

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

Case No. IT-06-90-A

BEFORE THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Date Filed: 31 August 2012

THE PROSECUTOR

v.

ANTE GOTOVINA AND MLADEN MARKAC

**APPELLANT ANTE GOTOVINA'S SUPPLEMENTAL BRIEF ON ALTERNATE
MODES OF LIABILITY**

[PUBLIC]

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I. OVERVIEW

1. The Trial Chamber held that if Appellant Ante Gotovina is found not liable for unlawful artillery attacks, he must be acquitted of deportation and persecution (deportation).¹ Accordingly, Appellant cannot be responsible for aiding and abetting deportation or persecution (deportation) through lawful shelling, because no underlying crime was committed.

2. Appellant also is not liable for aiding and abetting post-shelling crimes: deportations, persecutions (deportations), murder, other inhumane acts and cruel treatment, destruction, plunder and persecutions. The Chamber conceded that it found Gotovina liable for the "general atmosphere of crime" post-Storm "*in light of Gotovina's order to unlawfully attack civilians and civilian objects.*"² Accordingly, if Gotovina is not liable for unlawful shelling, the Chamber's findings regarding post-Storm crimes are tainted and must also be overturned. Moreover, as set forth below, the Trial Chamber made no essential findings on the elements of aiding and abetting and command responsibility.

¹ TJ, 1754, 1755, 1762.

² TJ, 2370.

3. Prosecution's Brief repeatedly violates the 20 July 2012 Order, which invited the Prosecution to (1) address whether liability should be ascribed to Appellant under Article 7(3) or as an aider and abettor, and (2) to "focus on whether any additional findings of the Trial Chamber satisfy the legal elements of these alternative modes of liability." Instead, the Prosecution addresses modes of liability outside the scope of the Order (including planning, instigating and ordering),³ and repeatedly raises new factual arguments (citing to the Trial Chamber's recitation of the evidence rather than its findings) to compensate for the absence of findings on alternate modes of liability.⁴
4. The Appeals Chamber should reject the Prosecution's effort to litigate this case *de novo* or beyond actual trial findings. Because the Trial Chamber (1) made findings which preclude liability under aiding and abetting or Article 7(3), and (2) made no findings to support convictions under these alternate modes, the Appeals Chamber should not conduct a *de novo* review of the trial evidence. If not liable for unlawful artillery attacks or membership in a JCE, the Appeals Chamber should overturn Gotovina's conviction and enter a Judgement of not guilty on all counts.

II. PRELIMINARY MATTERS

5. The 20 July Order requests the parties to "focus on whether any additional findings of the Trial Chamber satisfy the legal elements of these alternative modes of liability." Notably, the Appeals Chamber did not allow the parties to address whether any such "additional findings of the Trial Chamber" constitute errors of law or fact for purposes of Article 25(1). The 20 July Order thus (1) assumes that any "additional findings of the Trial Chamber" were *not* erroneous as a matter of law or fact, and (2) denies Appellant his

³ OTP Brief, par 4, fn.11.

⁴ See OTP Brief, pars 5-13, 15-20, 22-27, 30-39, 41-49 and, in particular, references to record evidence in footnotes 22-23, 27-28, 33, 36-41, 47, 53-55, 59-60, 63-66, 68, 75, 79, 95-96, 106, 113, 119-122, 142.

right to appeal these “additional findings of the Trial Chamber” pursuant to Article 25 and Article 14(5) of ICCPR.

6. Furthermore, the normal deference given to a Trial Chamber’s factual findings is strongly rebutted here by the Trial Chamber’s grave errors on core findings. In accordance with the principle *in dubio pro libertate*, any “additional findings of the Trial Chamber” should be deemed unsafe unless undisputed, particularly where the Appellant has not been given the opportunity to challenge these “additional findings.”
7. Moreover, should the Appeals Chamber consider convicting Appellant on an alternate mode of liability, Appellant would be entitled as a matter of right to a fair and public hearing before the Appeals Chamber pursuant to Article 21(2) and Rule 114.

III. GOTOVINA IS NOT GUILTY OF DEPORTATIONS (THROUGH SHELLING) AND PERSECUTIONS (DEPORTATIONS) BECAUSE THE CHAMBER FOUND NO CRIME IN LAWFUL SHELLING

8. The Trial Chamber found Appellant guilty of deportation and persecution (deportation) through shelling, only in cases where it found the artillery operation to have been conducted *unlawfully*. Where the artillery operation was conducted *lawfully*, the Trial Chamber found that Appellant was not guilty of deportations and persecutions (deportations).
9. The Indictment charged that Gotovina launched an unlawful artillery attack to deport Serb civilians from the four towns of Knin, Benkovac, Obrovac and Gracac, but also “many other towns, villages and hamlets, including Kistanje, Uzdolje, Kovacic, Plavno, Polaca, and Bukovic.”⁵ Because the Trial Chamber found the artillery operation to have been conducted unlawfully in the four towns, it convicted Appellant of deportation and persecution (deportation).⁶

⁵ OTP-PTB, par 31.

⁶ TJ, 1743: “the Trial Chamber found that the HV and Special Police deliberately targeted civilian areas in these towns....”

10. In contrast, the Trial Chamber acquitted Appellant on the charge that he had deported Serb civilians from “many other towns, villages and hamlets, including Kistanje, Uzdolje, Kovacic, Plavno, Polaca, and Bukovic”:⁷

[A]n unlawful attack on civilians or civilian objects in these towns or villages was not the only reasonable interpretation of the evidence. Instead, the evidence allowed for the reasonable interpretation that the forces who fired artillery projectiles which impacted on or nearby these places were deliberately targeting military targets.... *Under these circumstances, the Trial Chamber cannot conclusively establish that those who left such towns or villages were forcibly displaced, nor that those firing artillery at such towns had the intent to forcibly displace those persons.*⁸

11. Thus, the Trial Chamber concluded that where there was a reasonable interpretation that the HV was deliberately targeting military objectives, it could not “conclusively establish that those who left such towns or villages were forcibly displaced,” or that those firing artillery at such towns (including Appellant) “had the intent to forcibly displace such persons.” Accordingly, where it was not proven that shelling was conducted unlawfully, the Trial Chamber acquitted Gotovina of deportation and persecutions (deportation) through shelling.
12. Because the Trial Chamber held that lawful shelling did not result in the crimes of deportation and persecutions (deportation), Appellant cannot now be found to have aided and abetted these non-crimes.
13. Even in the four towns, the Trial Chamber repeatedly found the HV’s targeting of military objectives was “in good faith.”⁹ Because targeting of military objectives to expel civilians can never be conducted “in good faith,”

⁷ TJ, 1754, 1755, 1762.

⁸ TJ, 1755. Emphasis added.

⁹ TJ, 1899-1902, 1908, 1919, 1921, 1930, 1931, 1933, 1941.

these findings preclude the Prosecution's argument that lawful shelling was the *actus reus* of deportation.

14. Nevertheless, the Prosecution now attempts to overturn the Trial Chamber's finding that lawful shelling cannot be the *actus reus* of deportation. In so doing, the Prosecution (1) violates Appellant's right to fair notice of the charges against him;¹⁰ (2) violates the principle of *res judicata* by attempting to appeal a trial finding which it failed to appeal and is estopped from challenging; (3) violates the 20 July Order by seeking review of the trial evidence *de novo* because of the Prosecution's inability to cite trial findings to support its novel "lawful shelling as deportation" argument; and (4) cites to evidence in the record and the Trial Chamber's *recitation of evidence*, rather than *findings*, to piece together false factual arguments.
15. Because the Prosecution Brief raises *de novo* factual arguments rather than Trial Chamber *findings*, the Appeals Chamber should not consider them. Per the 20 July Order, Appellant herein focuses on the Chamber's *findings* and the "legal elements of the alternate modes of liability."¹¹

IV. GOTOVINA DID NOT AID AND ABET DEPORTATIONS (THROUGH POST-SHELLING CRIMES) OR PERSECUTIONS (DEPORTATIONS)

A. The Trial Chamber Made No Findings on Aiding and Abetting Liability

16. To convict for aiding and abetting deportations (through post-shelling crimes) or persecutions (deportations), the Trial Chamber was required to make findings regarding Appellant's conduct for each of the following elements:
 - a) substantially contributed to the underlying crimes;¹²
 - b) had a substantial effect on the underlying crimes;¹³

¹⁰ See Gotovina Supplemental Brief.

¹¹ Should the Appeals Chamber seek Appellant's response to the Prosecution's *factual* arguments, Appellant requests an additional Order allowing for briefing on these issues.

¹² *Vasiljević* AJ, 102.

- c) directed *conduct to* or *aimed specifically at* assisting, furthering or lending moral support to the perpetration of a specific crime;¹⁴
- d) had a legal duty to adopt measures which he failed to adopt,¹⁵ and had the material ability to do so;¹⁶
- e) was aware of the essential elements of the underlying crimes,¹⁷ or that they would probably be committed;¹⁸
- f) knew that his acts would assist the perpetrator in the commission of the crime;¹⁹ and,
- g) was aware of the persecutory *mens rea* of the (unidentified) perpetrators.²⁰

17. The Trial Chamber expressly stated in paragraph 2375 that it would make no such findings.

B. No Findings of “Substantial Effect” and “Directed to or Aimed Specifically At” Aiding and Abetting the Crimes

18. The Trial Chamber made no finding that Gotovina’s alleged conduct had a “substantial effect” on the underlying crimes. In particular, it made no finding that the underlying crimes identified in the Prosecution’s Annex would have been *substantially less* likely to occur²¹ had Gotovina adopted the *Chamber’s Measures*,²² and the Prosecution makes no argument that the Chamber made such a finding.

19. The legal requirement of “significant contribution” for JCE and “substantial contribution” for aiding and abetting are legally and factually not equivalent.²³

¹³ *Blaškić* AJ, 46.

¹⁴ *Vasiljević* AJ, 102; *Orić* AJ, 43; *Ntawukulilyayo* AJ, 214; *Nahimana* AJ, 482.

¹⁵ *Orić* AJ, 43; *Mrkšić* AJ, 134.

¹⁶ *Mrkšić* AJ, 154.

¹⁷ *Aleksovski* AJ, 162; *Simić* AJ, 86.

¹⁸ *Blaškić* AJ, 50.

¹⁹ *Vasiljević* AJ, 102; *Orić* AJ, 45.

²⁰ *Simić* AJ, 86; *Krnojelac* AJ, 52; *Aleksovski* AJ, 162.

²¹ *Mrkšić* AJ, 97-100, 156.

²² TJ, 2365. See also Appellant’s Brief, par 284.

²³ See, in particular, *Vasiljević* AJ, 102.

There are no findings that Gotovina's conduct (1) had a substantial effect on any underlying crime, or (2) was directed to or aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime,²⁴ or (3) that Gotovina had a legal duty (whether under Croatian law or customary international law) to adopt measures which he culpably failed to adopt,²⁵ or (4) that he had the material ability to do so.²⁶

C. The Chamber Did Not Make the Necessary *Mens Rea* Findings

20. The Trial Judgment contains no finding that the Appellant was aware of the essential elements of the underlying crimes,²⁷ or that he was aware that one of a number of crimes would *probably* be committed,²⁸ necessary findings for aiding and abetting liability. In particular, the Trial Chamber made no finding that Gotovina was aware of the "probability" of crimes occurring during and after Operation Storm. Instead, the Trial Chamber noted that Gotovina knew such crimes to be "possible."²⁹ "Possibility" falls far short of "probability," and does not trigger aiding and abetting liability.
21. At trial, the Prosecution argued not only that Gotovina knew of the possibility of such crimes, but that he "must have predicted" that such crimes would take place.³⁰ This argument was premised on the Prosecution's allegation that Gotovina's forces had committed widespread crimes immediately prior to Storm. In rejecting this argument, the Trial Chamber declined to make a finding that Gotovina "must have been aware that crimes would be committed by his subordinates," which is the "probability" standard.³¹ Moreover, the Chamber made no finding that that any subordinate under Gotovina's command had *ever* committed a crime against Serb civilians or property prior

²⁴ *Vasiljević* AJ, 102; *Orić* AJ, 43; *Ntawukulilyayo* AJ, 214; *Nahimana* AJ, 482.

²⁵ *Orić* AJ, 43; *Mrkšić* AJ, 134.

²⁶ *Mrkšić* AJ, 154.

²⁷ *Aleksovski* AJ, 162; *Simić* AJ, 86.

²⁸ *Blaškić* AJ, 50.

²⁹ TJ, 2373, (referring to Gotovina's alleged "awareness of ethnic tensions that *could* lead to crimes."); 2374 ("...notice of the *possibility* of the commission of crimes," and "...reconciling himself with the *possibility* that these crimes could be committed.).

³⁰ OTP-FTB, 145-154.

³¹ TJ, 2367.

to Storm. There was therefore no basis to believe that such crimes would be “probable.”

22. Finally, there is no trial finding that Appellant knew that his acts would assist any perpetrator in the commission of a crime,³² and that he was aware of the persecutory *mens rea* of any (unidentified) perpetrator.³³
23. Accordingly, Gotovina cannot be found liable for aiding and abetting deportations (through post-shelling crimes) and persecutions (deportations).

V. GOTOVINA IS NOT LIABLE FOR MURDERS, OTHER INHUMANE ACTS AND CRUEL TREATMENT, DESTRUCTION, PLUNDER OR PERSECUTIONS, AS AN AIDER AND ABETTOR OR UNDER ARTICLE 7(3)

24. The Trial Chamber made no finding that any perpetrator was *de facto* subordinated to Gotovina.³⁴ A *de jure* position of authority is insufficient for an inference that the *de jure* superior exercised effective control over *de jure* subordinates,³⁵ and the Trial Chamber made no finding that Gotovina exercised effective control at the time of any alleged offence. As such a conviction based on Article 7(3) is unsustainable.
25. Appellant was not operationally responsible for preventing and punishing crimes by HV personnel in the newly liberated territories of Croatia. The Trial Chamber recognized that while the post-shelling crimes were taking place, Gotovina was in Bosnia conducting combat operations against Bosnian Serb forces.³⁶ The Trial Judgment contains ample findings that the task of preventing and investigating crimes was carried out by other authorities.³⁷ General Lausic and his civilian counterpart in the MUP, Moric, headed this

³² Vasiljević AJ, 102.

³³ Simić AJ, 86; Krnojelac AJ, 52; Aleksovski AJ, 162.

³⁴ On the limited evidential value and relevance of a *de jure* subordination finding, see, e.g., Čelebići AJ, 197 and 306; Nahimana AJ, 787; Kordić TJ, 418.

³⁵ E.g. Orić AJ, 91-92, footnotes omitted; Hadžihasanović AJ, 20-21; Halilović AJ, 85; Nahimana AJ, 625, 787; Bagilishema AJ, 61; Čelebići AJ, 197-198.

³⁶ TJ, 72,85,1696,2365.

³⁷ TJ, 2100-2203.

security operation.³⁸ It is in this context that Appellant’s alleged “omissions” must be assessed. Under any interpretation of the facts, the Trial Chamber quite simply made insufficient findings for Gotovina to be liable for post shelling crimes as an aider and abettor or under Article 7(3).

A. Gotovina Did Not Aid and Abet Post-Shelling Crimes

26. As noted, the Trial Chamber rejected the Prosecution’s claim that Gotovina had knowledge that post-shelling crimes would “probably” occur.³⁹ It also made no finding that Gotovina’s alleged omissions had a substantial effect on the underlying crimes, or that Gotovina could have made such crimes “substantially less likely.”⁴⁰ Accordingly, Gotovina cannot be held liable for aiding and abetting post-shelling crimes.

1. No Finding that Gotovina Made a Substantial Contribution to Post-Shelling Crimes

27. The Trial Chamber made no finding that Gotovina made a “substantial contribution” to post-shelling crimes.

a. Chamber’s Findings on Post-Shelling Crimes are Tainted By the Unlawful Attack Finding

28. The Prosecution speciously points to the Chamber’s finding that Gotovina’s alleged omissions “had an impact on the general atmosphere towards crimes,” as evidence that Gotovina made a substantial contribution to post-shelling crimes. In context, it is clear that the Chamber’s comment was dependent upon its finding that Gotovina had committed an unlawful attack through shelling:

The Trial Chamber further assessed Gotovina’s failures to make a serious effort to prevent and follow-up on crimes reported to have been committed *in light of Gotovina’s order to unlawfully attack*

³⁸ TJ, 2145-2146; D1634, pg.2; D1635, pgs.2-3. See also TJ, 2100-2203.

³⁹ TJ, 2367.

⁴⁰ See above par 18 and below pars 31 and 35.

civilians and civilian objects. The Trial Chamber finds that Gotovina's failures had an impact on the general atmosphere towards crimes in the Split MD.⁴¹

29. Thereafter, the Trial Chamber reinforced its reliance on its unlawful shelling finding:

Gotovina ordered his subordinates to engage in unlawful attacks against civilians and civilian objects in Benkovac, Knin, and Obrovac. *By ordering an unlawful attack on civilians and civilian objects, Gotovina signalled his attitude towards crimes and towards Serbs to his subordinates.*⁴²

30. Clearly, the unlawful attack finding taints the subsequent comment on Gotovina's alleged attitude towards post-shelling crimes. If Gotovina is not liable for unlawful artillery attacks, the Appeals Chamber must also strike the Chamber's findings that Gotovina's alleged omissions "had an impact on the general atmosphere towards crimes," because the Trial Chamber expressly made the latter finding contingent upon the former.

b. Chamber's Measures Would Not Have Made the Crimes "Substantially Less Likely"

31. The Chamber's finding that Gotovina's alleged omissions contributed to the "general atmosphere" of crime falls far short of the relevant standard of a "substantial contribution," such that crimes by subordinates would have been "substantially less likely"⁴³ had Gotovina undertaken the *Chamber's Measures* (*i.e.*, make public statements, contact relevant people and reallocate available resources).

⁴¹ TJ, 2370. Emphasis added.

⁴² TJ, 2371. Emphasis added.

⁴³ *Mrkšić* AJ, 97-100, 156.

32. The Prosecution makes no reference to the *Chamber's Measures*, thus tacitly conceding that the *Chamber's Measures* do not meet the requisite *actus reus* of aiding and abetting liability.
33. Instead, the Prosecution re-states its failed trial arguments concerning measures Gotovina should have taken to prevent crime. For example, the Prosecution at trial repeatedly argued that because Gotovina took certain measures to prevent crime while an occupational commander in western Bosnia in the Fall of 1995 (such as imposing curfews), he should have imposed the same measures in Croatia.⁴⁴ The Appeals Chamber has clearly explained the difference between the powers and responsibilities of a commander occupying foreign territory (as Gotovina was in Bosnia in Fall 1995), and those of a commander on his home soil.⁴⁵
34. Now the Prosecution raises new “measures,” not part of the Prosecution’s case at trial, and suggests that Gotovina should have “restricted HV troops’ access to alcohol,” restricted “HV troops’ off-duty freedom of movement” earlier, and issued “orders addressing spoils of war” earlier.⁴⁶ These measures were neither proposed at trial,⁴⁷ nor adopted by the Trial Chamber, and Appellant objects to these arguments because they (1) violate his right to fair notice, and (2) lack a basis in the evidentiary record.
35. The Prosecution Brief asserts that its new suggested measures “*might have stopped*” post-shelling crimes, *i.e.*, that these measures *possibly* could have prevented these crimes.⁴⁸ However, the standard is that the suggested measures would have made the crimes “substantially less likely,” *i.e.* the crimes *probably* would not have occurred.⁴⁹ The Chamber made no such finding in relation to any underlying crime. Accordingly, even the

⁴⁴ OTP Brief, 36; OTP-FTB, 208.

⁴⁵ *Čelebići* AJ, 258.

⁴⁶ OTP Brief, 36.

⁴⁷ OTP-FTB, paras 206-208.

⁴⁸ OTP Brief, 36.

⁴⁹ *Orić* AJ, 43; *Mrkšić* AJ, 97-100, 156.

Prosecution's new arguments fail to meet the standard for aiding and abetting liability.

36. The Prosecution also wrongly asserts that Appellant's supposed failures were found to have had an encouraging effect on the perpetrators.⁵⁰ The Chamber found that Gotovina encouraged crime only by issuing an unlawful artillery order. Since that finding has been impugned, the Chamber's entire analysis is tainted. Furthermore, there is no finding that (1) his conduct had "a significant encouraging effect on the principal offender" and on the commission of the underlying crimes,⁵¹ or (2) any of the perpetrators in fact knew of, or were encouraged by, Appellant's supposed failure(s).⁵²

37. Finally, the Chamber did not make the necessary *mens rea* findings.⁵³

B. Gotovina is Not Guilty of Post-Shelling Crimes Under Article 7(3)

38. The Trial Chamber did not make at least eight findings necessary for a command responsibility conviction, namely that Appellant:

- 1) had effective control over any of the perpetrators *at the time of commission of the crimes*, rather than simply the "power to intervene";⁵⁴
- 2) knew or had reason to know that the underlying crime was "about to be committed,"⁵⁵
- 3) or had been committed by subordinates;
- 4) acquiesced to the commission of these crimes;⁵⁶
- 5) failed to adopt "necessary and reasonable" measures;

⁵⁰ OTP Brief, 35.

⁵¹ *E.g.* Vasiljević TJ, 70; Furundžija TJ, 232; Tadić TJ, 689; Aleksovski TJ, 64; Kunarac TJ, 393; Krnojelac TJ, 88; Kajelijeli TJ, 769.

⁵² See also Simić AJ, 130.

⁵³ Above, pars 16(g), 20, 22.

⁵⁴ Krajišnik AJ, 194, 352.

⁵⁵ See *e.g.* Kordić TJ, 445; Hadžihasanović 98bis, 166.

⁵⁶ *E.g.* The Flick, Hostage and High Command cases; ICRC, *Commentary on AP I*, p 1010, par 3547; UN Commission of Experts 1994, par 58. See also Halilović TJ, 95; Strugar TJ, 439; Musema TJ, 131.

- 6) had a legal duty to adopt any of the *Chamber's Measures*;⁵⁷
 - 7) or the material ability to carry them out; and
 - 8) demonstrated a “wanton, immoral disregard of the action of his subordinates amounting to acquiescence.”⁵⁸
39. Instead, the Trial Chamber made no findings regarding command responsibility.

1. Gotovina Lacked Effective Control Over Perpetrators

40. Effective control over perpetrators of post-shelling crimes was left to General Lausic and the MUP⁵⁹ and the Trial Chamber made no finding that Gotovina had effective control over perpetrators. Instead, per *Krajišnik*, the Trial Chamber assessed whether Gotovina had the “power to intervene” even without effective control, thus making him liable under JCE.⁶⁰
41. Various findings by the Chamber do suggest that Gotovina did not have effective control over criminal subordinates in Croatia. The Chamber did not find that Gotovina possessed effective control, but rather that he had an “obligation to retain control” while “geographic[ally] absen[t].”⁶¹ This suggests that Gotovina did not have effective control, but should have regained such control.
42. The Chamber also found that the “link between [Gotovina] as commander and his subordinated soldiers on the ground was *not too tenuous* to consider his JCE liability.”⁶² This “too tenuous” finding demonstrates that the Chamber was assessing whether Gotovina had any link to subordinates, not whether he had effective control.

⁵⁷ *Halilović* AJ, 183.

⁵⁸ *High Command* case, pp 543-544. See also ICRC, *Commentary on AP I*, p 1012, par 3541.

⁵⁹ TJ, 2145, TJ, 2145-2146; D1634, pg.2; D1635, pgs.2-3. See also TJ, 2100-2203.

⁶⁰ *Krajišnik* AJ, 194, 352.

⁶¹ TJ, 144.

⁶² TJ, 2365. Emphasis added.

43. Other findings likewise suggest that the Chamber believed that Gotovina lacked effective control. At trial, Gotovina demonstrated that he lacked effective control because, *inter alia*, his chain of command was not functioning properly and he could not, therefore, control individual perpetrators at least six chain of command levels below him.⁶³ In accepting this argument, the Chamber found that Gotovina “issued a number of orders [...] between 2 and 18 August 1995 instructing units to prevent crime,”⁶⁴ yet these orders were not effective.⁶⁵ As the Appeals Chamber has made clear, effective control must be demonstrated at every level of command.⁶⁶ No such finding was made here.
44. Furthermore, in adopting the *Chamber’s Measures*, the Chamber acknowledged that Gotovina’s chain of command was not functioning. For example, the Chamber faulted Gotovina for not “making public statements.” If the Chamber believed that the chain of command was functioning properly, Gotovina could have addressed culpable subordinates through that chain of command. By finding that Gotovina needed to address subordinates through the public media, rather than through his chain of command, the Chamber must have concluded that Gotovina did not have a functioning chain of command needed to exercise effective control over subordinates.
45. Next, the Chamber found that Gotovina should have “contact[ed] relevant people and [sought] their assistance.” The Chamber identifies no such relevant people, but clearly this must refer to persons either superior in, or outside of, Gotovina’s chain of command.⁶⁷ The Chamber thus believed that Gotovina lacked effective control because he needed outside assistance.

⁶³ Defence FTB, 626-646. *Orić* AJ, 20.

⁶⁴ TJ, 2364.

⁶⁵ *Strugar* AJ, 257; *Halilović* AJ, 207.

⁶⁶ See *Orić* AJ, 39.

⁶⁷ Appellant notes that there is no evidence—and no finding-- that any such relevant person was unaware of the crime problem and needed to be contacted by Gotovina.

46. The *Chamber's Measures* assume that Gotovina should have taken steps to “retain control”⁶⁸ because he lacked effective control. While the right to intervene (even without effective control) might be sufficient to impose JCE liability, the Appeals Chamber has held that a “right to intervene” is insufficient to impose command responsibility in the absence of effective control.⁶⁹
47. The Prosecution acknowledges that the Trial Chamber made no finding on effective control, but attempts to re-litigate this issue *de novo*.⁷⁰ Such a *de novo* review is precluded by *res judicata* and is outside the scope of the 20 July Order, which ordered the Prosecution to focus on the Chamber’s findings and not “particular factual issues already addressed in existing briefing.”

2. No Finding of Knowledge of, and Acquiescence with, the Underlying Crimes

48. The Chamber found that Gotovina “was informed by international observers ... about the occurrence and magnitude of crimes...committed in the area of the Split MD...”⁷¹ However, the Chamber made no finding that Gotovina knew *his subordinates* had committed the crimes identified in the Judgement (listed in the Annex to the Prosecution Brief). On the contrary, Gotovina denied to Forand any knowledge that his troops had been involved in crimes, and the Chamber rejected the Prosecution’s claim that Gotovina’s denial was in bad faith.⁷²
49. To be liable under Article 7(3), the Trial Chamber was required to find that Gotovina knew or had reason to know that a culpable subordinate was about to, or had engaged in, one of the crimes found to have been committed by the

⁶⁸ TJ, 144.

⁶⁹ *Halilović* AJ, 212.

⁷⁰ OTP Brief, 41-43.

⁷¹ TJ, 2363.

⁷² TJ, 2366.

Chamber.⁷³ The Chamber made no such finding with respect to any of the individual criminal incidents.

50. Furthermore, under customary law, a commander's deliberate failure to act must be akin to his acquiescence or approval with the crimes of his subordinates.⁷⁴ Again no such finding was made. Instead, with the Trial Chamber's finding that there was no agreement and no shared approval for non-core crimes,⁷⁵ there can be no finding that Gotovina acquiesced in relation to these crimes.
51. Accordingly, in the absence of such findings Gotovina cannot be held liable under Article 7(3).

3. Gotovina Did Not Fail to Take Necessary and Reasonable Measures

52. The Trial Chamber made no finding that Gotovina failed to take necessary and reasonable measures to prevent or punish crime. Instead, the Chamber assessed whether Gotovina had the "power to intervene," not whether he had taken "necessary and reasonable measures" for purposes of Article 7(3).
53. Whether Gotovina took "necessary measures" required the Chamber to establish that, as a *de jure* officer, he had a legal authority to adopt a particular measure,⁷⁶ that with this material ability he culpably and willfully failed to do so,⁷⁷ and thus failed to "genuinely try" to prevent or punish crimes.⁷⁸ The Chamber's conclusions on the genuineness of Gotovina's efforts is tied to its finding that Gotovina ordered an unlawful artillery attack.⁷⁹ Accordingly, if the Appeals Chamber reverses the unlawful attack finding, it must also

⁷³ Orić AJ, 60.

⁷⁴ See references above, in footnote 58.

⁷⁵ TJ, 2313, 2321.

⁷⁶ E.g. Halilović AJ,183.

⁷⁷ Regarding the necessary volitional element of that doctrine, see *Bagilishema* AJ, 35; *Hostage*, p. 1261; High Command, p. 543; ICRC, *Commentary on AP I*, par 3541; *Blaškić* AJ, 41.

⁷⁸ Orić AJ, 177; Halilović AJ, para.63; Popović TJ, para.1043.

⁷⁹ See above pars 28-30.

overturn the Chamber's finding on the genuineness of Gotovina's numerous efforts to prevent and punish crime.⁸⁰

54. The Trial Judgment contains no finding that Gotovina's actions did not meet the "necessary and reasonable" standard of Article 7(3). "Reasonable measures" are those that "*reasonably* fall within the *material* powers of the superior."⁸¹ The Chamber faulted Gotovina for having failed to intervene in Lausic's VP work for purposes of JCE liability,⁸² but made no finding that Gotovina's alleged right to intervene fell within his material powers. Instead, it found that such intervention was not *excluded* from Gotovina's authority.⁸³ The Chamber did not find that Gotovina had a *duty* to issue orders to the VP, particularly where the Chamber noted Lausic was in command of the VP for crime investigation and processing.⁸⁴ Accordingly, the Chamber made no finding that intervention into the VP's work was a "reasonable measure" that Gotovina could have taken. Per *Halilović*, Gotovina cannot be liable for failing to intervene where he had no operational duty to act.⁸⁵
55. The *Chamber's Measures* only addressed the issue of Gotovina's alleged power to intervene, not whether he took necessary and reasonable measures.⁸⁶ Moreover, the evidence in the record was overwhelming that he took all necessary and reasonable measures.⁸⁷
56. Finally, the Chamber concluded that there was no policy of non-investigation of crimes on the part of the competent Croatian authorities.⁸⁸ Instead, the Trial Chamber noted that the VP, MUP and civilian authorities had processed hundreds of HV soldiers for post-shelling crimes, including murder, looting

⁸⁰ See Appellant's Brief, 297-299.

⁸¹ *Orić* AJ, 177; *Halilović* AJ, 63; *Popović* TJ, 1043.

⁸² TJ, 146, 2365.

⁸³ TJ, 146.

⁸⁴ TJ, 2145-2146; D1634, pg.2; D1635, pgs.2-3. See also TJ, 2100-2203.

⁸⁵ *Halilović* AJ, 212.

⁸⁶ See above pars 40, 53.

⁸⁷ Appellant's Brief, 297-299.

⁸⁸ TJ, 2203.

and destruction of property.⁸⁹ There is no finding that Gotovina was made aware of a serious failure on the part of these competent authorities to adequately investigate crimes.⁹⁰ He was therefore entitled to assume that the investigations and prosecutions were being properly handled. Per *Boskoski*,⁹¹ the fact that other measures could have been taken is not sufficient to trigger an accused's responsibility if he knew that the competent authorities had been notified and investigations were being conducted.

57. For all these reasons, a command responsibility case may not be built out of the Chamber's JCE findings.

VI. CONCLUSION

58. The Trial Chamber made none of the findings necessary to convict Appellant for aiding and abetting or command responsibility. If the Appeals Chamber finds that Gotovina was not JCE member and not liable for unlawful artillery attacks, it should overturn his conviction and enter a Judgement of not guilty on all counts.
59. If the Appeals Chamber were to consider that it has jurisdiction to consider Gotovina's responsibility under these modes of liability, it should grant leave to the Appellant to be heard orally in relation to these alternative modes of liability.

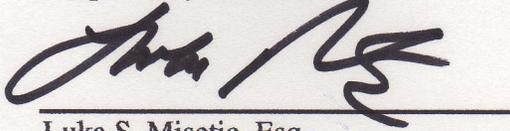
⁸⁹ TJ, 2193-2197. The Chamber found that obstacles encountered in August 1995 could reasonably explain any deficiencies in the work of the VP, and that it could not find the existence of a policy of non-investigation of crimes. TJ, 2203.

⁹⁰ *Boškoski* AJ, 234-235, 260 et seq.

⁹¹ *Ibid.*

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GLOSSARY

Abbreviations

Abbreviation Used	Full Citation
<i>AJ</i>	<i>Appeals Judgement</i>
<i>FTB</i>	<i>Final Trial Brief</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights</i>
<i>Gotovina Motion on Jurisdiction</i>	<i>Prosecutor v. Gotovina et al., IT-06-90-A, 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</i>
<i>20 July Order</i>	<i>Prosecutor v. Gotovina et al., IT-06-90-A, Order for Additional Briefing, 20 July 2012</i>
<i>Gotovina Supplemental Brief</i>	<i>Prosecutor v. Gotovina et al., IT-06-90-A, Ante Gotovina's Supplemental Brief Pursuant to the Oral Order of the Appeals Chamber of 14 May 2012, 17 May 2012</i>
<i>Appellant's Brief</i>	<i>Prosecutor v. Gotovina et al., IT-06-90-A, Appellant's Brief of Ante Gotovina, Public, 1 August 2011</i>
<i>OTP</i>	<i>Office of the Prosecutor</i>
<i>OTP Brief</i>	<i>Prosecutor v. Gotovina et al., IT-06-90-A, Prosecution Supplemental Brief on Alternative Modes of Liability for Ante Gotovina, 10 August 2012</i>
<i>PTB</i>	<i>Pre-Trial Brief</i>
<i>TJ</i>	<i>Trial Judgement</i>

ICTY Authorities Cited

Abbreviation Used	Full Citation
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , IT-95-14/1-A, <i>Judgment</i> , 24 March 2000.
<i>Aleksovski</i> TJ	<i>Prosecutor v. Zlatko Aleksovski</i> , IT-95-14/1-T, <i>Judgment</i> , 25 June 1999.
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , IT-95-14-A, <i>Judgement</i> , 29 July 2004.
<i>Bošković</i> AJ	<i>Prosecutor v. Ljube Bošković & Johan Tarčulovski</i> , IT-04-82-A, 19 May 2010.
<i>Čelebići</i> AJ	<i>Prosecutor v. Delalić et al.</i> , IT-96-21-A, <i>Judgement</i> , 20 February 2001.
<i>Furundžija</i> TJ	<i>Prosecutor v. Anto Furundžija</i> , IT-95-17/1-T, <i>Judgment</i> , 10 December 1998.
<i>Hadžihasanović</i> AJ	<i>Prosecutor v. Hadžihasanović and Kubura</i> , IT-01-47-A, <i>Judgement</i> , 22 April 2008.
<i>Hadžihasanović</i> 98bis	<i>Prosecutor v. Hadžihasanović and Kubura</i> , IT-01-47-T, <i>Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence</i> , 27 September 2004 .
<i>Halilović</i> AJ	<i>Prosecutor v. Sefer Halilović</i> , IT-01-48-A, <i>Judgment</i> , 16 October 2007.
<i>Halilović</i> TJ	<i>Prosecutor v. Sefer Halilović</i> , IT-01-48-T, <i>Judgment</i> , 16 November 2005.
<i>Kordić</i> TJ	<i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , IT-95-14/2-T, <i>Judgment</i> , 26 February 2001.
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , IT-00-39-A, <i>Judgement</i> , 17 March 2009.
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , IT-97-25-A, <i>Judgement</i> , 17 September 2003.
<i>Krnojelac</i> TJ	<i>Prosecutor v. Milorad Krnojelac</i> , IT-97-25-T, <i>Judgment</i> , 15 March 2002.
<i>Kunarac</i> TJ	<i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (“Foča”)</i> , IT-96-23&23/1-T, <i>Judgment</i> , 22 February 2001.
<i>Kupreškić</i> AJ	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Santić</i> , IT-95-16-A, <i>Judgement</i> , 23 October 2001

<i>Mrkšić</i> AJ	<i>Prosecutor v. Mile Mrkšić & Veselin Šljivančanin</i> , IT-95-13/1-A, <i>Judgment</i> , 5 May 2009.
<i>Orić</i> AJ	<i>Prosecutor v. Naser Orić</i> , IT-03-68-A, <i>Judgement</i> , 3 July 2008.
<i>Popović</i> TJ	<i>Prosecutor v. Vujadin Popović et al.</i> , IT-05-88-T, <i>Judgement</i> , 10 June 2010.
<i>Simić</i> AJ	<i>Prosecutor v. Blagoje Simić</i> , IT-95-9-A, <i>Judgement</i> , 28 November 2006.
<i>Strugar</i> AJ	<i>Prosecutor v. Pavle Strugar</i> , IT-01-42-A, <i>Judgement</i> , 17 July 2008.
<i>Strugar</i> TJ	<i>Prosecutor v. Pavle Strugar</i> , IT-01-42-T, <i>Judgement</i> , 31 January 2005.
<i>Tadić</i> TJ	<i>Prosecutor v. Duško Tadić</i> , IT-94-1-T, <i>Judgment</i> , 7 May 1997.
<i>Vasiljević</i> AJ	<i>Prosecutor v. Mitar Vasiljević</i> , IT-98-32-A, <i>Judgement</i> , 25 February 2004.
<i>Vasiljević</i> TJ	<i>Prosecutor v. Mitar Vasiljević</i> , IT-98-32-T, 29 November 2002.

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Abbreviation Used	Full Citation
<i>Bagilishema</i> AJ	<i>Prosecutor v. Ignance Bagilishema</i> . ICTR-95-1A-A, <i>Appeal Judgment</i> , 3 July 2002.
<i>Kajelijeli</i> TJ	<i>Prosecutor v. Juvénal Kajelijeli</i> , ICTR-98-44A-T, <i>Judgement</i> , 1 December 2003.
<i>Musema</i> TJ	<i>Prosecutor v. Alfred Musema</i> , ICTR-96-13-T, <i>Judgement</i> , 27 January 2000.
<i>Nahimana</i> AJ	<i>Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze</i> , ICTR-99-52-A, <i>Judgment</i> , 28 November 2007.
<i>Ntagerura</i> AJ	<i>Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe</i> , ICTR-99-46-A, <i>Judgement</i> , 7 July 2006.
<i>Ntawukulilyayo</i> AJ	<i>Prosecutor v. Dominique Ntawukulilyayo</i> , ICTR-05-82-A, 14 December 2011.

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Abbreviation Used	Full Citation
<i>Flick case</i>	<i>Flick and others</i> , United States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals, 1949, Vol. IX, p. 54.
<i>Hostage case</i>	<i>Trial of Wilhelm List and Others (“Hostage Case”)</i> , Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, Oct.1946-Nov.1949 (1950), Vol. XI, p. 1261.
<i>High Command case</i>	<i>The United States of America vs. Wilhelm von Leeb et al. (“The High Command Case”)</i> , Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, Oct.1946-Nov.1949 (1950), p.543.

General Sources

Abbreviation Used	Full Citation
<i>ICRC Commentary to AP I</i>	ICRC, <i>Commentary on the Additional Protocol I</i> , p.1010, par 3547.
<i>UN Commission of Experts 1994</i>	UN Commission of Experts Established Pursuant to Security Council 780 [1992], Final Report, UN Doc. S/1994/674, 27 May 1994, par 58.