial Chamber was of course not considering alternative modes of liability, as is the case now. Therefore, the Majority's criticism of the Trial Chamber for not having explicitly stated whether Markač made a "substantial contribution" to the relevant crimes committed by his subordinates, is in my opinion unwarranted. Nevertheless, in my view, the Trial Chamber's findings leave no doubt that – Markač's contribution to the JCE aside – his failure to prevent or punish created an environment conducive to the commission of crimes, and that he also created a climate of impunity which encouraged the commission of further crimes against Krajina Serbs.[180] In my opinion, this would be sufficient to establish the requisite substantial contribution. I must therefore respectfully disagree with the Majority in this regard.

84. Given that there is, in my view, clear evidence establishing Markač's liability on the basis of superior responsibility,[181] I do not consider it necessary to undertake an assessment of whether the remaining elements of aiding and abetting are also established with respect to Markač.

(c) Majority's Refusal to Analyse Remaining Findings

85. On the basis of the Trial Chamber's failure to make "explicit findings" regarding both Markač's effective control and his substantial contribution, the Majority "declines to analyse the Trial Chamber's remaining findings and evidence on the record".[182] In its view, to undertake such an investigation in this case would require the Appeals Chamber to "engage in excessive fact finding and weighing of evidence" and thereby risk substantially compromising Markač's fair trial rights.[183]

86. More specifically, the Majority explains that any attempt by the Appeals Chamber to derive the inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its "erroneous" reliance on unlawful attacks,

[179] *See* Trial Judgement, Part 6.5, and para. 2552.
[180] *See* Trial Judgement, paras 2581-2586.
[181] *See supra*, paras 76-81.
[182] Appeal Judgement, para. 150.
[183] Appeal Judgement, para. 150.

assessing the persuasiveness of this evidence, and then determining whether Markač's guilt on the basis of a different mode of liability was proved beyond reasonable doubt.[184] According to the Majority, such a broad based approach to factual findings on appeal "risks transforming the appeals process into a second trial".[185] I strongly disagree with the Majority, for the following reasons.

87. I respectfully disagree that, in order to investigate Markač's possible guilt on the basis of alternate modes of liability, the Appeals Chamber would have to engage in "excessive fact finding", or that such an exercise would risk substantially compromising Markač's fair trial rights. In my opinion, it may be possible to undertake such an investigation in a manner which avoids these dangers, provided that the investigation is limited to the Trial Chamber's relevant findings and does not involve inferring any conclusions which are not based on those findings. In the present case, I consider that such an investigation would be entirely possible, particularly if focussed on Markač's potential responsibility under Article 7(3) of the Statute.

88. The Trial Chamber made clear and extensive findings regarding Markač's position, powers and responsibilities, his acts and conduct, and his knowledge of crimes having been committed.[186] Reviewing those findings would thus not involve an overly laborious exercise result and certainly, in my opinion, would not amount to the "excessive fact finding" to which the Majority refers. In my opinion, the Majority ought to have carried out such an exercise, especially as it does not consider the possibility of referring the case back to the Trial Chamber for a decision on alternate modes of liability,[187] and given also that the parties were provided with the opportunity to supplement their arguments on appeal and to specifically address the issue of entering convictions under alternate modes of liability.[188]

89. I further disagree with the Majority that deriving inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its "erroneous" reliance on unlawful attacks. In this case, the factual findings relevant to Markač's potential responsibility under alternate modes of liability are independent and stand irrespective of the unlawfulness or otherwise of the attacks on the Four Towns. The relevant factual findings relate to: (i) Markač's failure to prevent and punish the crimes committed by his subordinates in Gračac between 5 and 6 August 1995 (destruction by members of the Special Police);[189] (ii) his failure to

[184] Appeal Judgement, para. 153.
[185] Appeal Judgement, para. 153.
[186] *See supra*, paras 76-81.
[187] I should indicate that I, too, would not be willing to send the case back to the Trial Chamber in respect of this issue.
[188] Appeal Judgement, para. 99.
[189] *See* Trial Judgement, para. 2569, *referring to* Trial Judgement Part 4.2.7(Gračac town); para. 2572.

prevent several murders by members of the Special Police in Oraovac on 7 August 1995;[190] (iii) his failure to prevent and punish acts of destruction by his subordinates in Donji Lapac between 7 and 8 August 1995;[191] and (iv) his failure to prevent and punish arson by members of the Special police in Ramljane on 26 August 1995.[192]

90. It is my firm belief that Markač can be found guilty of these crimes on the basis of superior responsibility, irrespective of the unlawfulness or otherwise of the attacks on the Four Towns. I therefore disagree with the Majority's decisions (i) not to review the evidence based on the Trial Chamber's factual findings and (ii) to decline to enter convictions against Markač on the basis of alternate modes of liability.

C. Conclusion

91. I have set out above the reasons why I am unable to support the approach and conclusions of the Majority in this case. For those reasons, I strongly disagree with the Majority that: (i) Gotovina's and Markač's relevant grounds of appeal should be granted; (ii) Gotovina's and Markač's existing convictions should be reversed; (iii) a verdict of acquittal should be entered in respect of both Gotovina and Markač; and (iv) the remaining grounds of appeal should be dismissed as moot.[193]

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

Done this 16th day of November 2012,
at The Hague,
The Netherlands.

_____
Judge Carmel Agius

[Seal of the Tribunal]

[190] *See* Trial Judgement, para. 2575, *referring to* Trial Judgement Part 4.1.4 (Marko Ilić and others – Schedule no. 10).
[191] *See* Trial Judgement, paras 2569, 2574, *both referring to* Trial Judgement Part 4.2.4 (Donji Lapac town).
[192] *See* Trial Judgement, paras 2569, 2576, *both referring to* Trial Judgement Part 6.2.6.
[193] *See* Appeal Judgement, para. 158.

IX. SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1. Although I have joined the Majority Opinion, I differ from the approach taken in the Judgement in arriving at the conclusion not to enter a conviction for an alternate mode of liability in respect of Markač for the deviatory crimes.[1] In this Opinion I explain the difference which, in my view, has consequences for the proper exercise of the judicial function at the appellate level. I also comment on the question whether the Appeals Chamber should in the circumstances of this case make an order for retrial.

2. The point at issue relates to the entering of a conviction for Markač in respect of superior responsibility as an alternate mode of liability.[2] The Trial Chamber made findings with regard to three of the four criteria for superior responsibility; it found that there was a crime within the jurisdiction of the Tribunal,[3] that Markač knew or had reason to know of the crimes,[4] and that Markač did not take necessary and reasonable steps to prevent or punish the crimes.[5] However, it made no finding in respect of what is perhaps the most important criterion of superior responsibility *viz* effective control, that is, it made no finding that Markač had effective control over the Special Police.

3. Having concluded that the Trial Chamber did not make findings sufficient to enter convictions against Markač based on the two relevant alternate modes of liability, the "Appeals Chamber decline[d] to assess the Trial Chamber's remaining findings and evidence on the record and accordingly decline[d] any attempt to infer conclusions about Markač's actions that would satisfy the elements of alternate modes of liability"[6] because to do so "would require the Appeals Chamber to engage in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising the Markač's fair trial rights".[7] In my view, when the Appeals Chamber enters a conviction for an alternative mode of liability it must do so on the basis of the findings of the Trial Chamber and those findings alone; the Appeals Chamber is not free to draw inferences from the evidence. It follows, therefore, that I am in disagreement with the approach taken in the Judgement on this issue, because it proceeds on the basis that the Appeals Chamber is free to draw inferences from the evidence, when, in my opinion, it has no such power, and consequently, the

[1] *See* Judgement, paras. 110, 150, 153-154.
[2] *See* Judgement, paras. 147-148.
[3] Trial Judgement, para. 2569.
[4] Trial Judgement, paras. 2570-2571, 2573.
[5] Trial Judgement, paras. 2572, 2574.
[6] Judgement, para. 150.
[7] Judgement, para. 150.

question of the Chamber "engag[ing] in excessive fact finding and weighing of evidence" does not arise.

4. It is regrettable that the thorough examination of the competence of the Appeals Chamber to enter new convictions at the appellate level called for in 2003 by Judges Meron and Jorda[8] has never been done. Had the examination been carried out it undoubtedly would have addressed in some detail the circumstances in which it is proper for the Appeals Chamber to enter convictions for an alternate mode of liability; it would have reiterated that an appeal is not a hearing *de novo*; it would also have identified the proper technique to be used by the Appeals Chamber in entering a conviction for an alternate mode of liability in order to eliminate the risk of "substantially compromising" an appellant's fair trial rights.

5. That thorough examination would have concluded that the risk of "substantially compromising" an appellant's fair trial rights is eliminated when the Appeals Chamber enters a conviction for an alternate mode of liability by relying exclusively on the findings of a Trial Chamber. That is so because the Trial Chamber's findings would be based on evidence that would have been open to challenge by an appellant in presenting his defence at trial. Had the examination so concluded, it would have been in anticipation of the 2006 Appeals Chamber's judgement in the *Simić* case.[9] In that case the appellant was convicted by the Trial Chamber for his participation in a joint criminal enterprise; that conviction was quashed and a conviction for aiding and abetting entered for persecutions.[10] In considering whether to enter a conviction for an alternate mode of liability, the approach taken by the Appeals Chamber in that case is instructive. The Chamber stated that "it was appropriate to ascertain whether the Trial Chamber's findings support the Appellant's responsibility for persecutions under Count 1 of the Fifth Amended Indictment as that of an aider and abettor pursuant to Article 7(1) of the Statute".[11] The Chamber then went on to find "that on the basis of the Trial Chamber's findings a reasonable trier of fact would be satisfied beyond reasonable doubt that the Appellant is responsible for aiding and abetting…".[12] Significantly, the Appeals Chamber confined itself to the findings of the Trial Chamber and analysed the appellant's challenges to those findings, but did not draw inferences from the evidence on the record to support the alternate conviction for aiding and abetting.

[8] *Rutaganda* Appeal Judgement, Separate Opinion of Judges Meron and Jorda, p. 1.
[9] *Simić* Appeal Judgement.
[10] *Simić* Appeal Judgement, paras. 74,75-84, 189.
[11] *Simić* Appeal Judgement, para. 84.
[12] *Simić* Appeal Judgement, para. 189.

6. The *Simić* case is consistent with the approach taken by the Appeals Chamber in the *D. Milošević* case in entering a conviction for superior responsibility as an alternate mode of liability.[13] That judgement is clear that the Appeals Chamber in entering a conviction for superior responsibility under Article 7(3) of the Statute did so on the basis of the findings of the Trial Chamber.[14] The Appeals Chamber expressed its satisfaction that "although the Trial Chamber did not convict Milošević under Article 7(3) of the Statute, it made the findings necessary for the establishment of his responsibility under this provision for the sniping incidents".[15] Moreover, the Appeals Chamber expressed its satisfaction that "[h]aving applied the correct legal framework to the conclusions of the Trial Chamber, the Appeals Chamber is satisfied that Milošević's responsibility under Article 7(3) of the Statute for having failed to prevent and punish the said crimes committed by his subordinates is established beyond reasonable doubt"[16] (emphasis added). Again, here the Appeals Chamber confined itself to the findings or conclusions of the Trial Chamber and drew no inferences from the evidence on the record.

7. The *Simić* and *D. Milošević* cases are consistent with the approach taken in certain domestic jurisdictions to an appellate body entering a conviction for an alternate offence.[17]

8. Section 3(1) of the UK's Criminal Appeal Act 1968, which addresses the question of the power of UK appellate bodies to substitute convictions for alternative offences, provides that it must appear to the appellate body on the finding of the jury "that the jury must have been satisfied of facts which proved him guilty of the other offence"; the UK case law confirms that the substituted verdict under this section "must be based on the findings of the jury, which established the appropriate facts to support the alternative offence…".[18]

9. The Australian case of *Spies v. R*, which dealt with the interpretation and application of Section 7(2) of the Criminal Appeal Act 1912 (NSW), is very relevant.[19] Section 7(2) provides:

> Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

[13] *D. Milošević* Appeal Judgement.
[14] *D. Milošević* Appeal Judgement, paras. 277-282.
[15] *D. Milošević* Appeal Judgement, para. 281.
[16] *D. Milošević* Appeal Judgement, para. 281.
[17] Criminal Appeal Act 1968 (England and Wales), Section 3; Criminal Appeals Act 2004 (Western Australia), Section 30(5); Criminal Appeals Act 1912 (New South Wales), Section 7(2).
[18] *Deacon*, at 696G, 699H. *See* also *Moses*, paras. 30-31.
[19] *Spies*.

10. The question in that appeal was whether the Court of Criminal Appeal of New South Wales erred in exercising its powers under Section 7(2) to convict the appellant of an offence against Section 229(4) of the *Companies (New South Wales) Code* after holding that a conviction for an offence against Section 176A of the *Crimes Act 1900* (NSW) should be set aside.[20] After an extensive analysis of English and Australian case law, the High Court of Australia allowed the appeal, entered an acquittal for the charge under Section 176A, and ordered a new trial for the alternative charge under Section 229(4).[21] However, it is the analysis which is helpful in understanding the circumstances in which an appellate body like the Appeals Chamber may enter a conviction for an alternate mode of liability, and in particular, whether in doing so it is entitled to find facts on its own or draw inferences from the evidence on the record.

11. On the basis of *Spies* there is no question of the appellate body finding facts on its own; there is no question of the appellate body drawing inferences from the evidence on the record; *Spies* establishes that the appellate body must be satisfied that the jury, as the trier of fact, must have been satisfied of the facts that proved the appellant guilty of the substituted offence.[22]

12. Australian and English cases confirm that where the jury was misdirected, evidence wrongly admitted, or there was some other error on the part of the trial judge, no substituted verdict can be entered, as it is difficult for an appellate court to be sure what facts the jury must have regarded as being established beyond reasonable doubt.[23] In other words, the appellate body is prohibited from entering a substituted verdict "if any of the facts of which the jury must have been satisfied is the product of evidence wrongly admitted, or has or may have been influenced by a misdirection, non-direction or other error on the part of the trial judge".[24] What this dictum indicates is the degree to which the appellate body is bound by the facts found by the trier of fact; if there is any uncertainty as to those factual findings it is not competent to enter a substituted verdict.

13. *Spies* also establishes that the appellate body must be certain that the jury found all the necessary facts to support the substituted verdict; if there is an issue in respect of the substituted verdict not covered by the facts found by the jury, the appellate body cannot enter a conviction for the new offence.[25] As the High Court of Australia concluded "[i]f there is any outstanding issue, whether of fact or opinion, in respect of the "other offence" which is not covered by "the facts" found to the point of certitude, the Court of Criminal Appeal cannot exercise the power to convict

[20] *See Spies*, para. 1.
[21] *Spies*, para. 105.
[22] *Spies*, para. 27.
[23] *Spies*, paras. 43-44; *Deacon*. See *Spies*, para. 44 *citing* Gleeson CJ in *McQueeny v. R* (1989) 39 A Crim R 56 at 60.
[24] *Spies*, para. 50.
[25] *Spies*, para. 49.

which is conferred by s 7(2). The function of the Court of Criminal Appeal is not to find facts, but to give legal effect to the findings of fact that the jury have expressly made or which are necessarily involved in the verdict of guilty which they have returned".[26] While the Tribunal does not have a statutory or regulatory provision equivalent to Section 7(2), it is difficult to imagine one being drafted that would allow the Appeals Chamber, in entering a conviction for an alternate mode of liability, to draw inferences from the evidence on the record, because that would involve the Appeals Chamber in overreaching; the sole purpose of its engagement with the record is to ensure that the factual findings of the Trial Chamber establish beyond a reasonable doubt the guilt of the appellant for the alternate mode of liability.

14. In the instant case Markač's convictions under the joint criminal enterprise were set aside and the question now is whether the Appeals Chamber can enter convictions for an alternate mode of liability, that is, superior responsibility. The Trial Chamber made findings in relation to three of the four criteria for superior responsibility; it did not make a finding in respect of Markač's effective control over the Special Police. The Judgement asserts that the Appeals Chamber "declines to assess the Trial Chamber's remaining findings and evidence on record and accordingly declines any attempt to infer conclusions about Markač's actions that would satisfy the elements of alternate modes of liability".[27] This determination clearly implies that the Appeals Chamber has the competence to draw inferences from the evidence on the record, but that it would not do so in this case. However, the analysis carried out above supports the conclusion that in entering a conviction for an alternate offence, an appellate body, such as the Appeals Chamber, is confined to the facts found by the trier of fact, and is not at liberty to find facts on its own or to draw inferences from the evidence on the record. There is no reason to suppose that the Appeals Chamber of this Tribunal would in this regard have a competence that the appellate bodies in Australia and the United Kingdom do not have. Both sets of tribunals – ICTY on the one hand, and Australia and the United Kingdom on the other - have a basis in the common law adversarial system which establishes a clear distinction between the trial and appellate functions. In the appellate bodies of the three jurisdictions an appeal is not a re-hearing of the trial, one consequence of which is that those bodies do not indulge in fact finding, a function which is the province of the court or body at first instance as the trier of fact.

15. A conviction cannot be entered for the alternate mode of liability of superior responsibility for Markač, since, absent a specific finding on the part of the Trial Chamber to support such a conviction it is not open to the Appeals Chamber to make factual findings of its own or draw

[26] *Spies*, para. 49.
[27] Judgement, para. 150.

inferences from the evidence on the record, which could form the basis of a conviction for an alternate mode of liability. That much is clear from *Spies*, which confirms that the appellate function is not to find facts but to give legal effect to the factual findings of the trier of fact.[28] The drawing of inferences by the Appeals Chamber impermissibly disturbs the traditional balance between the role of the appellate body and the role of the trial chamber as the trier of fact. It is this disturbance, or collision between the two roles that would result in the Appeals Chamber "engag[ing] in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising the Markač's fair trial rights"; it is in those circumstances that the fears of the Appeals Chamber reflected in paragraphs 150 and 154 would be realised.

16. In concluding, the following points should be noted. Firstly, the concern expressed in the Judgement that the Appeals Chamber would "engage in excessive fact finding and weighing of evidence and therefore risk substantially compromising the Appellants' fair trial rights" is misplaced.[29] No fact finding is done by the Appeals Chamber when it quashes a conviction and enters a conviction for an alternate mode of liability; its task is confined to ensuring that the Trial Chamber's findings support the conviction for the alternate mode of liability. By the same token, there is no basis for the conclusion in paragraph 154 of the Judgement that "drawing the inferences needed to enter convictions based on alternate modes of liability would also substantially undermine Markač's fair trial rights, as he would not be afforded the opportunity to challenge evidence relied on by the Appeals Chamber…". There is no risk of "substantially compromising" Markač's fair trial rights when, in entering a conviction for an alternate mode of liability, the Appeals Chamber confines itself to the Trial Chamber's findings. I note that in the instant case, in the interest of fairness, both Markač and Gotovina were provided with the opportunity to discuss the Trial Chamber's findings in the context of alternate forms of liability.[30]

17. Finally, consideration has to be given to the question whether, having quashed the convictions for both Appellants, the case should be remitted for re-trial.

18. There isn't much learning on this issue in the case law of the Tribunal or the ICTR. In this Tribunal, the only case in which a retrial to determine liability was ordered is *Haradinaj et. al*.[31] The Appeals Chamber did not provide any guidelines as to the circumstances in which it is appropriate for a re-trial to take place.[32] However, in ordering a re-trial for a specific count in the

[28] *Spies*, para. 49. *See* para. 12 above.
[29] Judgement, para. 150.
[30] *See* Judgement, para. 154.
[31] *Haradinaj et al*. Appeal Judgement, para. 50.
[32] *Ibid.*, para. 50.

ICTR case of *Muvunyi*, the Appeals Chamber stressed that "an order for re-trial is an exceptional measure to which resort must necessarily be limited",[33] and noted that "…Muvunyi has already spent over eight years in the Tribunal's custody. At the same time, the alleged offence is of the utmost gravity and interests of justice would not be well served if retrial were not ordered…".[34]

19. The issue of a re-trial was discussed in the Australian case of *Gilham v. R*, where McClellan CJ stated that "[t]he overriding consideration is whether the interests of justice require a new trial",[35] and then proceeded to set out a non-exhaustive list of eleven factors to be taken into consideration in determining whether the interests of justice call for a re-trial.[36] In concluding that a re-trial should not be ordered in the instant case, I am influenced principally by the holding of the Appeals Chamber of ICTR that an order for a re-trial is an exceptional measure; drawing from McClellan CJ's list of relevant factors, I would also not order a re-trial because: (i) it would be unduly oppressive to put the Appellants to the burden of a re-trial; (ii) a fair part of the sentences imposed upon convictions have already been served – in Gotovina's case, approximately one-third (7 years), and in Markač's case, approximately one-half (8 and ½ years); (iii) a re-trial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offence (1995) and the new trial.

20. In sum, I conclude that no conviction for an alternate mode of liability can be entered for Markač because on the basis of doctrine, jurisprudence and case law, there is no authority to do so in the circumstances of this case.

[33] *Muvunyi*Appeal Judgement,, para. 148.
[34] *Ibid.*
[35] *Gilham*, para. 649.
[36] *Ibid.*, para. 649. The factors identified were: (i) the public interest in the due prosecution and conviction of offenders; (ii) the seriousness of the alleged crimes; (iii) the strength of the Crown case; (iv) the desirability, if possible, of having the guilt or innocence of the accused finally determined by a jury, which, is the appropriate body to make such a decision; (v) the length of time between the alleged offence and the new trial, and in particular whether the delay will occasion prejudice to the accused; (vi) whether the grant of a new trial would impermissibly give the prosecution an opportunity to supplement or "patch up" a defective case or to present a case significantly different to that presented to the jury in the previous trial; (vii) the interests of the individual accused, and in particular whether it would be unduly oppressive to put the accused to the expense and worry of a further trial; (viii) whether a significant part of the sentence imposed upon conviction has already been served; (ix) the expense and length of a further trial; (x) whether a successful appellant to the Court of Criminal Appeal has been released from custody; and xi) whether an acquittal would usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions.

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

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Judge Patrick Robinson

Done on the 16th of November 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

X. DISSENTING OPINION OF JUDGE FAUSTO POCAR

1. In this Appeal Judgement, the Appeals Chamber, by majority, reverses Ante Gotovina's and Mladen Markač's convictions for committing, through a joint criminal enterprise ("JCE") whose common purpose was to permanently remove the Serb civilian population from the Krajina region, the crimes of persecutions, deportation, murder, and other inhumane acts as crimes against humanity as well as plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war and acquits the two appellants.[1] I respectfully disagree with the reasoning and any major conclusions of the Majority.

2. Given the sheer volume of errors and misconstructions in the Majority's reasoning and the fact that the Appeal Judgement misrepresents the Trial Chamber's analysis, I will not discuss everything in detail. Instead, I will limit my dissenting opinion to discussing the reasons of my disagreement with the three most fatal errors in the Majority's approach and conclusions with respect to: (i) the error relating to the 200 Metre Standard; (ii) the other evidence on the unlawfulness of the artillery attacks on the towns of Knin, Benkovac, Obrovac, and Gračac ("Four Towns"); and (iii) the JCE. Moreover, I will also discuss why I disagree, on a strict legal basis, with the Majority's reasoning with respect to alternate modes of responsibility.

A. 200 Metre Standard

3. The Indictment charged Gotovina and Markač with unlawful attacks on civilians and civilian objects as one of many underlying acts of persecutions as a crime against humanity.[2] In its assessment of the various underlying acts of persecutions as a crime against humanity, the Trial Chamber entered its finding on the unlawfulness of the attacks on the Four Towns on 4 and 5 August 1995 after considering mutually reinforcing evidence. As summarised by the Trial Chamber itself, in relation to each of the Four Towns, it "considered its findings on the HV's orders and artillery reports, if any, and compared them with its findings on the locations of artillery impacts, with a view of establishing what the HV targeted when firing its artillery during Operation Storm."[3] The Trial Chamber further "considered the amounts of shells fired, the types of artillery weapons used, and the manner in which they were used during the attacks."[4] This evidence was evaluated by the Trial Chamber "in light of expert testimony provided by witnesses [Harry]

[1] Appeal Judgement, para. 158. See also, Appeal Judgement, para. 98.
[2] Indictment, para. 48.
[3] Trial Judgement, para. 1892.
[4] Trial Judgement, para. 1892.

Konings and [Geoffrey] Corn, including with regard to the accuracy of artillery weapons and the effects of artillery fire."[5] In its assessment of the evidence, the Trial Chamber considered "that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target [offering a definite military advantage] were deliberately fired at that artillery target"[6] ("200 Metre Standard").

4. The Majority finds that the Trial Chamber erred in adopting a margin of error of artillery weapons of 200 metres.[7] Moreover, it finds that the Trial Chamber committed an error of law by failing to provide a reasoned opinion in deriving the 200 Metre Standard.[8] The Majority subsequently articulates that, "[i]n view of this legal error, [it] will consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid."[9] After only two paragraphs, the Majority then concludes that "after reviewing [the] relevant evidence, the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained."[10] Finally, the Majority finds that the remaining evidence on the attacks on the Four Towns "does not definitely demonstrate that artillery attacks against the Four Towns were unlawful" and concludes that "no reasonable trier of fact could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks."[11]

5. In my view, the Majority's approach is wholly erroneous and in violation of our standard of review on appeal for various reasons.

6. In its analysis, the Majority seems to identify two distinct errors.[12] One of them is the adoption of a margin of error of artillery weapons, which according to the Majority is "not linked to any evidence".[13] However, the Majority falls short of identifying what type of error it is.[14] The second error identified by the Majority[15] is the failure to provide a reasoned opinion as to the basis

[5] Trial Judgement, para. 1892.
[6] Trial Judgement, para. 1898.
[7] Appeal Judgement, paras 61, 64.
[8] Appeal Judgement, paras 61, 64.
[9] Appeal Judgement, para. 64.
[10] Appeal Judgement, para. 67.
[11] Appeal Judgement, para. 83.
[12] Appeal Judgement, paras 61, 64.
[13] Appeal Judgement, para. 61.
[14] See generally Appeal Judgement, paras 61, 64. Given the Majority's reference to an absence of link between the margin of error of artillery weapons and the evidence, it could be understood that the Majority deemed to qualify this error as an error of fact. However, absent further indication from the Majority, it is not possible to reach a conclusion in this regard. The importance of the characterization of this error will be discussed further below. See *infra* paras 9-11, 13.
[15] Although it might seem to be a detail, the Majority's reasoning is not articulated in a logical sequence. The Majority should have found that the *first* error was that the Trial Chamber committed an error of law by failing to provide a

for the margin of error of artillery weapons, which it correctly characterizes as an error of law.[16] Having found that the Trial Chamber committed an error of law by failing to provide a reasoned opinion as to the basis for the margin of error of artillery weapons and that the Trial Chamber's findings do not support the Trial Chamber's conclusion to adopt the 200 Metre Standard,[17] the Majority states that, "[i]n view of this legal error, [it] will consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid."[18] However, the Majority's subsequent analysis is erroneous, fails to do what it enounces, and is in violation of our standard of review on appeal.

7. The Majority states that, "[a]bsent an established range of error",[19] it cannot exclude the possibility that:

> all of the impact sites considered in the Trial Judgement were the results of shelling aimed at targets that the Trial Chamber considered to be legitimate. The fact that a relatively large number of shells fell more than 200 metres from fixed artillery targets could be consistent with a much broader range of error. The spread of shelling across Knin is also plausibly explained by the scattered locations of fixed artillery targets, along with the possibility of a higher margin of error.[20]

The Majority continues further and states:

> Although evidence on the record suggests that individual units of the HV aimed artillery in the general direction of the Four Towns rather than at specific targets, the Trial Chamber found that this evidence was not wholly conclusive when considered alone and was indicative of an unlawful attack only in the context of the Trial Chamber's application of the 200 Metre Standard. The Appeals Chamber […] considers that absent the 200 Metre Standard, this latter evidence is inconclusive.[21]

Finally, in the second paragraph of its analysis, the Majority states:

> The Trial Judgement suggests that in Knin, a few impacts occurred particularly far from identified legitimate artillery targets, and could not be justified by any plausible range of error. In view of its finding that the Trial Chamber erred in deriving the 200 Metre Standard, however, the Appeals Chamber […] does not consider that this conclusion is adequately supported. In any event, the Appeals Chamber […] has found that in Knin, the Trial Chamber erred in excluding the possibility of mobile targets of opportunity such as military trucks and tanks. The possibility of shelling such mobile targets, combined with the lack of any dependable range of error estimation, raises reasonable doubt about whether even artillery impact sites particularly distant from fixed artillery

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reasoned opinion as to the basis for the margin of error of artillery weapons. It is only then that it should have looked at the Trial Chamber's findings to see whether, despite the failure to provide a reasoned opinion, they support the Trial Chamber's conclusion to adopt the 200 Metre Standard. Having found that this was not the case, the Majority could then have found a *second* error, which was the adoption of a margin of error of artillery weapons, which was "not linked to any evidence". The reverse order of the Majority's approach creates unnecessary confusion.

[16] Appeal Judgement, para. 64.
[17] See Appeal Judgement, paras 58-61.
[18] Appeal Judgement, para. 64.
[19] Appeal Judgement, para. 65.
[20] Appeal Judgement, para. 65 (internal reference omitted).
[21] Appeal Judgement, para. 65 (internal references omitted).

> targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place.[22]

Based on this cursory analysis of only two paragraphs, the Majority concludes that "after reviewing the relevant evidence, the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained."[23]

8. I find the Majority's reasoning flawed as it is in violation of our standard of review on appeal, but also because it fails to conduct the review of the evidence it enounced it would do.

9. First, the Majority's reasoning fails to apply the standard that it previously and correctly enounced in the section of the Appeal Judgement setting the standard of review.[24] According to our appellate standard of review, where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[25] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[26]

10. Although the 200 Metre Standard was, according to the Majority, "not linked to any evidence",[27] it is not a simple error of fact. The Trial Chamber used the 200 Metre Standard in its consideration of the explanation given by the chief of artillery of the Split Military District during Operation Storm and subordinate of Gotovina, Marko Rajčić, that Gotovina's and his subordinates' orders to the HV artillery to put the towns under artillery fire should not be interpreted as treating the Four Towns as targets when firing projectiles during Operation Storm but that these orders meant that previously selected targets with specific coordinates in those towns should be put under constant disruptive artillery fire.[28] The Trial Chamber, having evaluated all of the evidence, considered "that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target [offering a definite military advantage] were deliberately fired at that

[22] Appeal Judgement, para. 66 (internal references omitted).
[23] Appeal Judgement, para. 67.
[24] See Appeal Judgement, para. 12.
[25] *Blaškić* Appeal Judgement, para. 15. *See also*, *e.g.*, *Haradinaj et al.* Appeal Judgement, para. 11; Appeal Judgement, para. 12.
[26] *Blaškić* Appeal Judgement, para. 15. *See also*, *e.g.*, *Haradinaj et al.* Appeal Judgement, para. 11; Appeal Judgement, para. 12.
[27] Appeal Judgement, para. 61.
[28] Trial Judgement, para. 1893.

artillery target."[29] Thus, in its assessment of the evidence, the Trial Chamber used the 200 Metre Standard as a presumption of legality – which was generous and to the benefit of Gotovina – to analyse in part the evidence of the shelling attacks and the artillery impacts. In my view, there is therefore no doubt that, while the error was allegedly founded on a factual basis, the establishment of the 200 Metre Standard and its use ultimately constitutes an error of law. The 200 Metre Standard was, as its name indicates, a *standard* or a legal tool that the Trial Chamber used in order to determine that Rajčić was not credible when he claimed that Gotovina's attack order was understood as directing his subordinates only to target designated military objectives.

11. Having found that the 200 Metre Standard was erroneous and that the Trial Chamber committed an error of law in deriving and applying an incorrect legal standard, the Appeals Chamber had, in accordance with the standard of appellate review, two obligations. First, to identify and articulate the correct legal standard and, second, to apply this standard to the evidence contained in the trial record or, in the alternative, to remand the case back to the Trial Chamber to apply the correct legal standard to the evidence. However, in contravention of our well-established appellate standard of review, the Majority followed neither of these requirements. As reflected by the wording used at the beginning of the Majority's two-paragraph analysis – "[a]bsent an established range of error" – the Majority pretends to review the evidence in the trial record without having first determined the correct legal standard.[30] It therefore starts on a wrong premise.

12. Second, although the Majority enounces that, "[i]n view of this legal error, [it] will consider *de novo* the remaining *evidence* on the record"[31], it does not consider the *evidence in the trial record* to determine whether the conclusion of the Trial Chamber is still valid, but limits its assessment to the *Trial Chamber's analysis and findings*.[32] The correct approach for the Majority in accordance with the appellate standard of review would have been to consider the evidence in the trial record in light of the legal standard it should have enounced. Unfortunately, the Majority fails to do so.

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[29] Trial Judgement, para. 1898.

[30] See Appeal Judgement, para. 65. See also the last sentence of paragraph 65 of the Appeal Judgement ("The Appeals Chamber […] considers that *absent the 200 Metre Standard*, this latter evidence is inconclusive." (emphasis added)). Similarly, the Majority also pretends to review the evidence in the trial record with respect to "targets of opportunity" without having first determined the correct legal standard. See Appeal Judgement, para. 66 ("The possibility of shelling such mobile targets, combined with *the lack of any dependable range of error estimation*, raises reasonable doubt about whether even artillery impact sites *particularly distant* from fixed artillery targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place."(emphasis added)).

[31] Appeal Judgement, para. 64 (second emphasis added).

[32] See Appeal Judgement, paras 65-66. For example, the Majority states that "[a]lthough evidence on the record suggests that individual units of the HV aimed artillery in the general direction of the Four Towns rather than at specific targets, the Trial Chamber found that this evidence was not wholly conclusive when considered alone and was indicative of an unlawful attack only in the context of the Trial Chamber's application of the 200 Metre Standard." See Appeal Judgement, para. 65.

13. By not articulating the correct legal standard, the Majority falls short of correcting any legal errors in the Trial Judgement and clarifying the law the Trial Chamber should have applied when assessing the legality of an attack directed on civilians and civilian objects. It also fails to consider whether the artillery attacks on the Four Towns were lawful or not when the evidence is assessed in light of the principles of international humanitarian law ("IHL"). First, the Majority fails to give any indication as to what the correct legal standard was. Does the Majority consider that the correct legal standard was a 400-metre standard? A 100-metre standard? A 0-metre standard? The Appeal Judgement provides no answer to this question. Second, the Majority also fails to clarify on which basis the correct legal standard should have been established. Does the Majority consider that a legal standard can be established on a margin of error of artillery weapons? Does the Majority consider that a trial chamber is entitled in law to establish a presumption of legality to assess the evidence of the shelling attacks and the artillery impacts in order to establish the lawfulness of the attack? Is a trial chamber not limited in its analysis to the strict application of IHL principles? Here again, the Appeal Judgement is mute on these issues. Third, if the Majority considers that applying a presumption of legality to analyse the evidence of the shelling attacks and the artillery impacts in order to establish its lawfulness is incorrect, it further fails to articulate which legal principles the Trial Chamber should have applied. Does the Majority consider that the Trial Chamber should have applied the principles of customary IHL in its analysis? If so, which exact IHL principles should the Trial Chamber have applied in assessing whether the artillery attack was lawful? Does the Majority consider that the minimum applicable legal standard was to analyse whether the shelling was aimed at targeting military objectives offering a definite military advantage, whether it was done in respect of the principle of proportionality and after all precautionary measures had been taken? Silence.

14. Unfortunately, the paucity of the legal analysis in the Majority's reasoning opens more questions than it provides legal answers. The Appeals Chamber fails in its mission to clarify the correct legal standard, finding errors without providing the necessary guidance to other trial chambers. By failing to articulate a legal standard, the Majority further omits to assess whether the shelling of the Four Towns was done in respect of IHL principles and, therefore, whether the attack on the Four Towns was lawful or not. In that sense, the Majority's approach does not leave a good legacy in terms of respecting IHL principles when assessing the legality of an attack on towns where civilians and civilian objects are present. The Majority imputes to the Trial Chamber the failure to provide a reasoned opinion regarding the standard adopted and reverses its conclusions while simultaneously failing to articulate the standard that should have been applied. Finally, I do not believe that justice is done when findings of guilt not lightly entered by the Trial Chamber in more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful

consideration of the trial record and a proper explanation. In light of the above, I fundamentally dissent.

B. Other Evidence on the Unlawfulness of the Artillery Attacks on the Four Towns

15. Contrary to the Majority's mischaracterization of the Trial Chamber's analysis, the Trial Chamber did not base its conclusion on the unlawfulness of the artillery attacks on the Four Towns only on the 200 Metre Standard nor was this standard "the cornerstone and the organising principle" of the Trial Chamber's analysis of the evidence of unlawful attacks on civilians and civilian objects as the Majority claims.[33]

16. In its assessment of the various underlying acts of persecutions as a crime against humanity, the Trial Chamber entered its finding on the unlawfulness of the attacks on the Four Towns after considering the following mutually reinforcing evidence: (i) the Brioni Meeting held on 31 July 1995 and the Brioni Transcript of this meeting, where Croatian political and military leaders – including Gotovina and Markač – agreed on a common plan to remove Serb civilians from the Krajina region through force or threat of force;[34] (ii) the attack orders given by Gotovina and his subordinates – including Rajčić – to the HV artillery to put the Four Towns under artillery fire as well as the testimonies of expert witnesses who interpreted these attack orders;[35] (iii) the HV artillery reports relating to the HV units' implementation of orders;[36] (iv) the evidence of the shelling attacks as well as the location of artillery impacts, including from international and military eyewitnesses;[37] and (vi) the disproportionate attacks on Milan Martić.[38]

17. If the Majority wishes to reverse Gotovina's and Markač's convictions for one of the underlying acts of persecutions as a crime against humanity, namely unlawful attacks on civilians and civilian objects, it needs to demonstrate that *all* the other remaining findings of the Trial

[33] Appeal Judgement, para. 64.
[34] See, *e.g.*, Trial Judgement, paras 1401, 1430, 1746, 1970-1995, 2311. See also *infra* paras 19-20, 26.
[35] See, *e.g.*, Trial Judgement, paras 1172-1173, 1185-1188, 1893; Exhibit P1125, p. 14.
[36] See, *e.g.*, Trial Judgement, paras 1242-1267, 1895-1896, 1911.
[37] See, *e.g.*, Trial Judgement, paras 1268-1359, 1365-1367, 1369, 1372, 1420, 1427, 1429, 1451, 1911. In assessing the evidence of the shelling attacks on the Four Towns and the artillery impacts, the Trial Chamber received and considered evidence regarding *inter alia*: (i) the different types of weapons and the use of artillery during military operations (including: the accuracy, ranges and rates of fire of the different types of artillery weapons; the properties of different types of property shells and their effects as well as the various effects that can be achieved by means of artillery fire) (see Trial Judgement, paras 1163-1171); (ii) the effects of using artillery against specific objects in Knin, including the anticipated military advantage, risk of collateral damage and incidental injury (see Trial Judgement, paras 1174-1175); (iii) the intensity of the shelling of Knin on 4 and 5 August 1995 (see Trial Judgement, paras 1369-1371); (iv) the methods and means employed during the attack (see Trial Judgement, paras 1369-1371); (v) the evidence of artillery impacts (see Trial Judgement, paras 1372-1397); and (vi) the shelling of Benkovac, Obrovac, and Gračac on 4 and 5 August 1995 (see Trial Judgement, paras 1399-1463, 1465-1476).
[38] See, *e.g.*, Trial Judgement, paras 1244, 1910.

Chamber establishing the unlawfulness of the attacks *cannot stand* in the face of the quashing of the Trial Chamber's application of the 200 Metre standard.

18. Unfortunately, here again the Majority's reasoning is far from being convincing. The Majority uses the error of the 200 Metre Standard to quash – in simply seven paragraphs – all the other remaining findings of the Trial Chamber establishing the unlawfulness of the attacks.[39] The Majority concludes that, "[i]n these circumstances, […] the reversal of the Impact Analysis [due to the error of the 200 Metre Standard] undermines the Trial Chamber's conclusion that artillery attacks on the Four Towns were unlawful."[40] Similar to its analysis on the evidence following the error of the 200 Metre Standard, the Majority again fails to articulate the correct legal standard and to apply it to the evidence contained in the trial record.[41] Moreover, the Majority fails to explain how the Trial Chamber's findings based on evidence not at all linked to the 200 Metre Standard – such as the the Brioni Meeting or the disproportionate attacks on Martić – do not stand. Thus, I must dissent.

C. JCE

19. The Trial Chamber found that Gotovina and Markač were members of and made significant contributions to the JCE whose common purpose was to permanently remove the Serb civilian population from the Krajina region by force or threat of force, which amounted to and involved the crimes of persecutions (deportation and forcible transfer, unlawful attacks against civilians and civilian objects, and restrictive and discriminatory measures), deportation and forcible transfer.[42] The Trial Chamber further found that "[t]he purpose of the [JCE] required that the number of Serbs remaining in the Krajina be reduced to minimum but not that the Serb civilian population be removed in its entirety."[43] The Trial Chamber's conclusion with respect to the JCE was based on four mutually reinforcing groups of factual findings:

(i) the Brioni Meeting held on 31 July 1995 during which the participants discussed the importance of the departure of the Serb civilian population from the Krajina region as a result and part of the imminent attacks as well as the preparation for Operation Storm on 2 and 3 August 1995;[44]

[39] Appeal Judgement, paras 77-83.
[40] Appeal Judgement, para. 83.
[41] Appeal Judgement, paras 77-81.
[42] Trial Judgement, paras 2314, 2369-2375, 2579-2587. See also Trial Judgement, paras 2303-2312, 2315-2321.
[43] Trial Judgement, para. 2314.
[44] See, *e.g.*, Trial Judgement, paras 1970-1995, 2304-2305, 2310-2311.

(ii) the artillery attacks against civilians and civilian objects in the Four Towns on 4 and 5 August 1995 as a result of which at least 20'000 persons were forcibly displaced and fled across the border to Bosnia-Herzegovina and Serbia constituting deportation;[45]

(iii) the crimes committed by armed units – including the Croatian military forces and Special Police – against the remaining Serb civilian population and property during the months of August and September 1995;[46] and

(iv) the discriminatory policy imposed by the Croatian political leadership against the Serb minority and the policy regarding the return of Croatian refugees and internally displaced persons as well as the discriminatory property law.[47]

20. Although the Majority does not summarise what were the significant contributions of Gotovina and Markač to the JCE, it is important to recall them here.[48] The Trial Chamber found that Gotovina significantly contributed to the JCE by: (i) participating in the Brioni Meeting in relation to planning and preparing Operation Storm in light of his position as commander of the Split Military District;[49] (ii) ordering the artillery attacks on the Four Towns;[50] and (iii) failing to take measures to punish his subordinates for crimes committed against the Serb civilian population and by failing to prevent the commission of future crimes by not insisting on any follow-up in relation to the perpetrators of these crimes.[51] The Trial Chamber found that Markač significantly contributed to the JCE by: (i) participating in the Brioni Meeting in relation to planning and preparing Operation Storm in light of his position as Assistant Minister of Interior in charge of Special Police matters and the Operation Commander of the Collective Special Police Forces;[52] (ii) ordering the artillery attacks on Gračac;[53] (iii) failing to prevent, report and punish his subordinates' crimes in Gračac and Donji Lapac;[54] and (iv) participating in the cover-up of his subordinates' crimes in Grubori and Ramljane.[55]

21. The Majority's analysis on the JCE is limited to considering "whether, absent the finding that artillery attacks on the Four Towns were unlawful, the Trial Chamber could reasonably

[45] See, *e.g.*, Trial Judgement, paras 1163-1476, 1540-1544, 1549-1551, 1558-1587, 1590-1592, 1607-1642, 1742-1753, 1892-1945, 2305-2306, 2311.
[46] See, *e.g.*, Trial Judgement, paras 1756-1758, 2307.
[47] See, *e.g.*, Trial Judgement, paras 1843-1846, 1997-2057, 2059-2098, 2308-2309, 2312.
[48] Although this issue should have been at the crux of the Majority's analysis, it only appears in the section on alternate modes of liability. See Appeal Judgement, paras 118, 138.
[49] Trial Judgement, paras 2324, 2370.
[50] Trial Judgement, paras 2324, 2370.
[51] Trial Judgement, paras 2365, 2370.
[52] Trial Judgement, paras 2554, 2559-2560, 2580.
[53] Trial Judgement, paras 2555, 2561, 2580.
[54] Trial Judgement, paras 2568-2575, 2581.
[55] Trial Judgement, paras 2569-2570, 2576, 2581.

conclude that the circumstantial evidence on the record was sufficient to prove the *existence* of the JCE."[56] The Majority contends that the *unlawful* artillery attacks were "the core indicator" that the crime of deportation took place[57] and "the primary means" to force the Serb civilian population to depart from the Krajina region.[58] The Majority claims that "where artillery attacks on settlements were not deemed unlawful, the Trial Chamber was unwilling to characterise Serb civilians' concurrent departures as deportation."[59] On the basis that the "findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested *primarily* on the existence of *unlawful* artillery attacks against civilians and civilian objects in the Four Towns"[60] and the reversal of the Trial Chamber's findings related to the *unlawful* artillery attacks, the Majority concludes that it "cannot affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed."[61] In only three paragraphs, the Majority then finds that the Brioni Meeting, the crimes committed by the Croatian military forces and Special Police against the remaining Serb civilian population and property during the months of August and September 1995, and the discriminatory policy and property law imposed by the Croatian political leadership with regard to the Serb minority are insufficient to justify the Trial Chamber's finding that a JCE existed.[62] In these circumstances, the Majority concludes that "no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force."[63] On this basis, the Majority acquits Gotovina and Markač.[64]

22. In my view, and for the reasons explained below, the Majority's analysis with respect to the JCE mischaracterizes the Trial Judgement and, in this respect, is incorrect and misleading. The Majority also re-interprets the Trial Chamber's findings without demonstrating an error on the part of the Trial Chamber and without applying the appropriate standard of appellate review.

23. In its analysis, the Majority makes statements which are contradicted by the Trial Judgement and/or not supported by any references. For example, the Majority pretends that the Trial Chamber "considered *unlawful* artillery attacks the core indicator that the crime of deportation

[56] Appeal Judgement, para. 85 (emphasis added).
[57] Appeal Judgement, para. 87.
[58] Appeal Judgement, para. 92.
[59] Appeal Judgement, para. 92.
[60] Appeal Judgement, para. 91 (emphasis added).
[61] Appeal Judgement, para. 91.
[62] Appeal Judgement, paras 93-95.
[63] Appeal Judgement, para. 96.
[64] Appeal Judgement, paras 97-98.

had taken place."[65] I note that this statement is not supported by any footnote containing references to the Trial Judgement. Moreover, the Trial Chamber found that "the *artillery attack* instilled great fear in those present in Knin[, Benkovač, Gračac, and Obrovac] on 4 and 5 August 1995" and that "[f]or the vast majority, if not all, of those leaving [the Four Towns] on 4 and 5 August 1995, this *fear* was the primary and direct cause of their departure."[66] Thus, contrary to the Majority's assertion, it was the *fear* instilled by the *artillery attack* which was the primary and direct cause of departure; it was not the *unlawfulness* of the artillery attacks.[67] The Majority tries to justify its affirmation by further stating that "the Trial Chamber held that Serb civilians' departures from settlements at the same time as or in the immediate aftermath of artillery attacks only constituted deportation where these artillery attacks were found to have been unlawful."[68] However, paragraph 1755 of the Trial Judgement to which the Majority refers to support this claim is not linked to the Trial Chamber's findings on the departure of persons from the Four Towns on 4 and 5 August 1995 but rather concerns the departure of persons from other locations.[69] Moreover, paragraph 1755 of the Trial Judgement does not state that deportation was only found where artillery attacks were found to have been *unlawful*. Finally, this paragraph must be read in conjunction with paragraph 1754 of the Trial Judgement regarding the departure of persons from locations other than the Four Towns where the Trial Chamber considered that:

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[65] Appeal Judgement, para. 87 (emphasis added). Similarly, the Majority also states: "More specifically, the Appeals Chamber […] recalls that, in the context of Operation Storm, unlawful artillery attacks were identified by the Trial Chamber as the *primary* means by which the forced departure of Serb civilians from the Krajina region was effected." See Appeal Judgement, para. 92. This affirmation is however not supported by any footnote containing references to the Trial Judgement. Moreover, the Majority seems somehow to contradict itself by using the word "primary", which does not mean "exclusively".

[66] Trial Judgement, paras 1743-1744.

[67] See also Trial Judgement, para. 1745 ("The Trial Chamber considers that the *fear of violence and duress* caused by the *shelling* of the towns of Benkovac, Gračac, Knin, and Obrovac created an environment in which those present there had no choice but to leave. Consequently, the Trial Chamber finds that the *shelling* amounted to the forcible displacement of persons from Benkovac, Gračac, Knin, and Obrovac on 4 and 5 August 1995."(emphasis added)).

[68] Appeal Judgement, para. 87, referring to Trial Judgement, para. 1755. Referring to the same paragraph of the Trial Judgement, the Majority also tries to justify its affirmation by stating: "By contrast, the Appeals Chamber […] observes that where artillery attacks on settlements were not deemed unlawful, the Trial Chamber was unwilling to characterise Serb civilians' concurrent departures as deportation." See Appeal Judgement, para. 92, referring to Trial Judgement, para. 1755.

[69] As enounced in paragraph 1742 of the Trial Judgement, the Trial Chamber made legal findings on forcible transfer and deportation with respect to four sets of events. It considered the departure of persons: (i) from the towns of Knin, Benkovac, Gračac, and Obrovac on 4 and 5 August 1995; (ii) from other locations after shells impacted on or nearby these locations on 4 and 5 August 1995; (iii) who were victims of or witnessed crimes committed by members of the Croatian military forces or Special Police during and after Operation Storm; and (iv) for which the evidence does not establish a geographic or temporal link to incidents of shelling, crimes, or other threatening acts committed by members of the Croatian military forces or Special Police. The Trial Chamber's legal findings with respect to the departure of persons from the towns of Knin, Benkovac, Gračac, and Obrovac on 4 and 5 August 1995 are found in paragraphs 1743 to 1753 of the Trial Judgement. Paragraph 1755 of the Trial Judgement to which the Majority refers is not linked to the legal findings on deportation with respect to the Four Towns, but concerns the Trial Chamber's legal findings on the departure of persons from other locations after shells impacted on or nearby these locations on 4 and 5 August 1995. See Trial Judgement, paras 1742-1755.

> the evidence is insufficient to establish the number of projectiles fired at these places and, with only a few exceptions, to determine the times and locations of impact of the projectiles. As the evidence lacks details on the timing, duration, and intensity of the shelling on or nearby such places, the Trial Chamber cannot conclusively determine that *the shelling on or nearby these places was the primary and direct cause of flight, or that fear of the shelling created an environment in which those present had no choice but to leave*. In this respect, the Trial Chamber also considered that the evidence indicated other factors which may have influenced people to leave. These factors include information provided by local committees or SVK units in Kakanj and Uzdolje, and, as in the case of Sava Mirković from Polača and the inhabitants of Zarići, the departure of others and fears of what would happen when the Croats arrived.[70]

The Majority's analysis is therefore an incorrect re-interpretation of the Trial Chamber's findings and evidence. Moreover, the Majority's affirmation is not supported by the Trial Judgement and, more importantly, the Trial Chamber's legal findings on the crime of deportation with respect to the departure of the Serb civilian population from the Four Towns on 4 and 5 August 1995 are not linked to the *unlawfulness* of the attacks.

24. In addition, the Majority further ignores that the Trial Chamber found that the crime of deportation also occurred with respect to events not linked to the shelling of the Four Towns on 4 and 5 August 1995, thus further contradicting the Majority's findings that the "*unlawful* artillery attacks [were] the core indicator that the crime of deportation had taken place."[71] Indeed, the Trial Chamber found that "the forcible displacement by members of the Croatian military forces and Special Police of […] persons in August 1995 constituted deportation."[72] These persons were victims of, or witnessed, crimes – including cruel treatment, inhumane acts, detention, plunder, destruction, and murder – committed by members of the Croatian military forces or Special Police after 5 August 1995.[73] The Trial Chamber considered that "these crimes caused duress and fear of violence in their victims and those who witnessed them, such that the crimes created an environment in which these persons had no choice but to leave."[74] Accordingly, the Trial Chamber found that the commission of these crimes also amounted to the forcible displacement and deportation of the victims and witnesses of those crimes after 5 August 1995.[75] The Trial Chamber further found that these crimes were committed with the intention to discriminate on political, racial, or religious grounds and therefore that "the deportation, which was brought about by the commission of the aforementioned crimes, was also committed on discriminatory grounds" and constituted one of the underlying acts of persecutions as a crime against humanity.[76]

[70] Trial Judgement, para. 1754 (emphasis added).
[71] Appeal Judgement, para. 87 (emphasis added).
[72] Trial Judgement, para. 1759. See also Trial Judgement, paras 1756-1758, 1760-1761.
[73] Trial Judgement, para. 1756. See also Trial Judgement, para. 1742.
[74] Trial Judgement, para. 1756.
[75] Trial Judgement, paras 1756, 1759.
[76] Trial Judgement, paras 1862-1863.

25. The quashing, by the Majority, of the *mere existence* of the JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force is another illustration of the Majority's misguided re-interpretation of the Trial Judgement without having demonstrated that the Trial Chamber erred. In paragraph 91 of the Appeal Judgement, the Majority pretends that the Trial Chamber's "findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested *primarily* on the existence of *unlawful* artillery attacks against civilians and civilian objects in the Four Towns."[77] On this basis and the reversal of the Trial Chamber's findings related to the *unlawful* artillery attacks, the Majority concludes that it "cannot affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed."[78] Contrary to the Majority's assertion and as summarised above,[79] the existence of the JCE as defined by the Trial Chamber did not rest solely on the existence of *unlawful* artillery attacks but was instead based on four mutually reinforcing sets of events including, but not limited to, the artillery attacks on the Four Towns on 4 and 5 August 1995. The Majority ignores that the existence of the JCE was also based on the evidence of: (i) the Brioni Meeting and the preparation of Operation Storm; (ii) the crimes committed by the Croatian military forces and Special Police against the remaining Serb civilian population and property after 5 August 1995; and (iii) the discriminatory policy and property law imposed by the Croatian political leadership against the Serb minority and the policy concerning the return of Croatian refugees and internally displaced persons.[80]

26. With respect to the Brioni Meeting, the Majority tries to justify its conclusion by claiming that, outside the context of the *unlawful* attacks against civilians and civilian objects, "it was not reasonable to find that the only possible interpretation of the Brioni Transcript involved a JCE to forcibly deport Serb civilians."[81] In this respect, the Majority purports that "[p]ortions of the Brioni Transcript deemed incriminating by the Trial Chamber can be interpreted, *absent the context of unlawful artillery attacks*, as inconclusive with respect to the existence of a JCE, reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction."[82] Moreover, the Majority contends that:

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[77] Appeal Judgement, para. 91 (emphasis added). The Majority seems somehow to contradict itself by using the word "primarily", which does not mean "exclusively".
[78] Appeal Judgement, para. 91.
[79] See *supra* para. 19.
[80] See *supra* para. 19.
[81] Appeal Judgement, para. 93.
[82] Appeal Judgement, para. 93 (emphasis added).

> discussions of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts. Other parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the towns of Knin, could be reasonably construed as using shorthand to describe the military forces stationed in an area, or intending to demonstrate potential military power in the context of planning a military operation.[83]

In light of the Trial Chamber's careful and detailed review of the minutes of the Brioni Transcript,[84] these suggestions are simply grotesque. The Majority ignores that, independently of its findings on the *unlawful* attacks on the Four Towns, the Trial Chamber explicitly rejected the interpretation that the statements made by Franjo Tuđman and Gotovina and the discussions at the Brioni Meeting were about the protection of civilians.[85] The Trial Chamber specifically found that "the references at the meeting to civilians being shown a way out was not about the protection of civilians but about civilians being forced out."[86] The Majority fails to demonstrate that the Trial Chamber erred in this regard. Moreover, the Majority's suggestions are also irreconcilable with the Trial Chamber's further reliance – in support of its conclusion on the Brioni Meeting – on Tuđman's speech a few weeks after Operation Storm during which he stated with respect to Knin:

> Up until […] when it has been captured by Turkish Ottoman conquerors and together with them the ones who stayed till yesterday in our Croatian Knin. But today it is Croatian Knin and never again it will go back to what was before, when they spread cancer which has been destroying Croatian national being in the middle of Croatia and didn't allow Croatian people to be truly alone on it's [sic] own, that Croatia becomes capable of being independent and sovereign state. […] They were gone in a few days as if they had never been here, as I said […] They did not even have time to collect their rotten money and dirty underwear.[87]

27. Regarding the crimes committed by the Croatian military forces and Special Police against the remaining Serb civilian population and property after 5 August 1995, the Majority claims that this evidence "is insufficient to support the finding that a JCE existed."[88] As explained above, the Trial Chamber found that the commission of crimes by members of the Croatian military forces or

[83] Appeal Judgement, para. 93 (internal references omitted).
[84] Trial Judgement, paras 1970-1995.
[85] Trial Judgement, para. 1993 ("Granić commented that by opening a corridor for the evacuation of the civilian population and the SVK, the authorities of Croatia aimed at avoiding unnecessary civilian casualties at all costs. This raises the question of whether the participants merely discussed a way to ensure that the civilians would get out of harm's way during the hostilities. The Trial Chamber has considered the minutes of the meeting in this respect and whether this would constitute a reasonable interpretation. In general, the participants made no reference to how the military operation should be conducted as to avoid or minimize the impact on the civilian population. Rather, after recalling how many Croatian villages and towns had been destroyed, Tuđman concluded that a counterattack by the Serbs from Knin would provide a pretext for Croatia to use artillery for complete demoralization. Gotovina responded that if there was an order to strike it, Knin could be destroyed in a few hours. He also reassured Tuđman that they could attack Knin very precisely without targeting the UNCRO barracks. Later in the meeting, Tuđman also made a reference to destroying a part of Knin. The Trial Chamber further considered that when Tuđman stressed that a way out should be left for civilians, Gotovina stated that if Croatian forces only continued to exert pressure, the only civilians left would be those who could not leave. The above statements do not lend support to an interpretation that the discussions at the meeting were about the protection of civilians.").
[86] Trial Judgement, para. 1995.
[87] Trial Judgement, para. 2306.
[88] Appeal Judgement, para. 94.

Special Police after 5 August 1995 amounted to the forcible displacement and deportation of the victims and witnesses of those crimes after 5 August 1995 and constituted one of the underlying acts of persecutions.[89] The Majority's analysis is flawed when it states that "the Trial Chamber found that acts of destruction and plunder committed by Croatian Forces in the Indictment period could not be tied to the Croatian military and political leadership or be considered part of the JCE's common purpose."[90] Although the Trial Chamber never found that destruction and plunder were within the *purpose* of the JCE,[91] it did not need to do so to consider that the crimes – which also included cruel treatment, inhumane acts, detention, and murder – committed by the Croatian military forces and Special Police against the remaining Serb civilian population and property after 5 August 1995 were further evidence of the *existence* of the JCE. In any event, the Majority has not demonstrated that a reasonable trier of fact could not have taken this evidence into account, in the context of its other mutually reinforcing factual findings, to find that a JCE to permanently remove the Serb civilian population from the Krajina region by force or threat of force existed.

28. Finally, with respect to the discriminatory policy imposed by the Croatian political leadership against the Serb minority and the policy concerning the return of Croatian refugees and internally displaced persons, the Trial Chamber found that "one aspect of the policy of Tuđman and others in the political and military leadership at the time was to invite and encourage Croats to return to, and settle in Croatia and to use the homes abandoned by Krajina Serbs for this purpose [and f]rom this also followed that the return of Serbs should be limited to a minimum."[92] Moreover, with respect to the discriminatory property law relating to, *inter alia*, the properties which have been abandoned during and after Operation Storm, the Trial Chamber found that "the motives underlying and the overall effect of the legal instruments was to provide the property left behind by Krajina Serbs in the liberated areas to Croats and thereby deprive the former of their housing and property" and that the discriminatory property law "were therefore part of the implementation of the return policy."[93] The Trial Chamber inferred from both the mass exodus of the Serb civilian population from the Krajina region "and the immediate efforts, on a policy and legislative level, to prevent the population from returning, that members of the Croatian military and political leadership intended to force the Krajina Serbs from their homes"[94] and found that "[t]hese measures aimed at ensuring that the removal of the Krajina Serb population became permanent" and as such was an underlying act of persecutions as a crime against humanity, which the JCE amounted to or

[89] See *supra* para. 24.
[90] Appeal Judgement, para. 94.
[91] Trial Judgement, para. 2313.
[92] Trial Judgement, para. 2057.
[93] Trial Judgement, para. 2098.
[94] Trial Judgement, para. 2310.

involved.[95] By stating that "[t]he fact that Croatia adopted discriminatory measures after the departures of Serb civilians from the Krajina does not demonstrate that these departures were forced",[96] the Majority misinterprets the Trial Chamber's findings, which did not rely on this discriminatory policy and property law to demonstrate that *the departures* were *forced* but rather found that they aimed at ensuring that the removal of the Krajina Serb population was permanent. The Majority therefore fails to demonstrate that the Trial Chamber erred in this regard or that a reasonable trier of fact could not have taken this evidence into account, in the context of its other mutually reinforcing factual findings, to prove the *existence* of a JCE to permanently remove the Serb civilian population from the Krajina region. Finally, by stating that "the Trial Chamber did not find that Gotovina and Markač played a role in creating or supporting Croatia's discriminatory efforts in the Krajina",[97] the Majority mistakenly conflates the mere *existence* of the JCE and Gotovina's and Markač's *significant contributions* to the JCE.

29. In sum, the Majority's conclusion quashing the existence of the JCE is based on an incorrect reading of the Trial Judgement as the Trial Chamber's findings on the existence of the JCE are not based *solely* on the *unlawfulness* of the attacks. The Majority has failed to demonstrate the opposite. Accordingly, a reasonable trier of fact, even assuming that the Trial Chamber's findings with respect to the unlawful artillery attacks could not stand, could have found that the only reasonable conclusion from the evidence was that there was a JCE whose common purpose was to permanently remove the Serb civilian population from the Krajina region by force or threat of force, which amounted to and involved the crimes of persecutions, deportation and forcible transfer. The application of the correct standard of appellate review, as set up at the beginning of the Appeal Judgement itself,[98] would have left this conclusion of the Trial Chamber undisturbed. The Majority negligently misapplied the standard of review. Therefore, I dissent.

30. Finally, even if the Majority wished to acquit Gotovina and Markač entirely, one might wonder what the Majority wanted to achieve by quashing the mere existence of the JCE rather than concentrating on Gotovina's and Markač's significant contributions to the JCE. I leave it as an open question.

[95] Trial Judgement, para. 2312.
[96] Appeal Judgement, para. 95.
[97] Appeal Judgement, para. 95.
[98] Appeal Judgement, para. 13.

D. Alternate Modes of Liability

31. After having reversed all of Gotovina's and Markač's convictions for committing, through their participation in a JCE, persecutions, deportation, murder, and other inhumane acts as crimes against humanity as well as plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war,[99] the Majority pretends to engage in an assessment "on the possibility of entering convictions under alternate modes of liability."[100] Unfortunately, here again the Majority's reasoning is both flawed and premised on a misconceived understanding of the law; a misconception which affects all the Majority's reasoning with respect to alternate modes of liability and its subsequent application of the law to the facts. Given that I disagree with the Majority's reasoning for reversing all of Gotovina's and Markač's convictions, I will limit my dissenting opinion on this issue to discussing why I disagree with the Majority's reasoning from a strict legal point of view. I will therefore not touch upon the Majority's analysis with respect to the application of the law to the facts with respect to the two appellants.

32. From a purely legal perspective, the Majority's reasoning with respect to the possibility of revising a mode of liability is based on a legal confusion. In its analysis, the Majority repeatedly refers to the possibility of entering convictions under alternate modes of liability.[101] It does so even when summarising the Prosecution's submissions in this respect,[102] although the Prosecution never referred to "entering" new convictions on appeal, but carefully adopted the correct language of "revising" a conviction for a certain crime from one mode of liability to another.[103] The Majority's mischaracterization and incorrect attribution of legal arguments to the parties in this case is another illustration of the Majority's erroneous analysis.

33. Contrary to the Majority's reasoning, revising an appellant's conviction for a certain crime from one mode of liability to another is not equivalent to entering a new conviction on appeal. On multiple occasions when the Appeals Chamber has found that a trial chamber erred in law in convicting an appellant for a certain crime under a specific mode of liability – most often under JCE/committing as in the present case – the Appeals Chamber has *revised* the appellant's conviction for this crime with an alternate mode of liability, such as aiding and abetting or superior responsibility.[104] This is further illustrated by the wording used by the Appeals Chamber on these

[99] Appeal Judgement, paras 49-98.
[100] Appeal Judgement, para. 99. See also Appeal Judgement, paras 100-157.
[101] Appeal Judgement, paras 99-103, 106-110.
[102] Appeal Judgement, para. 103.
[103] See Prosecution Alternate Liability Response, paras 1-12.
[104] See, *e.g.*, *Vasiljević* Appeal Judgement, paras 132-135, 141-143, 147, 181-182, p. 60 (revising the conviction with respect to the Drina River Incident for murder as a violation of the laws or customs of war and persecutions as a crime against humanity from JCE to aiding and abetting); *Krstić* Appeal Judgement, paras 135-144, 266, 268, p. 87 (revising

occasions.[105] In the *Blaškić*,[106] *Simić*,[107] and *Rukundo*[108] cases, the Appeals Chamber has explicitly specified that it was *affirming* the convictions. In *Krstić*, the Appeals Chamber has *revised* his conviction.[109] The Appeals Chamber has further explained on various occasions that an appellant's conviction entered for a certain crime under a specific mode of liability was "better [or properly] expressed",[110] "best described",[111] "appropriately characterized",[112] "more properly expressed",[113] "accurately characterized",[114] "properly characterized",[115] or "re-qualified"[116] by another mode of liability and has therefore substituted a certain mode of liability for an alternate mode of responsibility. In these cases, the *conviction* for a specific crime was not affected. In doing so, the Appeals Chamber has not entered a new conviction on appeal but has actually revised or re-characterised the Trial Chamber's verdict of guilt so that the appellant was still found guilty but under an alternate mode of responsibility.

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the conviction for the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995 constitutive of genocide as well as murder as a violation of the laws or customs of war from JCE to aiding and abetting); *Simić* Appeal Judgement, paras 74-75, 84, 105, 114-118, 130-138, 148-159, 182-189, 300-301 (revising the conviction for persecutions as a crime against humanity from JCE to aiding and abetting); *D. Milošević* Appeal Judgement, paras 275-282, 334, p. 128 (revising the conviction for the sniping of the civilian population constitutive of terror as a violation of the laws or customs of war as well as murder and other inhumane acts as crimes against humanity from planning and ordering to superior responsibility); *Rukundo* Appeal Judgement, paras 39, 50-54, 175-177, 269-270 (revising the conviction for genocide as well as murder and extermination as crimes against humanity from JCE to aiding and abetting). On fewer occasions, the Appeals Chamber has also revised a conviction from other modes of liability than JCE to aiding and abetting or superior responsibility. See, *e.g.*, *Blaškić* Appeal Judgement, paras 32-42, 659-670, p. 258 (revising the conviction for using detainees as human shields constitutive of inhuman treatment as a grave breach of the Geneva Conventions of 1949 from ordering to omission).

[105] I concede that, in a very few instances, the Appeals Chamber has used unfortunate language, which might give the impression *a priori* that the Appeals Chamber was entering a new conviction. Nonetheless a reading of these paragraphs in their context clarify that the Appeals Chamber was in fact revising the appellant's conviction for a certain crime from one mode of liability to another. Compare *Krstić* Appeal Judgement, para. 143 with *Krstić* Appeal Judgement, paras 135-139, 144, 266, 268, p. 87; Compare *D. Milošević* Appeal Judgement, paras 277, 282, 334 with *D. Milošević* Appeal Judgement, paras 275-276, 278-281, p. 128.

[106] *Blaškić* Appeal Judgement, p. 258, where in the Disposition, the Appeals Chamber "affirm[ed]" Blaškić's conviction for Count 19 under Article 7(1) of the Statute for the inhuman treatment of detainees occasioned by their use as human shields. See also *Blaškić* Appeal Judgement, para. 659 ("The Appeals Chamber holds that the reasoning of the Trial Chamber in finding the Appellant responsible for ordering the use of civilian detainees as human shields is flawed, although it *does not undermine* the conviction."(emphasis added)).

[107] *Simić* Appeal Judgement, para. 189 ("As a result, the Appeals Chamber *affirms* the Appellant's conviction for persecutions under Count 1 of the Fifth Amended Indictment insofar as the conduct underlying this conviction encompasses these acts, and holds that his responsibility is appropriately characterized as that of an aider and abettor."(emphasis added)). See also *Simić* Appeal Judgement, para. 75 ("Consequently, the question arises as to whether the Trial Chamber's findings support his responsibility under a different mode of liability").

[108] *Rukundo* Appeal Judgement, para. 270, where in the Disposition, the Appeals Chamber "affirm[ed]" Rukundo's convictions for genocide as well as for murder and extermination as crimes against humanity.

[109] *Krstić* Appeal Judgement, para. 268 ("As such, the *revision* of Krstić's conviction to aiding and abetting these two crimes […]."(emphasis added)).

[110] See, *e.g.*, *Blaškić* Appeal Judgement, paras 662, 670.

[111] See, *e.g.*, *Rukundo* Appeal Judgement, para. 39.

[112] See, *e.g.*, *Simić* Appeal Judgement, para. 189.

[113] See, *e.g.*, *Krstić* Appeal Judgement, para. 137.

[114] See, *e.g.*, *Krstić* Appeal Judgement, para. 138.

[115] See, *e.g.*, *Krstić* Appeal Judgement, para. 139.

[116] See, *e.g.*, *Simić* Appeal Judgement, para. 300.

34. Thus, while I agree with the Majority's reasoning that "the plain text of Article 25(2) of the Statute, namely the power vested in the Appeals Chamber to 'revise' a decision taken by a trial chamber" supports the Appeals Chamber's authority to revise an appellant's conviction for certain crimes from one mode of liability to another, I disagree with the Majority's qualification of such action as "enter[ing] convictions on the basis of alternate modes of liability".[117] In one instance, the Majority itself seems to accept the correct legal position when it states that "[t]he practice of *sustaining a conviction* pursuant to an alternate mode of liability is effectively one such *alteration* to a trial chamber's legal reasoning."[118]

35. Unfortunately, the Majority's correct articulation of the law is short-lived as it immediately refers to Section 3 of the England and Wales Criminal Appeal Act of 1968, which "allows an appellate court to substitute a *conviction* for an alternative *offence*".[119] The kind of scenario Section 3 of the England and Wales Criminal Appeal Act of 1968 envisages is not the revision of one mode of liability for another one, but the substitution of a conviction for an alternative offence.

36. Moreover, the legal confusion in the Majority's reasoning between entering a new conviction on appeal and revising a trial judgement to reflect an appellant's criminal responsibility pursuant to an alternate mode of liability is further revealed by the cases to which the Majority refers to justify its affirmation that "it has, on multiple occasions, rejected […] the proposition that additional convictions on appeal violate an appellant's right to a fair trial *per se*".[120] To support this affirmation, the Majority does not refer to any cases where it has revised an appellant's conviction for a certain crime from one mode of liability to an alternate mode of responsibility, thus again illustrating its legal confusion. Rather, these cases concern entering new convictions on appeal for new crimes.

37. Given the Majority's affirmation in its legal reasoning that it has the power to enter new convictions on appeal and that this alleged power is not a violation of the appellant's right to a fair trial,[121] I must hereby reaffirm that, for the reasons already indicated in my dissenting opinions in the *Mrkšić and Šljivančanin*,[122] *Galić*,[123] *Semanza*,[124] *Rutaganda*,[125] *Setako*,[126] and *Gatete*[127] cases,

[117] Appeal Judgement, para. 106.
[118] Appeal Judgement, para. 106 (first emphasis added).
[119] Appeal Judgement, para. 106 (emphasis added).
[120] Appeal Judgement, para. 107, referring to *Šljivančanin* Reconsideration Decision, *Galić* Appeal Judgement, *Semanza* Appeal Judgement, *Rutangada* Appeal Judgement.
[121] Appeal Judgement, para. 107.
[122] *Mrkšić and Šljivančanin* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, pp. 171-177, paras 1-13.
[123] *Galić* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.
[124] *Semanza* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 131-133, paras 1-4.
[125] *Rutaganda* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 1-4.
[126] *Setako* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, paras 1-6.

I do not believe that the Appeals Chamber has the power to enter a new conviction on appeal as it is bound to apply Article 24(2) of the Statute in compliance with fundamental principles of international human rights law as enshrined in particular in the International Covenant on Civil and Political Rights ("ICCPR").[128] Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

38. Finally, one might also regret that when stating that, in exercising its power to enter new convictions on appeal under alternate modes of liability, the Appeals Chamber is subject to the fundamental protection of the rights of the accused provided by the Statute and that it will not exercise such power if this would substantially compromise the fair trial rights of the appellants as delineated in the Statute,[129] the Majority falls short of providing any indication as to which fundamental principles of international human rights regarding the right to a fair trial it refers to. Again, the Majority missed the opportunity to express its views on this matter.

E. Conclusion

39. In light of the above, I fundamentally dissent from the entire Appeal Judgement, which contradicts any sense of justice.

Done in English and French, the English text being authoritative

Judge Fausto Pocar

Dated this 16th day of November 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[127] *Gatete* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, paras 1-5.
[128] International Covenant on Civil and Political Rights, 16 December 1966, entered into force on 23 March 1976.
[129] Appeal Judgement, para. 108.

XI. ANNEX A – PROCEDURAL HISTORY

1. Trial Chamber I rendered the Trial Judgement in this case on 15 April 2011. The main aspects of the appeal proceedings are summarised below.

A. Notices of Appeal and Briefs

1. Gotovina's Appeal

2. Gotovina filed his notice of appeal on 16 May 2011.[1] On 15 July 2011, he filed a motion requesting an increase in the word limit for his Appellant's brief,[2] which the Prosecution opposed.[3] Gotovina's motion was granted in part on 20 July 2011, permitting his Appellant's brief to contain 40,000 words instead of 30,000.[4] Gotovina filed his Appellant's brief on 1 August 2011.[5] The Prosecution responded to Gotovina's appeal on 12 September 2011.[6] Gotovina filed his reply on 27 September 2011.[7]

2. Markač's Appeal

3. Markač filed his notice of appeal on 16 May 2011.[8] On 20 July 2011, he filed a motion requesting an increase in the word limit for his Appellant's brief,[9] which the Prosecution opposed.[10] This motion was granted in part on 20 July 2011, permitting Markač's Appellant's brief to contain 40,000 words instead of 30,000.[11] Markač filed his Appellant's brief on 1 August 2011.[12] The

[1] Notice of Appeal of Ante Gotovina, 16 May 2011.
[2] Ante Gotovina's Motion for Leave to Exceed the Word Limit, 15 July 2011.
[3] Prosecution's Opposition to Gotovina's Motion for Leave to Exceed the Word Limit, 19 July 2011.
[4] Decision on Ante Gotovina's and Mladen Markač's Motions for Leave to Exceed the Word Limit, 20 July 2011, pp. 1, 3. The Prosecution received an equivalent word extension for its respondent's brief.
[5] Appellant's Brief of Ante Gotovina, 1 August 2011 (confidential). *See also* Book of Authorities for Ante Gotovina's Appellant's Brief, 1 August 2011. The Appeals Chamber notes that the appeal brief was filed as a confidential annex to a public submission. A public redacted version was filed on 2 August 2011.
[6] Prosecution Response to Ante Gotovina's Appeal Brief, 12 September 2011 (confidential). A public redacted version was filed on 29 September 2011. *See also* Corrigendum to Prosecution Response to Ante Gotovina's Appeal Brief, 28 September 2011 (confidential with confidential annexes). The Pre-Appeal Judge dismissed a motion by Gotovina to strike the Prosecution's response for exceeding the word limit, and allowed Gotovina a 6,000 word extension for his reply brief. *See* Decision on Motion to Strike the Respondent's Briefs, 14 September 2011, p. 3.
[7] Reply Brief of Appellant Ante Gotovina, 27 September 2011 (confidential). A public redacted version was filed on 4 October 2011. The Pre-Appeal Judge dismissed a motion by the Prosecution to strike Gotovina's reply brief for exceeding the word limit and denied a motion by the Prosecution to strike grounds of Gotovina's appeal which were presumed to be abandoned. *See* Decision on Prosecution's Motion to Strike Ante Gotovina's Reply Brief, 18 October 2011, pp. 1-2; Decision on Motion to Strike Gotovina's Abandoned Grounds of Appeal, 4 November 2011, p. 2.
[8] Mladen Markač's Notice of Appeal, 16 May 2011. The Appeals Chamber notes that the notice of appeal was re-classified as confidential on 18 May 2011 and a public redacted version was filed on 18 May 2011.
[9] Mladen Markač's Joinder to Ante Gotovina's Motion for Leave to Exceed the Word Limit, 20 July 2011.
[10] Prosecution Response to Mladen Marka[č]'s Joinder to Ante Gotovina's Motion for Leave to Exceed the Word Limit, 20 July 2011.
[11] Decision on Ante Gotovina's and Markač's Motions for Leave to Exceed the Word Limit, 20 July 2011, pp. 1-3. The Prosecution received an equivalent word extension for its respondent's brief.
[12] Mladen Markač's Appeal Brief, 1 August 2011 (confidential). *See also* Book of Authorities for Mladen Markač's Appeal Brief, 1 August 2011. A public redacted version of Markač's appeal brief was filed on 12 October 2011.

Prosecution responded to Markač's appeal on 12 September 2011.[13] Markač filed his reply on 27 September 2011.[14]

B. Assignment of Judges

4. On 23 May 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Mehmet Güney, Judge Fausto Pocar, Judge Andrésia Vaz, Judge Theodor Meron, and Judge Carmel Agius.[15] Pursuant to Rule 22(B) of the Rules, Judge Meron was elected the Presiding Judge in the case.[16] On 30 May 2011, Judge Meron designated himself as Pre-Appeal Judge.[17] On 17 November 2011, the President of the Tribunal replaced Judge Andrésia Vaz with Judge Patrick Robinson.[18]

C. Gotovina's Applications for Orders Pursuant to Rule 54 *bis* of the Rules

1. Applications to Compel the Republic of Serbia to Produce Documents

5. On 22 June 2011, Gotovina filed an application for an order pursuant to Rule 54 *bis* of the Rules compelling the Republic of Serbia to produce certain documents relating, *inter alia*, to the departure of Serb civilians from the Krajina region in August 1995.[19] The Prosecution requested leave to respond to Gotovina's application on 24 June 2011,[20] and filed its response on 4 July 2011.[21] Gotovina filed his reply on 11 July 2011.[22] The Appeals Chamber dismissed Gotovina's application on 19 July 2011.[23]

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[13] Prosecution Response to Mladen Markač's Appeal Brief, 12 September 2011 (confidential). A public redacted version was filed on 29 September 2011. The Pre-Appeal Judge dismissed a motion by Markač to strike the Prosecution's response for exceeding the word limit, and allowed Markač a 6,000 word extension for his reply brief. *See* Decision on Motion to Strike the Respondent's Briefs, 14 September 2011, p. 3. *See also* Corrigendum to Prosecution Response Brief to Mladen Markač Appeal, 28 September 2011 (confidential with confidential annexes).

[14] Mladen Markač's Reply to Re[s]pondent's Brief, 27 September 2011 (confidential). A public redacted version was filed on 6 October 2011. The Pre-Appeal Judge denied the Prosecution's request to file a sur-reply. *See* Decision on Prosecution's Request for Leave to File Sur-Reply to Respond to False Allegations in Markač's Reply Brief, 1 November 2011, p. 2.

[15] Order Assigning Judges to a Case Before the Appeals Chamber, 23 May 2011.

[16] Order Designating a Pre-Appeal Judge, 30 May 2011.

[17] Order Designating a Pre-Appeal Judge, 30 May 2011.

[18] Order Replacing a Judge in a Case Before the Appeals Chamber, 17 November 2011.

[19] Ante Gotovina's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 22 June 2011 (public with confidential annexes).

[20] Prosecution Request for Leave to Respond to Gotovina's Application Pursuant to Rule 54*bis*, 24 June 2011.

[21] Prosecution Response to Gotovina's Application Pursuant to Rule 54 *bis*, 4 July 2011 (confidential with confidential annexes). A public redacted version was filed on 6 July 2011. *See also* Decision on Prosecution Request for Leave to Respond to Gotovina's Application Pursuant to Rule 54 *bis*, 28 June 2011. Due to a clerical error, the Prosecution's response was not circulated to the Appellants until two days after the expiration of the filing deadline for a response, and Gotovina consequently filed a motion to strike the response as untimely. The Pre-Appeal Judge noted the clerical error and ordered an extension of the deadline for Gotovina to file a reply. *See* Ante Gotovina's Motion to Strike "Prosecution Response to Gotovina's Application Pursuant to Rule 54 *bis*", 7 July 2011; Order Amending Time Limits

6. On 7 September 2011, Gotovina renewed this application,[24] to which the Prosecution filed its response on 19 September 2011.[25] Gotovina filed his reply on 21 September 2011.[26] On 16 November 2011, the Appeals Chamber denied Gotovina's renewed application.[27]

2. Application to Compel the United Nations to Produce Documents or Information

7. On 2 December 2011, Gotovina filed an application for an order pursuant to Rule 54 *bis* of the Rules to compel the United Nations to locate and produce military documents relevant, *inter alia*, to artillery operations conducted by the Croatian Army during Operation Storm.[28] The Prosecution responded on 12 December 2011.[29] Gotovina filed his reply on 16 December 2011.[30] The Appeals Chamber denied the application on 10 February 2012.[31]

D. Motions Related to the Admission of Additional Evidence

1. Motions for the Admission of Additional Evidence

8. On 25 October 2011, Markač filed a motion for the admission of additional evidence on appeal pursuant to Rule 115 of the Rules.[32] On 27 October 2011,[33] 30 March 2012,[34] and 2 May

for Any Motion Replying to the "Prosecution Response to Gotovina's Application Pursuant to Rule 54 *bis*", 7 July 2011.

[22] Ante Gotovina's Reply in Support of His Application for an Order Pursuant to Rule 54 *bis* Directing the Republic of Serbia to Produce Documents, 11 July 2011 (confidential). A public redacted version was filed on 15 July 2011.

[23] Decision on Ante Gotovina's Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 19 July 2011, p. 2.

[24] Ante Gotovina's Renewed Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 7 September 2011.

[25] Prosecution Response to Gotovina's Renewed Application Pursuant to Rule 54*bis*, 19 September 2011.

[26] Ante Gotovina's Reply in Support of Renewed Rule 54 *bis* Application for an Order Directed to Serbia, 21 September 2011.

[27] 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, para. 10.

[28] Ante Gotovina's Application for an Order Pursuant to Rule 54 *bis* Directing the United Nations to Produce the So-Called "Artillery Logs" or Explain Their Whereabouts, 2 December 2011 (confidential). A public redacted version was filed on the same day.

[29] Prosecution Response to Gotovina's Application for a Rule 54*bis* Order Directed to the United Nations, 12 December 2011 (confidential). A public redacted version was filed on 16 December 2011.

[30] Reply Brief of Ante Gotovina in Support of His Application for a Rule 54 *bis* Order Directed to the United Nations, 16 December 2011 (confidential). A public redacted version was filed on 19 December 2011.

[31] Decision on Ante Gotovina's Application for an Order Pursuant to Rule 54 *bis* Directed to the United Nations, 10 February 2012 (confidential), para. 12.

[32] Appellant's Second Motion to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 25 October 2011 (confidential) ("Markač Rule 115 Motion"). *See also* Appellant's Motion to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 18 October 2011 (confidential); Prosecution Response to Markač's First Rule 115 Motion, 17 November 2011 (confidential); Appellant's Notice of Withdrawal of First Motion to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 23 November 2011 (confidential).

[33] 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. The Pre-Appeal Judge granted Gotovina's request for a 4,000 word extension to the word limit for

2012,[35] respectively, Gotovina filed three motions for the admission of additional evidence pursuant to Rule 115 of the Rules (collectively, "Rule 115 Motions"). Markač joined the First Gotovina Motion and the Second Gotovina Motion.[36]

9. The Prosecution responded to the Markač Rule 115 Motion on 24 November 2011.[37] Markač did not file a reply. The Prosecution filed its response to the First Gotovina Motion on 28 November 2011.[38] Gotovina filed his reply on 12 December 2011.[39] The Prosecution responded to the Second Gotovina Motion on 27 April 2012,[40] and Gotovina replied on 18 May 2012.[41] The Prosecution responded to the Third Gotovina Motion on 7 May 2012.[42] Gotovina did not file a reply.

10. On 4 and 7 May 2012, the Pre-Appeal Judge deferred deciding on the Rule 115 Motions until after oral arguments had taken place.[43] The Appeals Chamber dismissed the Rule 115 Motions in a single decision on 21 June 2012.[44]

Rule 115 motions established by the Tribunal and allowed the Prosecution an equivalent word extension for its respondent's brief. *See* Decision on Gotovina's Motion to Exceed Word Limit, 26 October 2011, p. 2.

[34] Appellant Ante Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115, 30 March 2012 (confidential with confidential exhibits) ("Second Gotovina Motion"). Pursuant to an order by the Appeals Chamber, a public redacted version was filed on 31 July 2012. *See* Decision on Prosecution Motion to Compel Gotovina to File a Redacted Public Version of His Second Motion to Admit Additional Evidence Pursuant to Rule 115, 28 June 2012 (confidential).

[35] Ante Gotovina's Third Rule 115 Motion, 2 May 2012 (confidential with confidential annexes) ("Third Gotovina Motion").

[36] Mladen Markač's Joinder to "Appellant Ante Gotovina's Motion to Admit New Evidence Pursuant to Rule 115", 27 October 2011 (confidential); Mladen Markač's Joinder to "Appellant Ante Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115", 2 April 2012 (confidential).

[37] Prosecution Response to Markač's Second Rule 115 Motion, 24 November 2011 (confidential with confidential annexes and confidential and *ex parte* annex).

[38] Prosecution Response to Gotovina's Rule 115 Motion, 28 November 2011 (confidential with confidential annexes and a confidential and *ex parte* annex). A public redacted version was filed on 16 December 2011.

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

[40] 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). A public redacted version was filed on 6 August 2012. *See also* Corrigendum to Prosecution Response to Ante Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115, 2 May 2012. The Appeals Chamber notes that the corrigendum was initially filed confidentially with a confidential annex, and was made public on 6 August 2012. The Pre-Appeal Judge denied Gotovina's request to strike the Prosecution's response to the Second Gotovina Motion. *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.

[41] Reply in Support of Appellant Ante Gotovina's Second Rule 115 Motion, 18 May 2012 (confidential). A public redacted version of the reply was filed on 6 August 2012. 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 pp. 123-124.

[42] Prosecution Response to Ante Gotovina's Third Rule 115 Motion, 7 May 2012 (confidential with confidential annexes).

[43] Decision Deferring Consideration of Motions for the Admission of Additional Evidence on Appeal, 4 May 2012 (confidential), p. 1; Decision Deferring Consideration of Ante Gotovina's Third Rule 115 Motion, 7 May 2012 (confidential), p. 1.

2. Motion to Replace Exhibit

11. On 17 April 2012, Gotovina filed a motion to replace an existing redacted version of an exhibit on the trial record with an unredacted version.[45] The Prosecution responded on 20 April 2012.[46] Gotovina did not file a reply. The Pre-Appeal Judge denied the motion on 1 May 2012.[47]

3. Motion *In Limine*

12. On 4 May 2012, Gotovina filed a motion *in limine* seeking orders to preclude the Prosecution from raising new arguments and to maintain confidentiality protections for certain reports appended to the Prosecution's response to the Second Gotovina Motion.[48] Markač filed a joinder to the motion on 7 May 2012.[49] The Appeals Chamber denied the motion on 9 May 2012.[50]

E. Motions to Intervene and Applications to Participate as *Amicus Curiae*

1. Motion to Intervene (Croatia)

13. On 16 December 2011, Croatia filed a motion to intervene in the appeal proceedings or, in the alternative, to submit a statement of interest relating to the appeal or to file a brief as *amicus curiae*.[51] The Prosecution responded on 30 December 2011,[52] and Croatia replied on 3 January 2012.[53] The Appeals Chamber denied the motion in its entirety on 8 February 2012.[54]

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[44] Decision on Ante Gotovina's and Mladen Markač's Motions for the Admission of Additional Evidence on Appeal, 21 June 2012 (confidential), para. 55. A public redacted version of the decision was filed on 2 October 2012.
[45] Ante Gotovina's Motion to Replace Exhibit D798 with Unredacted Version, 17 April 2012 (confidential with a confidential annex).
[46] Prosecution Response to Gotovina Motion to Replace Exhibit D798 with Unredacted Version, 20 April 2012 (confidential).
[47] Decision on Ante Gotovina's Motion to Replace Exhibit D798 with Unredacted Version, 1 May 2012 (confidential), p. 1.
[48] Ante Gotovina's Motion *In Limine* Seeking Order Precluding Prosecution from Raising New Allegation of "Disproportionate Attack," and Motion for Protective Order, 4 May 2012 (confidential).
[49] Mladen Markač's Joinder to "Ante Gotovina's Motion *In Limine* Seeking Order Precluding Prosecution from Raising New Allegation of 'Disproportionate Attack,' and Motion for Protective Order", 7 May 2012 (confidential).
[50] Decision on Ante Gotovina's Motion *In Limine*, 9 May 2012 (confidential), p. 2. The decision was issued without awaiting a response from the Prosecution in view of the lack of prejudice to it. *See* Decision on Ante Gotovina's Motion *in Limine*, p. 1.
[51] Motion to Intervene and Statement of Interest by the Republic of Croatia, 16 December 2011, para. 65. The motion was filed confidentially and made public on 8 February 2012.
[52] Prosecution Response to Republic of Croatia's Motion to Intervene and Statement of Interest, 30 December 2011. The response was filed confidentially and made public on 8 February 2012.
[53] Reply in Support of Motion to Intervene and Statement of Interest by the Republic of Croatia, 3 January 2012. The reply was filed confidentially and made public on 8 February 2012.
[54] Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012 ("Decision on Motion to Intervene"), para. 27. In this decision, the Appeals Chamber additionally granted the Prosecution's motion to vary the time limit for filing a response to submissions by non-parties and accepted the Prosecution's response as validly filed. *See* Decision on Motion to Intervene, para. 7. *See also* Prosecution Motion to Vary Time-Limit, 5 January 2012; Response of the Republic of Croatia to Prosecution Motion to Vary Time-Limit, 9 January 2012. The motion and response were filed confidentially and made public on 8 February 2012.

2. Application to Participate as *Amicus Curiae*

14. On 13 January 2012, Ms. Laurie R. Blank, Mr. Bill Boothby, Mr. Geoffrey S. Corn, Mr. William J. Fenrick, Mr. C.H.B. Garraway, Mr. Donald J. Guter, Mr. Walter B. Huffman, Mr. Eric Talbot Jensen, Mr. Mark E. Newcomb, Mr. Thomas J. Romig, Mr. Raymond C. Ruppert, and Mr. Gary Solis requested leave to file an *amicus curiae* brief in the present proceedings.[55] The Prosecution, Gotovina, and Markač each filed a separate response to the application.[56] The Appeals Chamber denied the application on 14 February 2012.[57]

F. Other Decisions and Orders

1. Motion Seeking an Order Compelling Croatia to Comply

15. On 26 September 2011, Gotovina filed a motion requesting that the Appeals Chamber order Croatia to withdraw appeal proceedings initiated by the Municipal State Attorney's Office in Zagreb against a member of the Gotovina defence team.[58] The Appeals Chamber dismissed the motion as moot on 15 November 2011.[59]

2. Motion to Remedy Alleged Disclosure Violations

16. On 23 March 2012, Gotovina filed a motion for relief to remedy alleged disclosure violations by the Prosecution under Rules 68 and 112(B) of the Rules, and for sanctions pursuant to Rule 68 *bis* of the Rules.[60] The Prosecution responded on 5 April 2012,[61] and Gotovina replied on 13 April 2012.[62] The Appeals Chamber granted the motion in part on 21 May 2012.[63]

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[55] Application and Proposed Amicus Curiae Brief Concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm, 13 January 2012.

[56] Prosecution Response to "Application and Proposed *Amicus Curiae* Brief" Filed on 13 January 2012, 23 January 2012; Ante Gotovina's Response to "Application and Proposed Amicus Curiae Brief" Filed on 13 January 2012, 27 January 2012 (confidential); Mladen Markač's Response to "Prosecution Response to 'Application and Proposed *Amicus Curiae* Brief' Filed on 13 January 2012", 2 February 2012. A public redacted version of Gotovina's response was filed on 27 January 2012.

[57] Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012, para. 14.

[58] Ante Gotovina's Motion Seeking an Order Directing the Republic of Croatia to Comply Immediately with Tribunal Orders, 26 September 2011.

[59] Decision on Ante Gotovina's Motion Seeking an Order Directing the Republic of Croatia to Comply Immediately with Tribunal Orders, 15 November 2011 (confidential), p. 1. *See also* Report from the Republic of Croatia entitled "Proceeding pursuant to the Order of the ICTY Trial Chamber dated 18 February 2011", 14 October 2011 (confidential).

[60] Appellant Ante Gotovina's Motion for Relief to Remedy the Prosecutor's Violations of Rule 68 and Rule 112(B), and for Sanctions Pursuant to Rule 68 *bis*, 23 March 2012 (confidential with confidential annexes).

[61] Prosecution Response to Ante Gotovina's Motion for Relief to Remedy the Prosecutor's Alleged Disclosure Violations, 5 April 2012 (confidential with confidential annexes). The Appeals Chamber granted the Prosecution a three day extension of the deadline to file this response. *See* Decision on Motions to Vary Word Limits and on Prosecution's Motion to Vary Time Limit, 27 March 2012 (confidential), pp. 2-3. *See also* Corrigendum to Prosecution Response to

G. Status Conferences

17. In accordance with Rule 65 *bis*(B) of the Rules, Status Conferences were held on 29 September 2011, 26 January 2012, 23 May 2012, and 18 September 2012.

H. Appeal Hearing

18. On 4 April 2012, the Appeals Chamber issued a scheduling order for the Appeal Hearing in this case.[64] On 24 April 2012, the Appeals Chamber issued an addendum informing the parties of certain modalities of the Appeal Hearing and inviting them to address several specific issues.[65] The Appeal Hearing was held on 14 May 2012 in The Hague.

I. Supplemental Briefing

19. At the Appeal Hearing, the Appeals Chamber issued an oral decision requesting supplemental briefing from Gotovina regarding whether the Prosecution had advanced new arguments in its oral submissions.[66] Gotovina filed his supplemental submission on 17 May 2012,[67] and the Prosecution responded on 21 May 2012.[68]

20. On 20 July 2012, the Appeals Chamber ordered supplemental briefing on the potential for convictions under alternate modes of liability.[69] The Prosecution filed its supplemental submissions on 10 August 2012,[70] to which Gotovina and Markač each responded on 31 August 2012.[71]

Ante Gotovina's Motion for Relief to Remedy the Prosecutor's Alleged Disclosure Violations, 10 April 2012 (confidential with a confidential annex).

[62] Appellant Ante Gotovina's Reply in Support of His Motion for Relief to Remedy the Prosecutor's Violations of Rule 68 and Rule 112(B), and for Sanctions Pursuant to Rule 68 *bis*, 13 April 2012 (confidential with confidential annexes). The Appeals Chamber granted Gotovina a three day extension of the deadline to file this reply. *See* Decision on Motion for Extension of Time to File Reply Brief, 3 April 2012 (confidential). The Prosecution requested leave to file a sur-reply. *See* Prosecution Request for Leave to File Sur-Reply to Gotovina's Motion for Relief to Remedy the Prosecutor's Alleged Disclosure Violations, and Proposed Sur-Reply, 23 April 2012 (confidential); Appellant Ante Gotovina's Response to Prosecution Motion for Leave to File Sur-Reply, 24 April 2012 (confidential). The Appeals Chamber considered the Prosecution's Sur-Reply and Gotovina's Response to the Sur-Reply, in part. *See* 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), para. 5.

[63] 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), para. 19.

[64] Scheduling Order for Appeal Hearing, 4 April 2012.

[65] *Addendum* to the Scheduling Order for Appeal Hearing, 24 April 2012.

[66] AT. 14 May 2012 p. 123.

[67] Ante Gotovina's Supplemental Brief Pursuant to the Oral Order of the Appeals Chamber of 14 May 2012, 17 May 2012.

[68] Prosecution Response to Gotovina's Supplemental Brief, 21 May 2012. The Appeals Chamber did not allow a reply. *See* AT. 14 May 2012 p. 123.

[69] Order for Additional Briefing, 20 July 2012.

[70] Prosecution Supplemental Brief on Alternative Modes of Liability for Ante Gotovina, 10 August 2012; Prosecution Supplemental Brief on Alternative Modes of Liability for Mladen Markač, 10 August 2012.

21. On 10 August 2012 Gotovina filed a motion challenging the Appeals Chamber's jurisdiction to consider alternate forms of liability.[72] On 10 August 2012 Markač joined Gotovina's alternate liability challenge.[73] The Prosecution responded on 17 August 2012,[74] Gotovina replied on 21 August 2012,[75] and Markač joined Gotovina's alternate liability reply on 22 August 2012.[76] The Appeals Chamber has denied the motion in this judgement.[77]

[71] Appellant Ante Gotovina's Supplemental Brief on Alternate Modes of Liability, 31 August 2012; Response to the Prosecution Markač Submission, 31 August 2012 (confidential). A public redacted version of the Markač Additional Response was filed on 31 August 2012. *See also* Book of Authorities for Ante Gotovina's Supplemental Brief on Alternate Modes of Liability, 31 August 2012.
[72] Appellant Ante Gotovina's Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 10 August 2012.
[73] Mladen Markač's Joinder to "Ante Gotovina's Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 10 August 2012.
[74] Prosecution Response to Gotovina Motion Challenging Jurisdiction, 17 August 2012.
[75] Appellant Ante Gotovina's Reply in Support of His Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 22 August 2012.
[76] Mladen Markač's Joinder to "Appellant Ante Gotovina's Reply in Support of His Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver", 21 August 2012.
[77] *See supra*, para. 107.

XII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BLAGOJEVIĆ AND JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BOŠKOSKI AND TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement").

GOTOVINA *ET AL.*

Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-T, Judgement, 15 April 2011 ("Trial Judgement").

HARADINAJ *ET AL.*

Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement").

KARADŽIĆ

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 ("*Karadžić* Foreseeability Decision").

KRAJIŠNIK

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUPREŠKIĆ *ET AL.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA *ET AL.*

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 29 February 2005 ("*Kvočka et al.* Appeal Judgement").

LIMAJ *ET AL.*

Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement").

Dragomir MILOŠEVIĆ

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*D. Milošević* Appeal Judgement").

MRKŠIĆ AND ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamber on 5 May 2009 – or an Alternative Remedy, 8 December 2009 ("*Šljivančanin* Reconsideration Decision").

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 Feburary 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

BAGOSORA AND NSENGIYUMVA

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

GATETE

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2011 ("*Kalimanzira* Appeal Judgement").

KAYISHEMA AND RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), dated 1 June 2001, filed on 19 July 2001 (the English translation of the French original was filed on 4 December 2001) ("*Kayishema and Ruzindana* Appeal Judgement").

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2009 ("*Muvunyi* Appeal Judgement").

NTAGERURA *ET AL.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 29 March 2007 ("*Ntagerura et al.* Appeal Judgement").

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal Judgement").

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (the English translation of the French original was filed on 9 February 2004) ("*Rutaganda* Appeal Judgement").

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SETAKO

Ephrem Setako v. The Prosecutor, Case No. ICTR-04-81-A, Judgement, 28 September 2011 ("*Setako* Appeal Judgement").

ZIGIRANYIRAZO

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement").

3. Other Jurisdictions

DEACON

R v. Deacon [1973] WLR 696 at 696G, 699H (United Kingdom) ("*Deacon*").

GILHAM

Gilham v. R [2012] NSWCCA 131 (Australia) ("*Gilham*").

MOSES

Moses v The State [1996] UKPC 29 (Trinidad and Tobago) ("*Moses*").

SPIES

Spies v. R [2000] HCE 43 (Australia) ("*Spies*").

B. Statutes

Code of Criminal Procedure, Germany (1987, most recently amended 2010).

Code of Criminal Procedure, Italy (2011).

Criminal Appeal Act, England and Wales (1968).

Criminal Appeals Act, New South Wales (1912).

Criminal Appeals Act, Western Australia (2004).

Criminal Code, Canada (1985).

C. Other References

International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976 ("ICCPR").

Oxford English Dictionary Online, September 2012, Oxford University Press.

D. List of designated terms and abbreviations

According to Rule 2(B) of the Rules, the masculine shall include the feminine and the singular the plural, and vice versa.

2 August Order	Prosecution Exhibit 1125
200 Metre Standard	Standard applied by the Trial Chamber to determine whether an artillery projectile was fired at an identified military target
Additional Measures	Measures which the Trial Chamber believed that Gotovina should have adopted. The Trial Chamber stated that Gotovina could have, for example: i) contacted and sought assistance from relevant individuals; ii) made public statements; and iii) diverted additional capacity towards preventing and following up crimes being committed in the Krajina after artillery attacks that were part of Operation Storm
Additional Prosecution Brief (Gotovina)	Prosecution Supplemental Brief on Alternative Modes of Liability for Ante Gotovina, 10 August 2012
Additional Prosecution Brief (Markač)	Prosecution Supplemental Brief on Alternative Modes of Liability for Mladen Markač, 10 August 2012
Alternate Liability Challenge	Appellant Ante Gotovina's Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 10 August 2012
Alternate Liability Reply	Appellant Ante Gotovina's Reply in Support of his Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 21 August 2012
Appeal Hearing	Oral Hearing held on 14 May 2012
Appeals Chamber	Appeals Chamber of the Tribunal
Appellants	Ante Gotovina and Mladen Markač collectively
AT.	Transcript page from hearings on appeal in the present case
BiH	Bosnia and Herzegovina
BM-21	122-millimetre BM-21 Multi Barrel Rocket Launcher

Brioni Meeting	Brioni Meeting of 31 July 1995
Brioni Transcript	Transcript of the Brioni Meeting, Prosecution Exhibit 461
Cf.	Compare with
Croatia	Republic of Croatia
Croatian Forces	HV and Special Police forces
Decision on Proposed *Amicus* Brief	Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012
Failure to Act	Trial Chamber finding that Mladen Markač created a "climate of impunity" which encouraged commission of crimes against Serbs from the Krajina
Failure to Take Additional Measures	Trial Chamber finding that Gotovina failed to make a "serious effort" to ensure that reports of crimes against Serb civilians were followed up and future crimes were prevented
Four Towns	The towns of Knin, Benkovac, Gračac, and Obrovac, collectively
Geneva Conventions	Geneva Conventions I to IV
Gotovina	Ante Gotovina
Gotovina Additional Response	Appellant Ante Gotovina's Supplemental Brief on Alternate Modes of Liability, 31 August 2012
Gotovina Appeal	Appellant's Brief of Ante Gotovina, 2 August 2011 (public redacted version)
Gotovina Notice of Appeal	Notice of Appeal of Ante Gotovina, 16 May 2011
Gotovina Reply	Reply Brief of Appellant Ante Gotovina, 4 October 2011 (public redacted version)
Gotovina's First Supplemental Brief	Ante Gotovina's Supplemental Brief Pursuant to the Oral Order of the Appeals Chamber of 14 May 2012, 17 May 2012
HV	*Hrvatska Vojska* – Croatian Army
Impact Analysis	The Trial Chamber's analysis of impact sites within the Four Towns
Indictment	*The Prosecutor of the Tribunal v. Ante Gotovina et al.*, Case No. IT-06-90-T, Amended Joinder Indictment, 12 March 2008

JCE	Joint criminal enterprise
Markač	Mladen Markač
Markač Additional Response	Response to the Prosecution Markač Submission, 31 August 2012 (public redacted version)
Markač Appeal	Mladen Markač's Public Redacted Appeal Brief, 12 October 2011 (public redacted version)
Markač Joinder	Mladen Markač's Joinder to "Ante Gotovina's Motion Challenging the Appeals Chamber's Jurisdiction to Consider Alternate Modes of Liability, or in the Alternative for Finding of Prosecution Waiver, 10 August 2012
Markač Notice of Appeal	Mladen Markač's Public Redacted Notice of Appeal, 18 May 2011 (public redacted version)
Markač Reply	Mladen Markač's Public Redacted Reply to Respondent's Brief, 6 October 2011 (public redacted version)
n. (nn.)	Footnote(s)
Operation Storm	Military operation established and implemented by Croatian leaders, officials, and forces to re-take territory in the Krajina region of Croatia
Order for Additional Briefing	Order for Additional Briefing, 20 July 2012
p. (pp.)	Page(s)
para. (paras)	Paragraph(s)
Prosecution	Office of the Prosecutor of the Tribunal
Prosecution Alternate Liability Response	Prosecution Response to Gotovina Motion Challenging Jurisdiction, 17 August 2012
Prosecution Final Trial Brief	*The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Prosecution's Public Redacted Final Trial Brief, 3 August 2010
Prosecution Pre-Trial Brief	*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Public Version of Pre-Trial Brief, 23 March 2007 (public redacted version)
Prosecution Response (Gotovina)	Prosecution Response to Ante Gotovina's Appeal Brief, 29 September 2011 (public redacted version)
Prosecution Response	Prosecution Response to Gotovina's Supplemental Brief,

(Gotovina's First Supplemental Brief)	21 May 2012
Prosecution Response (Markač)	Prosecution Response to Mladen Markač's Appeal Brief, 29 September 2011 (public redacted version)
RSK	*Republika Srpska Krajina* – Republic of Serbian Krajina
Rules	Rules of Procedure and Evidence of the Tribunal
Special Police	Special Police of the Ministry of the Interior of Croatia
Split MD	Split Military District
Statute	Statute of the Tribunal
SVK	*Srpska Vojska Krajine* – Serbian Army of Krajina (a.k.a. "ARSK")
T.	Transcript page from hearings at trial in the present case
Trial Chamber	Trial Chamber I of the Tribunal
Trial Judgement	*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011
Tribunal	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
Tuđman	Franjo Tuđman
UN	United Nations
UNCRO	United Nations Confidence Restoration Operation