

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

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

**IN THE APPEALS CHAMBER**

**Before: A bench of the Appeals Chamber**

**Registrar: Mr. John Hocking**

**Date: 16 May 2011**

**THE PROSECUTOR**

**v.**

**ANTE GOTOVINA  
MLADEN MARKAČ**

***PUBLIC***

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**NOTICE OF APPEAL OF ANTE GOTOVINA**

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**The Prosecutor:**

Mr. Serge Brammertz

**For Ante Gotovina:**

Mr. Gregory W. Kehoe  
Mr. Luka S. Mišetić  
Mr. Payam Akhavan  
Mr. Guénaél Mettraux

**For Mladen Markač:**

Mr. Goran Mikuličić  
Mr. Tomislav Kuzmanović

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
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**I. PROCEDURAL BACKGROUND**

- A. Pursuant to Article 25 of the Statute of the Tribunal and Rule 108 of the Rules of Procedure and Evidence, General Ante Gotovina (“Appellant”) submits this Notice of Appeal and grounds of appeal against Trial Chamber I’s Judgement dated 15 April 2011 (IT-06-90-T) (hereinafter, “Judgement”). The Trial Chamber convicted the Appellant of eight counts of crimes against humanity and war crimes, and imposed a sentence of 24-years imprisonment.
- B. Consistent with Rule 108 and the relevant Practice Direction,<sup>1</sup> the Notice of Appeal sets forth a brief overview of the Appellant’s submissions on the primary errors of fact and law, followed by a detailed recital of each and every ground and sub-ground of appeal that forms part of the Appeal.

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<sup>1</sup> *Practice Direction on Formal Requirements for Appeals from Judgements*, IT/201 (7 March 2002).

## II. OVERVIEW OF THE PRIMARY GROUNDS OF APPEAL

- C. The Judgement rests on a finding that all artillery projectiles falling beyond 200 meters of designated “military targets” must be presumed to be unlawful. There is no basis in the evidence to support this finding. Moreover, this finding was neither litigated by the parties nor raised by the Prosecution at trial. This factually baseless theory was adopted by the Trial Chamber only after the hearing had closed.
- D. This finding is the necessary foundation of every aspect of the conviction. The Judgement held (1) General Gotovina ordered an unlawful attack against civilians and civilian objects; (2) this unlawful attack was the “primary and direct cause” of the forcible displacement of 20,000 Serb civilians; and (3) based on the finding of unlawful attack and resulting forcible displacement, draws the inference of his participation in a JCE to permanently remove the Serb civilian population from the Krajina region. The Trial Chamber held that murder, cruel and inhumane treatment, plunder, and wanton destruction were *not* part of the core crimes of the JCE. It held only that those crimes were the natural and foreseeable consequence of the implementation of the JCE by means of deportation through unlawful attacks. Without the finding that artillery projectiles falling beyond 200 meters are unlawful, the conviction of Gotovina cannot stand.
- E. Even if the Trial Chamber’s arbitrary 200 meter rule is accepted, and its numerous factual and legal errors are disregarded, the Judgement amounts at best to a remarkable finding that out of more than 1,205 artillery projectiles, only 5% impacted beyond the Trial Chamber’s acceptable range. In other words, the Trial Chamber infers a JCE to commit crimes against humanity and war crimes from an artillery attack in which 95% of projectiles were satisfactorily shown to have been directed at military objectives. The only evidence in the record concerning a potential margin of error was a passing reference to a 400 meter range of error by a Prosecution witness. Had the Trial Chamber elected to adopt the Prosecution’s position of a 400 meter range of error, it would have found that only 13 out of at least 1,205 projectiles

impacted beyond that margin, a 99% rate of accuracy. No reasonable trier of fact could have concluded based on a 1% error rate that there was an unlawful attack against a civilian population.

- F. The Trial Chamber's erroneous inference is further based on the presumption that all projectiles falling beyond 200 meters were directed at civilian areas. Thus, the burden of proof is shifted from the Prosecutor to Gotovina to prove that there were military objectives in those specific areas. In any event, the Trial Chamber found that most of the 5% of projectiles that were presumed to be unlawful fell into "empty fields" which it nonetheless characterized as "civilian areas". Additionally, the Trial Chamber did not find that a single civilian was killed, injured, or forcibly displaced as the result of instances of unlawful shelling.
  
- G. In relation to deportation, the Trial Chamber rejected reliable evidence of RSK<sup>2</sup> evacuation orders and propaganda-induced fear of a Croatian military victory as causes of the departure of Serb civilians. Rather, the Trial Chamber concluded that the "primary and direct cause" of the departure of 20,000 Serb civilians was the 1% to 5% of artillery projectiles, most of which fell into empty fields. Furthermore, the Trial Chamber did not cite any evidence that a single Serb civilian fled because of those particular artillery projectiles rather than because of the overall effect of lawful combat operations.
  
- H. This Appeal has far-reaching significance beyond the case of General Gotovina. The Judgement is an unreasonable and unrealistic precedent that undermines the credibility and relevance of humanitarian law. It imposes a standard so exacting that it renders lawful warfare impossible for military commanders.

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<sup>2</sup> The so-called "Republic of Serbian Krajina."

### III. RELIEF SOUGHT

- I. Each of the grounds of appeal in this Notice, considered individually or in combination, satisfies the relevant standards of review, consisting of either errors of law invalidating the Judgement or errors of fact resulting in a miscarriage of justice.
- J. General Gotovina has not yet been provided a copy of the Judgement in a language which he understands. Accordingly, he files this Notice of Appeal while reserving the right to seek leave to amend the Notice of Appeal after he has had an opportunity to examine the findings of the Trial Chamber in the Judgement.

#### 1. **GROUND ONE: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN CONCLUDING THAT THERE WAS AN UNLAWFUL ATTACK ON CIVILIANS AND CIVILIAN OBJECTS**

##### Range of Targeting Error and Unlawfulness of Shelling

1.1. The Trial Chamber erred in fact and law when it concluded that the HV<sup>3</sup> unlawfully attacked civilians and civilian objects in Knin, Benkovac, Obrovac and Gračac because “too many projectiles impacted in areas which were too far away from identified artillery targets. . .for the artillery projectiles to have impacted in these areas as a result of errors or inaccuracies in the HV’s artillery fire.”<sup>4</sup>

1.1.1. The Trial Chamber erred in fact and law when it found that only if a projectile landed within 200 meters of an identified “military target”

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<sup>3</sup> Hrvatska Vojska or Croatian Army.

<sup>4</sup> See Trial Judgement (“TJ”), paragraphs 1892-1945, and in particular paragraphs 1906, 1920, 1932 and 1940.

would it be a “reasonable interpretation of the evidence” that the projectile was intended to be fired at a “military target.”<sup>5</sup>

1.1.2. The Trial Chamber erred in fact and law in evaluating the lawfulness of artillery attacks based on an arbitrary 200 meter standard that finds no support in the evidence.

1.1.3. The Trial Chamber erred in fact and law in evaluating the lawfulness of artillery attacks based on an arbitrary standard (the “200 meter rule”) that did not form part of the Prosecution case and of which the Defence had no notice at trial and thus no opportunity to confront it.

1.1.4. The Trial Chamber erred in law and fact when it failed to consider and exclude other reasonable explanations for why shells may have impacted more than 200 meters from “military targets” identified by the Trial Chamber.<sup>6</sup>

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

1.1.5.1. The Trial Chamber erred in fact in finding that at least 50 projectiles landed in Knin more than 200 meters from known “military targets”.<sup>7</sup>

1.1.5.2. The Trial Chamber erred in fact in concluding that at least 10 projectiles landed more than 200 meters from known “military targets” in Benkovac.<sup>8</sup>

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<sup>5</sup> TJ, paragraph 1898; also paragraphs 1903-1906, 1909, 1920-1922, 1932-1934, 1940, 1942.

<sup>6</sup> TJ, paragraph 1906; also paragraphs 1918, 1920, 1932-1933, 1940.

<sup>7</sup> See TJ, paragraphs 1893 to 1913, in particular paragraphs 1903-1906; paragraphs 1386-1392.

<sup>8</sup> See TJ, paragraphs 1914-1925, in particular paragraph 1920; paragraphs 1426-1430.

1.1.5.3. The Trial Chamber erred in fact in concluding that at least 2 projectiles landed more than 200 meters from known “military targets” in Gračac.<sup>9</sup>

1.1.5.4. The Trial Chamber erred in fact in concluding that at least 2 projectiles landed more than 200 meters from known “military targets” in Obrovac.<sup>10</sup>

1.1.5.5. The Trial Chamber erred in fact and law in relying upon uncorroborated and unreliable testimony of single witnesses about the nature of the shelling.<sup>11</sup>

1.1.6. Trial Chamber erred in fact and law when concluding that the HV did not have the ability to strike targets of opportunity.<sup>12</sup>

1.1.7. The Trial Chamber erred in fact and law when it concluded that the attack on commander-in-chief of Serb forces, Milan Martić, was disproportionate and could be regarded as evidence of the indiscriminate nature of the attack.<sup>13</sup>

### Unlawful and Indiscriminate Attacks

1.2. The Trial Chamber erred in fact and law when taking the view that shelling was indiscriminate and that areas devoid of “military targets” were unlawfully attacked.<sup>14</sup>

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<sup>9</sup> See TJ, paragraphs 1926-1937, in particular paragraphs 1932-1933; paragraphs 1455-1458.

<sup>10</sup> See TJ, paragraphs 1938-1945, in particular paragraphs 1940-1941; paragraphs 1473-1476.

<sup>11</sup> See TJ, paragraphs 1387-1388, 1392, 1426, 1427-1430, 1455-1457, 1473, 1475-1476.

<sup>12</sup> TJ, at paragraphs 1907, 1908, 1915, 1921, 1933, 1941.

<sup>13</sup> TJ, at paragraphs 1906, 1907, 1910, 1911.

<sup>14</sup> TJ, at paragraphs 1892-1945, 1970-1995, 2303-2320.

1.2.1. The Trial Chamber erred in law when it failed to render a reasoned opinion concerning the applicable legal standard to determine whether the artillery attack was indiscriminate.<sup>15</sup>

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

1.2.2.1. The Trial Chamber erred in fact and law when it concluded that whenever a projectile was found to have landed more than 200 meters from a “military target” (as discussed above), the projectile in question was, *prima facie*, directed at civilian areas.<sup>16</sup>

1.2.2.2. The Trial Chamber erred in fact and law when it substituted the concept of “legitimate military objective” for the legally irrelevant and narrower concept of “military target” in establishing whether individual incidents of shelling were unlawful.<sup>17</sup>

1.2.2.3. The Trial Chamber erred in fact and law when inferring from a limited number of isolated incidents of shelling that attacks on all three relevant towns/cities were indiscriminate.<sup>18</sup>

1.2.2.4. The Trial Chamber erred in fact and law by failing to determine the lawfulness of the attack on the basis of whether General Gotovina acted within the limits of honest judgment on the basis of the conditions prevailing and information available at the time.<sup>19</sup>

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<sup>15</sup> TJ, at paragraphs 1892-1945, 2368-2375.

<sup>16</sup> TJ, at paragraphs 1695, 1746, 1755, 1892-1945.

<sup>17</sup> TJ, at paragraphs 1746, 1755, 1766, 1892-1945, 2305, 2309.

<sup>18</sup> TJ, at paragraphs 1911, 1923, 1935, 1943.

<sup>19</sup> TJ, at paragraphs 1892-1945; 2329-2375.



- 1.2.3. The Trial Chamber erred in fact and law when finding that whole towns/cities were treated as targets for artillery.<sup>20</sup>

### Reversal of Onus and Burden of Proof

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

- 1.3.1. The Trial Chamber erred in fact and law when it applied a presumption that absent positive evidence that a person or object was a “military target,” the person or object was civilian in character.<sup>21</sup>

- 1.3.2. The Chamber erred in law when instead of requiring the Prosecution to prove beyond reasonable doubt that there were civilians or civilian objects in relevant areas, it made its findings based on the defendant’s failure to prove that there were military objectives in relevant areas.<sup>22</sup>

- 1.3.3. By establishing a “200 meter rule,” the Trial Chamber erred in fact and law by effectively applying a presumption that any artillery projectile falling beyond that range constituted an unlawful attack against civilians and civilian objects.<sup>23</sup>

- 1.3.4. At paragraph 1898, the Trial Chamber erred in fact and law when it applied a standard of proof (“a reasonable interpretation of the evidence”<sup>24</sup>) that is lower than the applicable and only relevant standard of

<sup>20</sup> TJ, at paragraphs 1746, 1892-1945, 2305, 2311, 2370, 2583.

<sup>21</sup> See TJ, paragraphs 1893 to 1913, in particular paragraphs 1903-1906; paragraphs 1386-1392; paragraphs 1914-1925, in particular paragraph 1920; paragraphs 1426-1430; paragraphs 1926-1937, in particular paragraphs 1932-1933; paragraphs 1455-1458; paragraphs 1938-1945, in particular paragraphs 1940-1941; paragraphs 1473-1476.

<sup>22</sup> TJ, paragraphs 1892-1945.

<sup>23</sup> TJ, paragraph 1695, 1746, 1892-1945.

<sup>24</sup> TJ, paragraph 1898, *in fine*.

proof (“only reasonable interpretation or inference based on the evidence”).

1.3.5. The Chamber also erred in fact and law when it disregarded the presumption of innocence by drawing inferences prejudicial to the Appellant based on facts that were not proven at trial.<sup>25</sup>

1.3.6. The Trial Chamber erred in fact and law by finding that the artillery attacks against commander-in-chief of Serb forces, Milan Martić, created a “significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects” although there was no evidence of the presence of civilians in these locations or of the fact that the action in question actually presented a risk (or caused harm) to any civilian.<sup>26</sup>

1.3.7. The Trial Chamber erred in fact and law when it reversed the burden of proof by applying a presumption that, absent conclusive evidence to the contrary, the HV did not have the ability to strike opportunistic targets.<sup>27</sup>

1.3.8. The Trial Chamber erred in fact and law when in the absence of conclusive evidence of the location of a “military target” (as determined by the Trial Chamber), it inferred the general location of that “military target” to the prejudice of the Accused by placing it more than 200 meters away from locations where projectiles were found to have impacted.<sup>28</sup>

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<sup>25</sup> TJ, at paragraph 1267, 1932; 1892-1945.

<sup>26</sup> TJ, paragraphs 1906, 1907, 1910.

<sup>27</sup> TJ, paragraphs 1907, 1908, 1915, 1921, 1933, 1941 and 1892-1945.

<sup>28</sup> TJ, paragraphs 1929, 1933.

Mens rea and Individual Shelling Incidents

1.4. The Trial Chamber erred in fact and law when it failed to establish the existence and presence of the relevant *mens rea* requirement in relation to individual incidents of supposed unlawful attacks on civilians and civilian objects.<sup>29</sup>

Denial of Right to Fair Trial and Equality of Arms

1.5. The Trial Chamber violated General Gotovina's right to a fair trial and right to obtain the evidence of witnesses when it denied his *Request to Order the European Union to Carry Out Further Investigations Into the Whereabouts of the "RC Knin Logbook"*.<sup>30</sup>

1.6. The Trial Chamber violated General Gotovina's right to a fair trial and right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," when it denied General Gotovina's motion in its "*Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz*."<sup>31</sup>

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

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<sup>29</sup> TJ, paragraphs 1892-1945.

<sup>30</sup> *Decision on the Gotovina Defence's Request to Order the European Union to Carry Out Further Investigations on the Whereabouts of the "RC Knin Log-Book,"* dated 3 June 2010.

<sup>31</sup> Dated 1 December 2009

- 2.1. The Trial Chamber erred in fact and law when it failed to distinguish between lawful and unlawful artillery attacks in determining the cause of the departure of civilians.<sup>32</sup>
- 2.2. The Trial Chamber erred in fact and law by concluding that indiscriminate artillery attacks were the “primary and direct cause” of the departure of Serb civilians from Knin, Benkovac and Obrovac.<sup>33</sup>
- 2.3. The Trial Chamber erred in fact and law by concluding that the crime of deportation applied to displacement caused by artillery attacks prior to the placing of the “Krajina” under the actual authority of Croatian forces.<sup>34</sup>
- 2.4. The Trial Chamber erred in fact and law when rejecting as unreasonable the conclusion that Serb civilians left their homes as a consequence of an evacuation ordered by the RSK and SVK authorities.<sup>35</sup>
- 2.5. The Trial Chamber erred in fact and law when it failed to consider or regarded as irrelevant the issue of nationality of Krajina Serbs in relation to the lawfulness of their detention and the lawfulness of denial of mass return following Operation Storm.<sup>36</sup>
- 2.6. The Trial Chamber erred in law when it failed to determine whether its position was consistent with customary international law at the time relevant to the charges.<sup>37</sup>

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<sup>32</sup> TJ, at paragraphs 1710, 1720, 1742-1763, 1843, 1862, 1863, 2098, 2305, 2308, 2310, 2311, 2314, 2369, 2370, 2372, 2373.

<sup>33</sup> TJ, at paragraphs 1743-1746, 1754.

<sup>34</sup> TJ, at paragraphs 1743-1746, 1750, 1754.

<sup>35</sup> TJ, paragraphs 1512-1539.

<sup>36</sup> TJ, paragraphs 1748-1754; 1867-1872.

<sup>37</sup> TJ, paragraphs 1748-1754; 1867-1872.

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

3.1. The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to carry out unlawful attacks on civilians and civilian objects.<sup>38</sup>

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

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

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

3.2. The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to carry out deportation and forcible transfer of civilians.<sup>39</sup>

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

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<sup>38</sup> TJ, paragraphs 2303 to 2314, in particular 2305, 2311, 2314.

<sup>39</sup> TJ, paragraphs 2303-2314, in particular 2310, 2314.

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

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

3.3. The Trial Chamber erred in fact and law when concluding that there existed an agreement and shared intent to impose discriminatory and restrictive measures against Serb civilians.<sup>40</sup>

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

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

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

3.4. The Trial Chamber erred in fact and law when concluding that the underlying core crimes qualify as acts of persecutions.<sup>41</sup>

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<sup>40</sup> TJ, paragraphs 2303-2314, in particular 2308, 2312, 2314.

<sup>41</sup> TJ, paragraphs 2310, 2311, 2312, 2314, 2316-2320.

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

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

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

3.4.4. The Trial Chamber erred in fact and law when concluding that the artillery attack was discriminatory in purpose, based upon a prohibited discriminatory ground, and that it amounted to persecution.<sup>42</sup>

3.5. The Trial Chamber erred in fact and law when concluding that an agreement had been reached among the members of the alleged JCE for the “permanent” removal of the Serbian civilian population and inferring a common intent to use “force or threat of force” for that purpose.<sup>43</sup>

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

##### Brioni Meeting: General Errors

4.1. The Trial Chamber erred in fact and law by drawing unreasonable conclusions regarding Gotovina’s participation in and statements at the Brioni meeting.<sup>44</sup>

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<sup>42</sup> TJ, paragraphs 1742-1763, 1913, 1924, 1936, 1937.

<sup>43</sup> TJ, paragraph 2314.

<sup>44</sup> TJ, paragraphs 1970-1996, 2370, 2374.

No shared intent

4.2. The Trial Chamber erred in law when failing to provide a reasoned opinion in relation to its finding of a shared intent on Gotovina's part to commit the underlying core crimes.<sup>45</sup>

4.3. The Trial Chamber erred in fact and law when it found that Gotovina shared the intent to commit the underlying core crimes.<sup>46</sup>

Absence of agreement regarding JCE core crimes and no membership in the supposed JCE

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

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

No "significant contribution" to a JCE

4.6. The Trial Chamber erred in fact and law when it concluded that Gotovina made a significant contribution to the supposed JCE.<sup>47</sup>

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

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<sup>45</sup> TJ, paragraph 2371, 2373, 2374.

<sup>46</sup> TJ, paragraph 2371, 2373, 2374.

<sup>47</sup> TJ, paragraph 2370, 2373, 2374.



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

4.7. The Trial Chamber erred in fact and law when taking the view that Gotovina made a significant contribution to the JCE by, *inter alia*, failing to make a serious effort to prevent and follow-up on crimes reported to have been committed, including murder, inhumane acts, unlawful detention, plunder, and destruction.<sup>48</sup>

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

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

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

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

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<sup>48</sup> TJ, at paragraphs 144-146; 2370, 2373, 2374.

4.7.5. The Trial Chamber erred in fact and law regarding the alleged rebuttal of Gotovina's entitlement to assume diligent performance of duties by subordinates involved in the prevention and punishment of crimes.<sup>49</sup>

4.7.6. The Trial Chamber erred in fact and law when finding that Gotovina had command and control over the military police for the purpose of carrying out an investigation.<sup>50</sup>

4.7.7. The Trial Chamber erred in fact and law when it failed to ascertain whether, at the time relevant to the charges, Gotovina had effective control over subordinates said to have committed the crimes or, if it did, to provide a reasoned opinion on that point:

4.7.7.1 The Trial Chamber erred in law when it failed to render a reasoned opinion on that point.

4.7.7.2 The Trial Chamber erred in fact and law in finding that the link between General Gotovina and persons committing crimes was not too tenuous to consider his JCE liability.<sup>51</sup>

4.7.7.3 The Trial Chamber erred in fact and law when it concluded that although General Gotovina was engaged in combat in Bosnia for most of the indictment period, he was required to "retain control over subordinate units" in the indictment area.<sup>52</sup>

4.7.8 The Trial Chamber erred in law when it failed to provide adequate and timely notice of the measures Gotovina allegedly "could have taken," and

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<sup>49</sup> TJ, at paragraph 2365.

<sup>50</sup> TJ, paragraphs 144-146, 2363, 2365, 2370

<sup>51</sup> TJ, at paragraph 2365.

<sup>52</sup> TJ, at paragraphs 144-146, 2365.

erred in law when it failed to respect Gotovina's right to be heard and his right to present evidence concerning these alleged measures.<sup>53</sup>

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

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

4.7.9 The Trial Chamber erred in fact and law when it failed to provide a reasoned opinion explaining how "Gotovina's failures" had an impact on the general atmosphere of crime, and in finding that "Gotovina's failures" had an impact on the general atmosphere towards crimes in the Split MD.<sup>54</sup>

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

#### "Natural and foreseeable" crimes

4.7.11 The Trial Chamber erred in fact and law when it found that the crimes of murder, inhumane acts, cruel treatment, plunder, destruction and unlawful detention were, objectively, natural and foreseeable consequences of the execution of the JCE.<sup>55</sup>

4.7.12 The Trial Chamber erred in law when it failed to provide a reasoned opinion explaining the basis upon which it concluded that the crimes of

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<sup>53</sup> TJ, paragraph 2365, 2373.

<sup>54</sup> TJ, paragraph 2370, 2373, 2374.

<sup>55</sup> TJ, paragraphs 2321, 2372-2375.

murder, inhumane acts, cruel treatment, plunder, destruction and unlawful detention were, objectively, natural and foreseeable consequences of the execution of the alleged JCE.

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

4.8 The Trial Chamber erred in law when suggesting that foresight of a mere “possibility” would be enough as a matter of customary international law to trigger Gotovina’s liability in relation to natural and foreseeable crimes.<sup>56</sup>

4.9 The Trial Chamber erred in fact and law when concluding that Gotovina knew of the possibility of these crimes being committed and acted culpably despite or regardless of that knowledge.<sup>57</sup>

4.10 The Trial Chamber erred in fact and law in failing to establish or, alternatively, in unreasonably concluding, that Gotovina possessed the requisite discriminatory *dolus specialis* relevant to the crime of persecution and that he had ordered the attack with that mindset and failing to provide a reasoned finding in that regard.

## **5 GROUND FIVE: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN IT FAILED TO ESTABLISH AND PROVIDE A REASONED OPINION REGARDING GOTOVINA’S SUPPOSED AWARENESS OF THE EXISTENCE OF A WIDESPREAD OR SYSTEMATIC ATTACK AGAINST A CIVILIAN POPULATION AND INVOLVEMENT THEREIN**

5.1 The Trial Chamber erred in law when it failed to provide a reasoned opinion in writing regarding Gotovina’s supposed awareness of the existence of a widespread or systematic attack against a civilian population.<sup>58</sup>

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<sup>56</sup> TJ, paragraph 2374.

<sup>57</sup> TJ, paragraphs 2372-2375.

5.2 The Trial Chamber erred in fact and law when it concluded that Gotovina was aware of the existence of a widespread or systematic attack against a civilian population.<sup>59</sup>

**6 GROUND SIX: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN IT FAILED TO ESTABLISH AND PROVIDE A REASONED OPINION REGARDING THE CHAPEAU REQUIREMENTS OF ARTICLE 3 OF THE STATUTE**

6.1 The Trial Chamber erred in law when it failed to provide a reasoned opinion in writing explaining how the *chapeau* requirement of a nexus between Gotovina's action and the armed conflict was satisfied.

6.2 The Trial Chamber erred in fact and law when it failed to establish that Gotovina possessed an awareness of the requisite nexus between his acts and the armed conflict.<sup>60</sup>

**7 GROUND SEVEN: THE TRIAL CHAMBER ERRED IN FACT AND LAW WHEN DOUBLE COUNTING GOTOVINA'S HIGH-RANKING POSITION IN THE MILITARY COMMAND STRUCTURE AS A BASIS FOR CONVICTION AND AS AN AGGRAVATING FACTOR FOR SENTENCING.**<sup>61</sup>

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<sup>58</sup> TJ, paragraph 2370.

<sup>59</sup> TJ, paragraph 2370.

<sup>60</sup> TJ, paragraphs 2322-2375.

<sup>61</sup> TJ, paragraph 2604.

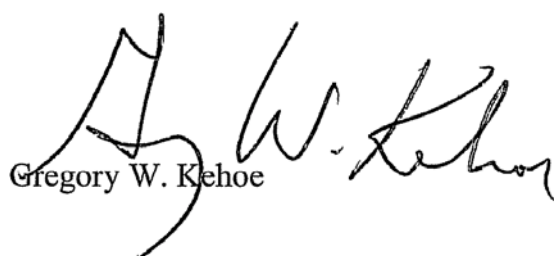
#### IV. CONCLUSION

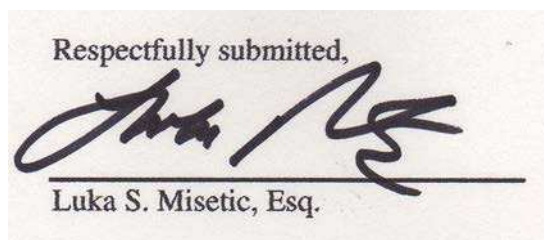
K. Accordingly, the Appellant seeks a reversal of all erroneous findings, a reversal of guilty findings on all relevant counts, and a finding of “not guilty” on all counts.

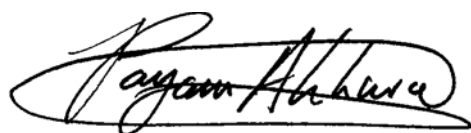
Word Count: 4,929

Dated this 16<sup>th</sup> day of May 2011

Respectfully submitted,

  
Gregory W. Kehoe

Respectfully submitted,  
  
Luka S. Misetic, Esq.



Payam Akhavan



Guénaél Mettraux