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: 23 January 2012

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

THE PROSECUTOR

v.

ANTE GOTOVINA
MLADEN MARKAČ

PUBLIC *with* PUBLIC ANNEX

PROSECUTION RESPONSE TO "APPLICATION AND PROPOSED *AMICUS CURIAE* BRIEF" FILED ON 13 JANUARY 2012

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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I. OVERVIEW

1. The application and proposed *amicus curiae* brief should be rejected.[1] The Applicants' Proposed Brief cannot assist the Appeals Chamber in its consideration of the issues on appeal. Much of the Proposed Brief is irrelevant on its face. In its remainder, it raises factual issues which the Applicants are not in a position to address; it is further premised upon a flawed understanding of the meaning and content of the Judgement. The content of the Proposed Brief and the links of some Applicants with the Defence in this case also raise concerns about the objectivity of the Applicants, further warranting rejection of the Proposed Brief.

2. Moreover, admission of the Proposed Brief would result in the circumvention of the Rule 115 procedure for admission of evidence on appeal. The Proposed Brief impermissibly duplicates, endorses and elaborates upon the content of new expert

[1] 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 ("Proposed Brief" and "Applicants"). The Prosecution notes that the application was not signed by any of these

reports which the Defence seek to have admitted on appeal, and which are also appended to the Proposed Brief. Whereas the procedure under Rule 115 permits the testing of any new evidence admitted on appeal (*e.g.*, by the admission of rebuttal evidence and cross-examination), no such opportunity is available where the same material is put before the Appeals Chamber cloaked as the brief of an *amicus curiae*. Such an outcome is fundamentally unfair.

3. In light of the issues raised by the Proposed Brief, its length, and the *sui generis* nature of this filing, the Prosecution seeks leave to file this Response of 5,842 words.

II. THE PROPOSED BRIEF IS IRRELEVANT AND PROVIDES NO INDEPENDENT ASSISTANCE TO THE APPEALS CHAMBER

4. The bulk of the Proposed Brief is irrelevant to the issues on appeal. Significant passages repeat expert testimony from trial: these are neither in dispute between the parties nor of assistance in determining those issues which are in dispute. Other passages address non-controversial principles of law which the Applicants themselves concede were fully understood by the Chamber, and which they submit are likewise now fully understood by the parties and the Appeals Chamber. Finally, in several key respects, which are set out below,[2] the Proposed Brief raises phantom concerns which form no part of the Judgement.

A. The Proposed Brief repeats expert testimony heard at trial

5. At trial, Mr. Geoffrey Corn testified as an expert witness on behalf of the Gotovina Defence.[3] His expert report was admitted into evidence,[4] and his testimony was considered by the Chamber.[5] Corn now presents himself as one of the Applicants[6] with a view to making yet again the same submissions on exactly the same matters.

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individuals (the Registry notification page lists Mr. Geoffrey Corn as the contact on behalf of the Applicants).

2 *See* below section IV.

3 Corn Decision, para.1. *See also* Judgement, paras.36, 1163.

4 Corn Decision, para.7.

5 *E.g.* Judgement, paras.1163-1175.

6 *See* fn.1 above (Corn is identified as the only contact for the Applicants).

The Proposed Brief is thus redundant of Corn's trial evidence in the following respects:

- In the sub-section "The Relationship between IHL and Rules of Engagement",[7] the Proposed Brief largely reproduces the second sub-section of Corn's report at trial, devoted to explaining "the difference between the law of armed conflict and rules of engagement."[8] None of the Parties has raised the issue of ROE on appeal, or suggested that the Chamber "conflat[ed] traditional ROE restrictions with legal obligations"[9] under IHL.

- The sub-section of the Proposed Brief devoted to "[t]he relationship between orders and operational execution", in which the Applicants assert that any criminal adjudication of an unlawful attack "must ultimately turn on whether the defendant acted with the requisite culpable state of mind",[10] addresses the same issue as the third sub-section (and aspects of the thirteenth sub-section) of Corn's trial report, devoted to "the importance of evidence of good faith when attempting to impute improper motives to a Commander in a given decision making process."[11]

- The sub-section of the Proposed Brief on "Enemy Leadership, Operational Significance, and the Proportionality Balance", which seeks "to offer [the Applicants'] collective perspective on the military operational value of disrupting the ability of a civilian supreme military commander of enemy forces to participate in the enemy's strategic and operational decision-making process",[12] parallels the sixth sub-section of Corn's report addressing "the principle of proportionality" and the Addendum to his report, where Corn asserts that the decision to execute the "Martić attacks" was justified.[13] (Corn wrote, "It is therefore axiomatic that enemy C3I, logistics, and lines of communication are all high value targets during all military operations."[14] The

7 Proposed Brief, paras.10-12.
8 Exh.D1642 ("Corn's report"), pp.3-6.
9 Proposed Brief, para.12.
10 Proposed Brief, para.13.
11 Corn's report, pp.6-8, 22.
12 Proposed Brief, para.25.
13 Corn's report, pp.11-13, 23.
14 Corn's report, p.25.

Proposed Brief reads likewise: "Indeed, it is an axiom of military operations that enemy command, control, and communications capability is always a high value target."[15]) Unsurprisingly, the Applicants (including Corn) generally "endorse the views of the two experts relied on by the Trial Chamber" (one of whom was Corn).[16]

- The Proposed Brief urges the Appeals Chamber to maintain "an effective symmetry between the realities of military operations and the law that regulates such operations."[17] The first sub-section of Corn's report at trial discussed the need for "symmetry between the law of armed conflict and military logic".[18]

6. Other parts of the Proposed Brief relate to topics covered by other expert evidence from trial. This material is equally unable to provide the Appeals Chamber any further assistance than that already available in the trial record and is likewise irrelevant. For example, one of the sub-sections of the Proposed Brief concerns "[t]he Planning and Execution of Targeting Operations".[19] Yet Col. Harry Konings, "an expert in the use of artillery in military operations",[20] gave extensive information on the targeting process[21] and the Chamber relied on this aspect of his evidence.[22] Likewise, variables affecting the accuracy of artillery (discussed in the sub-section of the Proposed Brief concerning "[t]he Importance of Recognizing the Impact of Operational Variables When Assessing Operational Effects"[23]) are fully reflected in Konings' expert report[24] and were taken into account by the Chamber in its Judgement.[25]

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15 Proposed Brief, para.26.
16 Proposed Brief, para.26.
17 Proposed Brief, p.27.
18 Corn's report, pp.2-3.
19 Proposed Brief, paras.3-5.
20 Judgement, para.1163.
21 Exh.P1259, pp.2-5 (sub-sections addressing "the process of decision making in planning a military operation involving artillery, including the process of targeting", "the distinction between strategic, operational and tactical targeting for artillery operations", and "the considerations that go into targeting, including the levels at which targeting decisions are made, particularly with respect to targets in civilian populated areas").
22 *E.g.* Judgement, paras.1163-1175.
23 Proposed Brief, paras.21-23.
24 Exh.P1259, pp.8-12. *See also* Response to 115 Motion, paras.88-92.
25 Judgement, paras.1165, 1898.

B. The Proposed Brief discusses non-controversial principles of law

7. In areas where the Proposed Brief addresses the "Applicable Legal Standards", the Applicants concede "the high level of expertise in this law brought to bear by the judges, prosecutors, and defense counsel" of this Tribunal.[26] Purporting to confine themselves to addressing "several critical legal norms applicable",[27] their legal submissions are in fact no more than basic statements of law with particular respect to:

- The axiomatic principle that criminal responsibility must be determined on the basis of the totality of the available evidence.[28]
- The necessity of *mens rea,*[29] which is addressed in the Judgement.[30]
- The principle of distinction[31] (which the Applicants "agree" that "[t]he Trial Chamber carefully considered and applied", and which was one of the "relevant legal standard[s] against which to judge the legality of the artillery and rocket attacks"[32]). This is addressed in the Judgement.[33]
- The presumption of innocence,[34] which is addressed in the Judgement.[35]
- The meaning of the proportionality rule[36] (which, the Applicants note, the Chamber "applied"[37] and the definition of which it "undoubtedly understood"[38]). This is addressed in the Judgement.[39]

8. In its own terms, the Proposed Brief adds nothing of value on these matters and should be rejected.

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26 Proposed Brief, para.7.
27 Proposed Brief, para.7.
28 Proposed Brief, para.6.
29 Proposed Brief, paras.8-9.
30 *E.g.* Judgement, paras.1801-1803, 1840-1842, 1906, 1911 (relating to Knin).
31 Proposed Brief, para.13.
32 Proposed Brief, para.5.
33 *E.g.* Judgement, paras.1899-1908 (relating to Knin). *See also* Response Brief, paras.59-61.
34 Proposed Brief, para.23.
35 Judgement, para.14.
36 Proposed Brief, paras.24-25.
37 Proposed Brief, para.24.
38 Proposed Brief, para.25.
39 Judgement, para.1910.

III. THE APPLICANTS IMPERMISSIBLY ADDRESS FACTUAL ISSUES

9. In addition to the irrelevance of much of the Proposed Brief, the Applicants' approach to those issues which *are* before the Appeals Chamber[40] is improper. The Proposed Brief does not address questions of law (as an *amicus*' submission should[41]) but rather impermissibly focuses on issues of fact,[42] offering "its conclusions that the Trial Chamber erred in a number of areas […]."[43] The Proposed Brief should be rejected on this basis alone. However, not only do the Applicants overstep the proper remit of *amicus curiae* in the first place, they attempt to assume the roles of Defence counsel, expert witness and fact finder. This cannot assist the Appeals Chamber.

10. The partisan nature of the Proposed Brief is clear from the manner in which it challenges factual findings of the Chamber.[44] Notwithstanding the Applicants' assertion that they do not opine "on the culpability of the defendant",[45] their submissions call for just such conclusions. Furthermore, as explained below, the Proposed Brief is based on a partial or flawed reading of the Judgement which fundamentally misunderstands the Chamber's findings.[46] As such, the factual conclusions drawn in the Proposed Brief are unsound. The Applicants also rest their conclusions on material which is not in evidence, in particular the three reports submitted by the Defence under Rule 115, and misapprehend the evidence which is in the record. Their factual submissions lack precision, full citation, and objectivity.

11. The lengthy military background of the majority of the Applicants does not qualify them to present post-trial expert testimony to the Appeals Chamber cloaked in the role of *amicus curiae*. The function of the *amicus curiae* is distinct from that of an expert witness. Instead of confining themselves to the legal explanation of legal authority (or even the evidence in the record), they endorse opinion evidence in the three new Defence reports, which themselves are not presently in the record. "Second-

40 *E.g.* the interpretation of Gotovina's attack order, the appropriate margin of error in the employment of the particular artillery assets used by the HV, and the circumstances of the "Martić attacks".
41 *Hartmann Amicus* Decision, paras.5, 7; Information on *Amicus* Briefs, para.5(b).
42 *See Karadžić Amicus* Decision, p.2; Information on *Amicus* Briefs, para.5(b).
43 *Hartmann Amicus* Decision, para.7.
44 *E.g.* Proposed Brief, paras.14-19, 26-27.
45 Proposed Brief, para.14. *See also* para.27.

hand" opinion of this kind is prejudicial since it cannot be tested in the ordinary fashion (*e.g.*, by cross-examination).

12. The Applicants' confusion as to the proper mandate of an *amicus curiae* is most apparent in their discussion of the significance of the 200-metre margin of error (addressed further below). The Proposed Brief asserts that "There is no military practice to suggest that a 200-meter radius is the norm in employment of artillery and other indirect fire assets."[47] It endorses the three new Defence reports[48] as reflecting "a clear consensus that the standard applied by the Trial Chamber is operationally invalid and has no pragmatic foundation."[49] Yet the Proposed Brief makes no reference to the facts that:

- The three new Defence expert reports are not in evidence. (The Appeals Chamber is yet to render a decision on their admission in these proceedings.)
- The three new Defence reports have not been tested in cross-examination.
- The Applicants have not been qualified by the Tribunal to give opinion evidence on whether the three new Defence reports represent a broader consensus or not.
- Existing expert and other evidence relevant to the assessment of the three new Defence reports is already in the record.[50]
- The Chamber derived its 200-metre margin of error on a reasoned basis, which is contained in the Judgement.[51]

13. The Applicants overlook the fact that the evidence in the record—and even the proposed expert reports tendered by the Defence—reflect a variety of conclusions as to the appropriate margin of error in the circumstances of this case.[52] The Applicants'

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46 *See* below section IV.
47 Proposed Brief, para.16(A).
48 *See* Gotovina 115 Motion.
49 Proposed Brief, para.16(B).
50 *See*, *e.g.* Judgement, para.1898; Exh.P1259.
51 *See* Judgement, para.1898; Response Brief, paras.76-80.
52 *See* Response Brief, paras.76-80; Response to 115 Motion, paras.79-84. For instance, Rajčić—Gotovina's direct subordinate as chief of the artillery of the Split MD—testified that the range of error for the 130-mm guns shelling Knin was 70-75 metres in distance and 15 metres along the axis (Judgement, paras.1237, 1898). Artillery expert Konings testified to a range of error of

acceptance of any margin of error as a "norm", "standard" or "benchmark" applicable to conflicts generally, whether 200 metres or 400 metres, exposes their misapprehension of the highly fact-sensitive nature of this issue.

14. The Applicants trespass further still into factual matters when they conclude that 400 metres is a more appropriate margin of error on the facts of this case.[53] By their suggestion that the Appeals Chamber should substitute the Chamber's reliance on a 200-metre margin to "send a powerful message",[54] they appear to call for a judgement based on factors other than the evidence in the record. The only evidence which the Applicants cite to support their view of a 400-metre margin of error is the testimony of Leslie.[55] Yet the Chamber chose not to rely on Leslie's evidence on this point because he was not called as an artillery expert and because he did not testify in detail about his basis for concluding that landing within a 400-metre radius of a target was acceptable for a first shot.[56] Furthermore, the Applicants rely on Leslie's evidence of a 400-metre radius of error while failing to acknowledge his related testimony that the attack was indiscriminate.[57] The Applicants' blanket advocacy of a 400-metre margin of error is extraordinary for its failure to consider the implication of such a position on the lawfulness of the use of such weapon systems in the first place. Firing 900 artillery rounds with a 400-metre range of error against point targets in a densely populated, 6 square-km town such as Knin would, in any event, run afoul of Article 51(4)(b) and (c) of API.[58]

IV. THE PROPOSED BRIEF IS PREMISED ON A FLAWED UNDERSTANDING OF THE JUDGEMENT

15. As noted above, the Proposed Brief demonstrates that the Applicants are uninformed about the content of the Judgement and the findings of the Chamber. In five key respects, the Proposed Brief addresses issues or assumes premises which, in

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up to 55 metres in range and 5 metres of deflection, in addition to external factors leading to possible variations of 18-60 metres per factor—factors which could however be measured and taken into account prior to firing (Judgement, paras.1165, 1898).

53 Proposed Brief, para.17.

54 Proposed Brief, para.17.

55 Proposed Brief, para.17.

56 Judgement, para.1898.

57 *See* T.1989-1991. *See also* T.2015 ("I, as a military professional, would agree that certain elements of Operation Storm were conducted with a high degree of expertise. If the aim was to ensure that the local population was cleansed from the region.")

light of the Judgement, are erroneous and therefore vitiate the utility of the Proposed Brief to the Appeals Chamber. These concern: the criminal objective pursued through Operation Storm; the interpretation of Gotovina's attack order and the evidence relevant to this process; the meaning of the Chamber's reference to a 200-metre margin of error; the extent of the Chamber's findings on specific artillery impact locations in Knin; and, the considerations upon which the Chamber relied in concluding that the "Martić attacks" were disproportionate. Each of these issues is briefly addressed in turn.

A. Operation Storm was an integral part of the JCE to permanently remove the Serb civilian population from the Krajina by force or threat of force

16. The Trial Chamber determined that the unlawful attack unleashed on 4-5 August 1995 "formed an important element in the execution of the JCE" to permanently remove "the Serb civilian population from the Krajina by force or threat of force".[59] The Applicants' partial or partisan understanding of this case is evident from the very beginning of the Proposed Brief in which they ignore the Chamber's conclusion as to the criminal objective integral to Operation Storm. The HV's use of artillery on 4-5 August 1995 was not part of "an effort to disrupt and degrade enemy capabilities in support of a deliberate main effort attack against entrenched SVK defensive positions with the objective of breach and exploitation of those defenses".[60] Nor did the Chamber "acknowledge[]", as the Applicants assert, that this "was not a situation of blatant indiscriminate attacks on civilian population centers".[61] It determined the very opposite to have been true. The Croatian political and military leadership "took the decision to treat whole towns as targets for the initial artillery attack",[62] despite their overwhelmingly civilian character.[63] Rather than finding the attack was against "entrenched SVK defensive positions"[64], the Judgement

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58 *See also* Judgement, fn.932.
59 Judgement, paras.2370, 2600.
60 Proposed Brief, para.2.
61 Proposed Brief, para.2.
62 Judgement, para.2311.
63 Judgement, paras.1233, 1430, 1463, 1475.
64 Proposed Brief, para.2.

determined there was only a "limited SVK and police presence in Knin".[65] The Proposed Brief is in error from the outset.

B. Gotovina ordered the targeting of Knin and the other towns as such

17. The Chamber determined beyond reasonable doubt that Gotovina ordered the targeting of Knin and the other towns as such, relying in part on the plain meaning of his own orders to his troops.[66] Although the Applicants concede that Gotovina's attack order could indeed "be interpreted as an order to conduct an indiscriminate attack against Knin" and other cities,[67] they wrongly suggest that the Chamber considered the "explicit terms" of Gotovina's attack order "in the abstract".[68] To the contrary, in addition to assessing "the consistency between the alleged illegality of an order and the effects produced by execution"[69] (which the Applicants recognize formed part of the Chamber's assessment:[70] see below), the Chamber relied on a wealth of evidence as to the proper interpretation of Gotovina's attack order. This included:

- the agreement at Brioni by members of the JCE to force the Serb population out of the Krajina through unlawful attacks;
- the repetition of Gotovina's specific language in his attack order to put the towns "under fire" in the attachment to his order prepared by his chief of artillery, Rajčić;
- the repetition of Gotovina's specific language in his attack order to put the towns "under fire" in other orders passed down the chain of command;
- the existence of contemporaneous reports by HV artillery units indicating that the towns themselves were treated as targets;
- the eyewitness accounts of people (including international military personnel) present in Knin as to the indiscriminate nature of the shelling;

65 Judgement, para.1908.
66 Judgement, para.1911.
67 Proposed Brief, para.14.
68 Proposed Brief, para.14.
69 Proposed Brief, para.16.
70 Proposed Brief, para.16.

- the disregard for civilian life and property indicated by the disproportionate nature of the "Martić attacks".[71]

18. The Applicants ignore the fact that the Chamber also heard expert testimony from both Konings and Corn on the text and interpretation of Gotovina's attack order.[72] There is nothing "abstract" about the Chamber's consideration of this issue.

19. Neglecting to address this significant body of evidence, the Proposed Brief raises the hypothetical that the language to "put the towns […] under artillery fire" contained in Gotovina's attack order (as well as in the orders of his subordinates) may have been unintended and "generalised terminology".[73] Not only is this speculation inconsistent with the other evidence in the case, it assumes facts which are not in evidence or determined by the Chamber. Contrary to the Applicants' implication, Operation Storm was a premeditated and carefully planned attack taken at the initiative of the HV. There was no "necessarily hasty preparation".[74] Gotovina had the responsibility to ensure that his orders were as clear and specific as necessary to ensure that only lawful objects would be targeted. Konings and Corn agreed on this point at trial.[75] Further, the suggestion that a commander could escape liability for issuing an illegal order simply because it was not reviewed by a lawyer before being executed finds no support either in the record or in law.[76]

C. The 200-metre margin of error is neither a legal standard applicable to any other case nor the keystone of Gotovina's liability

20. The Judgement made no determination on margins of error as a matter of law. Rather, the 200-metre margin was a factual tool employed in this case to assess whether Rajčić's evidence about the meaning of Gotovina's attack order was inconsistent with the plain reading of the order and the other substantial evidence in

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71 *See* Judgement, paras.1896, 1910-1911, 1915, 1923, 1927, 1935, 1943, 1992-1995. *See also* paras.1185, 1187, 1249, 1263-1264, 1269-1270, 1277-1278, 1284, 1287-1288, 1295-1296, 1301, 1309, 1311, 1402, 1405, 1407, 1439-1440, 2311. *See also* Response Brief, paras.13-51.

72 Judgement, paras.1172-1173.

73 Proposed Brief, para.15. In particular, the Applicants suggest that "it is unsurprising that non-legal staff officers preparing an operations [*sic*] under the pressures associated with on-going combat might use imprecise terminology", ignoring that Gotovina's order was drafted a few days prior to the start of operations.

74 Proposed Brief, para.20.

75 *See* Judgement, para.1172; Corn: T.21277-21280, 21473-21474.

76 Proposed Brief, para.15.

the record showing an unlawful attack.[77] The frequency with which artillery projectiles struck more than 200 metres away from possible lawful targets (and, sometimes, much further than 200 metres) convinced the Chamber that Rajčić's testimony on this point could not be believed.

21. The Applicants' concern with the Chamber's use of "a 200-meter standard" misunderstands the Judgement in the same way as the Defence. The Chamber did not state, as a matter of law, that the "norm" or "standard" for *any* artillery attack was a 200-metre radius of error. The notion of a "radius of legally permissible error"[78] is a notion entirely alien to the Judgement. Instead, the Chamber determined that, on the evidence presented, 200 metres was a generous margin of error to assess (on the facts of *this* case)[79] whether the attacks could have been directed at military objectives as Rajčić suggested—and in contradiction to the criminal intent expressed on the fact of Gotovina's attack order (reproduced down the chain of command) and the substantial body of other evidence. The Applicants' "fear that adoption of an unrealistic operational standard will, in future conflicts […], result in non-compliance with IHL balancing standards" demonstrates that they fail to understand this aspect of the Judgement. This aspect of the *Gotovina* case will not serve as a uniform "margin of error" applicable to other cases. The range of error as derived and used in this case is not a "norm" applicable to other conflicts and has no application beyond the unique facts of this case.

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77 See above, Section IV.B. See also, Response Brief, para.63; Judgement, paras.1893–1911.

78 Proposed Brief, para.16(C). *See also* para.6 (implying rhetorically that the Judgement may impose a standard of "absolutely perfect execution"), 17 (referring to a "benchmark of acceptable error"). To the extent that the Applicants suggest that there *should* be, as a matter of law, some radius of legally permissible error but that it should be 400 metres rather than 200 metres (para.17), they make precisely the mistake for which they would criticize the Chamber (para.16(C)). To the contrary, in accord with the Chamber's approach, margins of error must be an evidentiary issue which turns on the facts of the case.

79 Judgement, para.1898. The Chamber derived a 200-metre margin of error from its analysis of the following: 1) the evidence of Konings (internal factors can lead to error in the fall of a 155-mm shell of up to 55 metres in range and 5 metres of deflection, in addition to external factors such as muzzle velocity, wind speed, air temperature/density leading to possible variations of 18-60 metres per factor—factors which could, however, be measured and taken into account prior to firing); 2) the HV's use of a 10-digit coordinate system, which would enable it to plot its targets with an accuracy of up to one metre; 3) Rajčić's evidence concerning the 130-mm cannon actually used by the HV (at a range of 26km, a 130-mm shell has an error of about 15 metres "along the axis" and 70-75 metres "in distance" with "the normal scattering dispersion [...] being an area with a diameter of 35 metres"); 4) the evidence of Konings and Rajčić that the 122-mm MBRL actually used by the HV "generally covers a broader area than the 130-mm cannon."

D. The Chamber's limited findings about specific artillery impacts in Knin did not establish that the majority of artillery effects struck lawful objectives

22. The Applicants further misapprehend the Judgement with respect to the extent of the Chamber's findings of specific artillery impacts in Knin. They assert without support for their calculations, or reference to their source, that "approximately 96% of artillery effects impacted lawful military objectives".[80] Again, this parallels a Defence submission.[81] The Judgement contains no such determination. The inference that the Applicants draw from this unfounded statistic as to the "ratio of valid to invalid effects"[82] is unsustainable in light of the evidence in the trial record: the Judgement is clear that the Chamber could determine the impact locations for only a fraction of the shells fired.[83] The Chamber's findings do not lead to the factual conclusion claimed by the Applicants (that the vast majority of shell impacts actually were "valid", *i.e.* lawful). Indeed, of the approximately 154 shell impacts which the Chamber could determine beyond reasonable doubt, approximately 50% could not reasonably have been found to have been intended to strike a lawful target.[84] Again in this context, the Applicants ignore the significant and compelling evidence of the agreement, intention and execution of the plan to target Knin and the other towns as such.[85]

E. The Chamber properly found the "Martić attacks" were disproportionate

23. The Chamber concluded that the "Martić attacks" were disproportionate not because it "did not assign sufficient value to the military advantage"[86] but rather due to the "very slight" chance that the attacks would realise that military advantage. Contrary to the position taken in the Proposed Brief, the Judgement expressly sets out the values "attributed to each side of the proportionality balance".[87] It weighed the "significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects" against the fact that "firing at Martić's apartment could disrupt his ability to move, communicate, and command and so offered a definite military advantage" but that "the chance of hitting or injuring Martić […] was very

80 Proposed Brief, paras.18-19 (citation at para.19).
81 Gotovina Notice, p.3, para.E.
82 Proposed Brief, para.19.
83 *E.g.* Judgement, para.1909. *See further* Response Brief, paras.73-74.
84 *See* Response Brief, paras.71-74, Annex A.
85 *See* above section IV.B.; Response Brief, para.74.
86 Proposed Brief, para.24. *Contra* Judgement, para.1910.

slight".[88] The assessment of the remote chance of hitting Martić was based on the testimony of Gotovina's artillery chief Rajčić.[89] The Proposed Brief entirely fails to address this balancing exercise but rather simply takes issue with the Chamber's ultimate conclusion, echoing the substance of Corn's original report at trial.[90]

24. In presenting their "strong consensus" that the "Martić attacks" were not disproportionate,[91] the Applicants improperly stray into factual matters and, in doing so, rely on alleged facts which are not in evidence. Other than reference to "the Trial Chamber record",[92] the Applicants provide no support for the assertion that Gotovina believed "most of the civilians had left", that he and his subordinates "took great care […] to avoid civilian casualties", or that the "Martić attacks" were "reasonably […] assessed as critical to operational success".[93] To the contrary, the Chamber determined that "[a]t the times of firing […] civilians could have reasonably been expected to be present on the streets" in the areas targeted.[94] The Prosecution notes that, in the Gotovina Defence's initial instructions to Corn to prepare an expert report, he was instructed to "assume" that "there were indications that the number of non-mobilized civilians remaining in Knin […] was as low as 3,000".[95] This assumption, applied in Corn's report,[96] appears now to be reflected in the Proposed Brief. The Judgement is unequivocal in rejecting this assumption: "there were at least 15,000 civilians in Knin on 4 August 1995".[97] It is also clear in rejecting the contention that Gotovina and his subordinates took great care to avoid civilian casualties.[98]

25. The Applicants' assertion that the "effects of [the "Martić attacks"] produced no civilian casualties" is unsubstantiated. Although the Chamber did not make factual

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87 Proposed Brief, para.26.
88 Judgement, para.1910; Response Brief, paras.152-154.
89 Judgement, para.1910.
90 *See* Proposed Brief, paras.25-26; Judgement, para.1175 ("Corn testified that Knin was a critical command, control, and communication centre […] As commander in chief Milan Martić was a lawful military objective, and although the probability of killing or disabling Martić by artillery attack was limited, if Gotovina believed Martić to be an important component in SVK decision-making, the potential operational advantage in disrupting the SVK command and control structure would be substantial.").
91 Proposed Brief, para.27.
92 Proposed Brief, para.27.
93 Proposed Brief, para.27.
94 Judgement, para.1910.
95 Corn's report, Attachment, pp.1, 3-4.
96 Corn's report, pp.27-29.
97 Judgement, paras.1233, 1577, 1747.
98 *See e.g.* Judgement, paras.1911, 1923, 1935, 1943, 2311, 2320.

determinations as to the extent of any casualties, it noted the evidence of numerous witnesses who saw the bodies of civilians apparently killed by artillery fire.[99] The Chamber further determined that the attack as a whole resulted in the deportation of at least 20,000 civilians as well as damage to civilian objects.[100]

V. THE PROPOSED BRIEF RAISES CONCERNS ABOUT THE OBJECTIVITY OF THE APPLICANTS

26. An *amicus curiae* should be objective and impartial.[101] Yet in this case concerns about the objectivity of the Applicants, as their views are presented in the Proposed Brief, are of sufficient gravity that the Proposed Brief must be rejected in its entirety. There is no effective means for this Tribunal to cure these concerns and admit any part of the Proposed Brief into the record.

27. First, the basic content of the Proposed Brief reveals that the Applicants lack objectivity. In key respects, the Proposed Brief is based on facts and assumptions which are not contained in the Judgement but rather appear to be informed by the Defence's case. For example, the Proposed Brief asserts that "this was not a situation of blatant indiscriminate attacks on civilian population centers,"[102] yet this is just what the Chamber concluded beyond reasonable doubt.[103] Its partisan quality is further evident from:

- The fact that Corn, the Applicants' contact point,[104] was an expert Defence witness at trial.

- The close correspondence between the Applicants' (improper) factual submissions and the position taken by the Defence in this case.[105]

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99 Judgement, paras.1287, 1291-1292, 1302, 1307, 1333, 1336.

100 Judgement, paras.1710, 1903, 1920, 1940, 2305.

101 *Hartmann Amicus* Decision Brief, para.7; *Gatete Amicus* Decision, para.3; *Kayishema Amicus* Decision (Kanyarukiga), para.6; *Milošević Amicus* Decision, p.4. *But see Kayishema* Reconsideration Decision (ADAD), para.12; *Bagosora Amicus* Decision, p.2 (*vacated by Bagosora Amicus* Reconsideration).

102 Proposed Brief, para.2.

103 Judgement, paras.1911, 1923, 1935, 1943.

104 *See* fn.1 above.

105 *See*, *e.g.*, Gotovina Brief, paras.9-141; Gotovina Reply, paras.10-66; Prosecution Response (Gotovina), paras.8-167. Since the Proposed Brief thus provides no further assistance to the Appeals Chamber than the briefs of the parties, it can be rejected on this basis alone. *See*

- Its unequivocal endorsement of three expert reports obtained by the Gotovina Defence—and opposed by the Prosecution[106]—whose admission in this case is yet to be determined.[107]

- Its assertion that the Judgement establishes "a radius of legally permissible error for the use of artillery and other indirect fire assets".[108] As set out above, this partisan interpretation of the Judgement is incorrect.[109]

- Its reference to alleged "facts" in the case, favourable to the Defence, which are not only unsupported but contradicted by the findings of the Chamber.[110]

28. Second, notwithstanding the detailed biographies prefacing the Proposed Brief,[111] the Applicants have failed to "identify[] and explain[] any contact or relationship [they] had, or ha[ve], with any party to the case."[112] Not only does the Proposed Brief fail to disclose that Corn was admitted as a Defence expert witness in the proceedings in which he now presents himself as *amicus curiae*, it neglects to disclose that Eric Talbot Jensen has been since 2011 "a Defense Expert Consultant" in the "Prosecutor v. Gotovina (Appeal)". This information is contained in his *curriculum vitae*, which is publicly available.[113] It is inappropriate for Corn or Jensen now to appear as *amicus curiae*. The Applicants' reticence to place the issue of Corn and Jensen's prior involvement in the case before the Appeals Chamber leaves the

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Decision on ADC-ICTY's *Amicus* Request, para.4; *Kayishema Amicus* Decision (IBUKA & AVEGA), para.8; *Kanyarukiga Amicus* Decision, para.5.

106 Response to 115 Motion, paras.1-3, 5-6, 66-99, 122.

107 Proposed Brief, paras.16(B), 17. *See* Appellant Ante Gotovina's Motion to Admit New Evidence Pursuant to Rule 115, 27 October 2011 (public redacted). The Prosecution opposes this Motion: Response to 115 Motion.

108 Proposed Brief, para.16(C).

109 *See* above section IV. C.

110 *Contrast, e.g.* Proposed Brief, para.27 ("Gotovina would have reasonably believed most of the civilians had left the residential area in the vicinity of the Martić apartment; Gotovina and his subordinates took great care to target only military targets and to avoid civilian casualties"), *with*, Judgement, paras.1233, 1577, 1747 (at least 15,000 civilians in Knin), 1910 ("civilians could have reasonably been expected to be present on the streets of Knin near Martić's apartment"), 1911, 1923, 1935, 1943, 2311, 2370 (finding that Gotovina ordered the four towns to be targeted as such).

111 Proposed Brief, pp.1-11. The Brief totals 26 pages in length.

112 Information on *Amicus* Briefs, para.3(f).

113 *See* Annex, p.6, (reproducing *curriculum vitae* of Eric Talbot Jensen available at http://www.law2.byu.edu/faculty/profiles2009/vitae/EricTalbotJensen1324487064.pdf and accessed on 23 January 2012). Mr. William Fenrick discloses that he was formerly a senior legal officer of the Prosecution. The Prosecution notes, in this regard, that Fenrick was involved in the preparation of the indictment in this case.

Prosecution unable to assess any further links which may exist between the Applicants and the Defence.

29. The interlocking nature of the concerns about (at least some of) the Applicants' ability to view this case objectively contaminates the Proposed Brief as a whole. Mere severance of Corn and Jensen from the Applicants will not cure the partisan views already reflected in the Proposed Brief. For these reasons, although the Prosecution notes the distinguished individual careers of many of the Applicants, their Proposed Brief should be rejected.

VI. CONCLUSION

30. For these reasons, the Proposed Brief should be rejected.

31. In the event the Appeals Chamber were to admit the Proposed Brief, the Parties should be afforded sufficient opportunity to respond fully on the merits to the Applicants' submissions and to test factual assertions made in it.

Word Count: 5,842

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Dated this 23rd day of January 2012
At The Hague, The Netherlands

GLOSSARY

Pleadings, Orders, Decisions etc. from *Prosecutor v. Ante Gotovina & Mladen Markač,* Case No. IT-06-90

Abbreviation	Full citation
Decision on ADC-ICTY's *Amicus* Request	*Prosecutor v. Ante Gotovina et al.*, Case No.IT-06-90-T, T.Ch., Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as *Amicus Curiae*, 9 June 2009 (public)
Corn Decision	*Prosecutor v. Ante Gotovina et al.*, Case No.IT-06-90-T, T.Ch., Decision on Admission of Expert Report of Geoffrey Corn, 22 September 2009 (public)
Judgement	*Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač,* Case No. IT-06-90-T, T.Ch., Judgement, 15 April 2011 (public with confidential appendix)
Gotovina 115 Motion	*Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač,* Case No. IT-06-90-T, T.Ch., Appellant Ante Gotovina's Motion to Admit New Evidence Pursuant to Rule 115, 4 November 2011 (public redacted)
Gotovina Brief	*Prosecutor v. Ante Gotovina & Mladen Markač,* Case No. IT-06-90-A, Appellant's Brief of Ante Gotovina, 2 August 2011 (redacted public version)
Gotovina Notice	*Prosecutor v. Ante Gotovina & Mladen Markač,* Case No. IT-06-90-A, Notice of Appeal of Ante Gotovina, 16 May 2011 (public)
Response Brief	*Prosecutor v. Ante Gotovina & Mladen Markač,* Case No. IT-06-90-A, Prosecution Response to Ante Gotovina's Appeal Brief, 12 September 2011 (redacted public version filed on 29 September 2011)
Response to 115 Motion	Prosecution Response to Gotovina's Rule 115 Motion, 28 November 2011 (public redacted)

Other ICTY authorities

Abbreviation	Full citation

Hartmann Amicus Decision	*In the Case Against Florence Hartmann*, Case No.IT-02-54-R77.5-A, App.Ch., Decision on Application for Leave to File *Amicus Curiae* Brief, 5 February 2010 (public)
Karadžić Amicus Decision	*Prosecutor v. Radovan Karadžić*, Case No.IT-95-5/18-PT, T.Ch., Decision on *Amicus Curiae* Request, 6 July 2009 (public)
Milošević Amicus Decision	*Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-T, T.Ch., Decision Concerning an *Amicus Curiae*, 10 October 2002 (public)

ICTR authorities

Abbreviation	Full citation
Bagosora Amicus Decision	*Prosecutor v. Théoneste Bagosora*, Case No.ICTR-96-7-T, T.Ch., Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998 (public)
Bagosora Amicus Reconsideration	*Prosecutor v. Théoneste Bagosora*, Case No.ICTR-96-7-T, T.Ch., Reconsideration of Earlier Decision on *Amicus Curiae* Application by the Kingdom of Belgium, 13 February 2007 (public)
Gatete Amicus Decision	*Prosecutor v. Jean-Baptiste Gatete*, Case No.ICTR-2001-61-11bis, T.Ch., Decision on *Amicus Curiae* Requests (IBUKA, AVEGA and ICDAA), 30 June 2008 (public)
Kanyarukiga Amicus Decision	*Prosecutor v. Gaspard Kanyarukiga*, Case No.ICTR-2002-78-I, T.Ch., Decision on *Amicus Curiae* Request by the Organization of Defence Counsel (ADAD), 22 February 2008 (public)
Kayishema Amicus Decision (IBUKA & AVEGA)	*Prosecutor v. Fulgence Kayishema*, Case No.ICTR-2001-67-I, T.Ch., Decision on the Request by IBUKA & AVEGA for Leave to Appear and Make Submissions as *Amicus*, 1 July 2008 (public)
Kayishema Amicus Decision (Kanyarukiga)	*Prosecutor v. Fulgence Kayishema*, Case No.ICTR-2005-87-I, T.Ch., Decision on the *Amicus Curiae* Request of the Defence of Gaspard Kanyarukiga, 14 September 2007 (public)
Kayishema Reconsideration Decision (ADAD)	*Prosecutor v. Fulgence Kayishema*, Case No.ICTR-2001-67-I, T.Ch., Decision on ADAD's (The Organisation of ICTR Defence Counsel) Motion for Reconsideration of Request for Leave to Appear as *Amicus Curiae*, 1 July 2008 (public)

Other Abbreviations

Abbreviation	Full citation
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978)
Information on *Amicus* Briefs	Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, 27 March 1997

Public
Annex

Available at
http://www.law2.byu.edu/faculty/profiles2009/vitae/EricTalbotJensen1324487064.pdf

Accessed on 23 January 2012

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EDUCATION

YALE LAW SCHOOL, LL.M., 2006

THE JUDGE ADVOCATE GENERAL'S SCHOOL, LL.M., Military Law, 2001
Specialization in International Law

UNIVERSITY OF NOTRE DAME, J.D., 1994

BRIGHAM YOUNG UNIVERSITY, B.A., International Relations, 1989

PUBLICATIONS

Books:

The Law of Armed Conflict: An Operational Approach, First Edition, forthcoming 2012, Aspen Publishing (with G. Corn, V. Hansen, C. Jenks, R. Jackson, and J. Schoettler).

The War on Terror and the Laws of War (Oxford University Press, 2009). (with G. Corn, V. Hansen, R. Jackson, M. Lewis, and J. Schoettler,).

Book Chapters:

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Have also published numerous articles, handbooks, and chapters in military publications, and run numerous symposia on military law, international law and related topics.

PRESENTATIONS:

The Internet In Bello: Seminar on Cyber Law, Ethics & Policy, Berkeley Law School (November, 2011). Presented on "Geography and Neutrality During Cyber War."

Centra Technologies and the Office of Cyber Issues, Office on the Director of National Intelligence, Seminar on Reframing the Global Cyber Threat (October, 2011). Presented on the legal aspects of cyber operations in combatting the global cyber threat.

Defense Institute of International Legal Studies Workshop on Terrorism, Computer Crimes and the Battlefield (September, 2011). Presented on various aspects of terrorism, cyber crime and cyberwarfare to government and military leaders from eight eastern European nations.

World Summit on Counter-Terrorism, International Institute for Counter-Terrorism, Herzliya, Israel (September, 2011). Presented on "The Scope of the 21st Century Battlefield: Forecasting the Legal and Policy Landscape."

Cyber Deterrence, 13th Annual Sommerfeld Lecture, The Judge Advocate General's Legal Center and School, Charlottesville, VA (August, 2011).

Cyber-Security: The Geostrategic Implications of Cyberspace, Centre of Excellence for National Security & Global Futures Forum (Singapore) (July, 2011). Presented on the law of cyber operations, including cyber warfare.

New Technologies and Future Challenges for the Law of Armed Conflict, Columbia Human Rights Institute (June, 2011).

Crime and Terrorism: Law Enforcement Ten Years after 9/11; U.S. Department of State, Federal Bureau of Investigation, John Jay College (May, 2011). Presented on cyber terrorism.

Cyber Law Conference, United States Air Force Judge Advocate General's School (April, 2011). Presented on US cyber policy.

Federalist Society, International Intervention in Libya (April, 2011). Moderated a panel discussion on the legal bases for intervention in Libya by the international community.

New York City Bar Association, Military Affairs Committee (April, 2011). Presented on law of war detention and cyber operations.

The Effect of WikiLeaks (March, 2011). Presented on the effect on US national security from the classified and sensitive information that was published by WikiLeaks.

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The Future of the Law of War, Special Operations Command Legal Conference (February, 2011).

Fordham International Law Journal Annual Symposium, Cyber Attacks: International Cybersecurity in the 21st Century (February, 2011). Moderated panel on "Cyber Attacks and the Law of Armed Conflict."

The Defense Policy Symposium, Stanford Law and Policy Review Symposium (January, 2011) Presented on indefinite detention.

American Constitution Society, Prosecuting Suspected Terrorists (November, 2010). Presented on the use of military tribunals to try suspected terrorists.

World Summit on Counter-Terrorism, International Institute for Counter-Terrorism, Herzliya, Israel (September, 2010). Presented on "Shaping a Legal Framework for Counterinsurgency."

Expert Commentator for the Harvard University Program on Humanitarian Policy and Conflict Research Webinar (July 2010). Presented on "The Environment in Armed Conflict: Military or Civilian Asset."

Conference of American Armies in Bogota, Colombia (April 2010). Presented on "Status of United Nations Personnel."

International Committee of the Red Cross International Humanitarian Law Workshop at the U. of California – Berkeley Law School. (with Geoff Corn) (April 2010). Presented on the integration of international humanitarian law into law school subjects.

3rd Annual National Security Law Workshop at U. of Texas Law School. (with Chris Jenks) (April 2010) Presented on "Indefinite Detention Under the Laws of War."

Lieber Society Interest Group Meeting at the Annual Conference of the American Society of International Law (March 2010). Presented on "Current Developments in the Law of Armed Conflict."

A review of "The Response" (March, 2010). Provided commentary on the movie "The Response" which deals with Combatant Status Review Tribunals.

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World Summit on Counter-Terrorism, International Institute for Counter-Terrorism, Herzliya, Israel (September, 2009). Presented on "Converging Paradigms in Modern Asymmetric Warfare."

Defense Institute of International Legal Studies Workshop on Peacekeeping and Human Rights in Kazakhstan (2009). Presented on various aspects of peacekeeping and human rights to the Kazakh Army and government leaders.

Defense Institute of International Legal Studies Workshop on Human Rights in Argentina (2008). Presented on various aspects of human rights to the Argentinean Army and government leaders.

United States Naval War College International Law Department Annual Symposium (June, 2008). Presented on Army rule of law operations in Afghanistan.

Defense Institute of International Legal Studies Workshop on Peacekeeping Operations in Azerbaijan (2008). Presented on various aspects of peacekeeping to the Azerbaijan Army and government leaders.

United States Military Academy Law and Terrorism Conference (2007). Panel Moderator for the panel on "Cyber-Warfare and the Role of Law."

Defense Institute of International Legal Studies Workshop on Peacekeeping Operations in Honduras (2007). Presented on various aspects of peacekeeping to the Honduran Army and government leaders.

The New England Journal of International and Comparative Law Symposium: Modern Warfare: The Role of the Non-State Actor (2007). Presented on post-conflict reconstruction.

American Branch of the International Law Association International Law Weekend, New York City (2006). Presented on the Military Commission Act's effects on military jurisprudence and international law.

George C. Marshall Center Armenian Defense Reforms Seminar (2007). Subject Matter Expert and Facilitator for the Seminar on the Civilianization of the Ministry of Defense and Amending the Law on Defense in Armenia.

National Security Law Institute, University of Virginia Law School (June, 2004). Presented on rules of engagement, the history and framework of the law of war, and military information operations.

National Security Law Institute, University of Virginia Law School (June 2002). Presented on rules of engagement and the history and framework of the law of war.

GROUPS OF EXPERTS

Manual on the International Law Applicable to Cyber Warfare, Cooperative Cyber Defense Center of Excellence & Durham University (UK) Law School's Law and Conflict at Durham Research Group (2009 to Present).

Responsibility in Multinational Operations, Swedish National Defence College's International Law Centre & The Amsterdam Center for International Law (2009).

JUDICIAL PROCEEDINGS/TRIAL TEAMS

Defense Expert Consultant; Prosecutor v. Gotovina (Appeal), International Tribunal for the Former Yugoslavia (2011).

Prosecution Expert Consultant; Department of Justice, District of Minnesota; U.S. v. Omer Abdi Mohamed (2011).

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Eric Jensen responds to Duncan Hollis, Opinio Juris, July 13, 2011, available at http://opiniojuris.org/2011/07/13/hilj-jensen-responds-to-hollis/.

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Implications of the Capture of Mullah Abdul Ghani Baradar in Pakistan, KTRH – Houston, Feb. 17, 2010.

PROFESSIONAL EXPERIENCE

VISITING ASSISTANT PROFESSOR, FORDHAM LAW SCHOOL, New York City, 2009-2011
Taught Public International Law, National Security Law, International Criminal Procedure, International Criminal Law, and the Law of Armed Conflict.

CHIEF, INTERNATIONAL LAW, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY, Washington, D.C., 2006-2009
Provided legal advice to The Judge Advocate General, U.S. Army; the Army Staff; and Judge Advocates throughout the world on Status of Forces and other international agreements, foreign criminal jurisdiction, international courts and tribunals, and all other international law subjects, including the law of war and national security law.

LEGAL ADVISOR, U.S. FORCES, Baghdad, Iraq, 2004-2005
Deputy Staff Judge Advocate responsible for providing legal advice to the commanders of staffs of over 25,000 soldiers as well as supervising, training, and ensuring ethical standards for over seventy attorneys, paralegals and support staff engaged in providing full spectrum legal advice and services while deployed to Iraq as part of U.S. military operations.

LEGAL ADVISOR, **U.S. FORCES,** Tuzla, Bosnia and Herzegovina, 1996, 1998
Provided legal advice to the commander and staff of U.S. forces in Tuzla operating as part of the multinational forces.

LEGAL ADVISOR, U.N. FORCES, Skopje, Macedonia, 1997
Provided legal advice to the commander and staff of U.S. and U.N. forces in Skopje operating as part of the United Nations forces.

PROSECUTOR, Ft. Richardson Alaska, 1995-1996
Provided criminal law advice to all Army commanders and units located on Ft. Richardson, Alaska and prosecuted more than 20 courts-martial.

BAR ADMISSION

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