International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-06-90-A
	Date:	2 February 2012
	Original:	English

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, Presiding** **Judge Fausto Pocar** **Judge Patrick Robinson** **Judge Mehmet Güney** **Judge Carmel Agius**
Registrar:	**Mr John Hocking**
Response:	**1 February 2012**

PROSECUTOR
v.
ANTE GOTOVINA AND MLADEN MARKAČ

PUBLIC

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

Office of the Prosecutor

Ms Helen Brady
Mr Douglas Stringer

Counsel for Ante Gotovina

Mr Gregory Kehoe
Mr Luka S. Mišetić
Mr Payam Akhavan
Mr Guénaël Mettraux

Counsel for Mladen Markač

Mr Goran Mikuličić
Mr Tomislav Kuzmanović
Mr John Jones
Mr Kai Ambos

I. Introduction

1. On 23 January 2012, the Prosecution filed a Motion entitled, "*Prosecution Response to 'Application and Proposed* Amicus Curiae *Brief' filed on 13 January 2012*" ("*the Prosecution Motion*"). While calling its pleading a "*Response*", it is plainly in substance, if not in form, a motion for the rejection of the Proposed Amicus Brief. The Prosecution cites no rule of the Rules of Procedure and Evidence ("the Rules") which would entitle it to file a "*Response*" to the *Application and Proposed Amicus Curiae Brief* ("the *Application*").

2. Indeed, the "Information on *Amicus* Briefs" (IT/122) on which the Prosecution Motion repeatedly relies (see, for example, at footnotes 41 and 42 of the *Prosecution Motion*), clearly states:

> "*If the Chamber solicits or invites amicus curiae briefs, the Chamber shall give each party the opportunity to oppose the amicus submission*."

3. That provision obviously applies, *mutatis mutandis,* to where there has been an application to submit an *Amicus Brief.* The Prosecution did not wait to be given the opportunity by the Chamber to oppose the *Amicus* submission.

4. Accordingly, the Appellant files this response to what is plainly a Prosecution Motion, pursuant to Rules 73 and 107 of the Rules and the "*Practice Direction on Procedure for the Filing of Written Submissions in appeal proceedings before the International Tribunal*" (IT/155 Rev. 3) (para. V.13)

II. Applicable law

5. Rule 74 of the Rules provides as follows:

> "***Rule 74 Amicus Curiae***
>
> *A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber*."

6. The rule is drafted in very broad terms ("*any issue*"), which does not support the narrow interpretation of the provision for which the Prosecution argues in the Prosecution Motion.

7. When deciding whether to receive an *amicus curiae* brief, the primary criterion for the Appeals Chamber is "whether such submissions would assist the Appeals Chamber in its consideration of the questions at issue on appeal."[1]

III. The Prosecution's overly restrictive approach to the admission of *amicus* briefs is not supported by the ICTY's case-law or practice

8. There are a number of propositions advanced, either explicitly or implicitly, in the Prosecution Motion which are not supported by the ICTY's case-law:

(1) The assertion that if any portion of a proposed *Amicus* brief concerns issues not in dispute, then the entire brief should be rejected (paragraph 4, *Prosecution Motion*);

(2) The assertion that if a proposed *Amicus* brief contains any "*non-controversial principles of law*", then the entire brief should be rejected (paragraphs 4, 7 and 8, *Prosecution Motion*);

(3) The assertion that if a proposed *Amicus* brief complements or corroborates expert testimony given at trial, then the entire brief should be rejected (paragraphs 5-6, *Prosecution Motion*);

(4) The assertion it is impermissible for an *Amicus* brief to address factual issues (paragraphs 9-14, *Prosecution Motion*). The Prosecution relies in this regard on "*Information on Amicus Briefs, para. 5(b)*". In fact, that document (IT/122), which is merely an information sheet and not binding case-law, states at para. 5(b), "*In general, amicus submissions shall be limited to questions of law, and in any event may not include factual evidence relating to*

[1] See, for example, *Prosecutor v Hartmann*, IT-02-54-R77.5-A,"Decision on Application for Leave to File Amicus Curiae Brief," 5 February 2010, at para. 4 and *Prosecutor v Nahimana*, ICTR-99-52-A, "Decision on the Admissibility of the Amicus Curiae Brief filed by the 'Open Society Justice Initiative' and on its Request to be heard at the Appeals Hearing," 12 January 2007, p.3.

elements of a crime charged" (emphasis added), which recognises, that the limitation to questions of law is a *general* rule only (to which, of course, there may be exceptions). As to the prohibition on "*includ*[ing] *factual evidence relating to elements of a crime charged*", the proposed *Amicus* brief does not "*include*" any such evidence. Moreover, it addresses mixed questions of fact and law, not questions of fact *tout court*;

(5) The assertion that each and every one of 12 experts may be regarded as "*partisan*", and their collective opinion rejected, for no better reason than the professional association of 2 of the experts with the Defence. Linked to this is the assertion that these experts in IHL, a branch of law concerned above all with the maximisation of protection of civilians during war, would slant their professional opinions away from the protection of civilians and in favour of the accused, for some unexplained (and unfathomable) reason.

9. None of these assertions are sound. Nor is there any basis for the excessively restrictive approach to *Amicus* briefs put forward by the Prosecution. The ICTY has, in fact, admitted *Amicus* submissions in a host of circumstances, including on appeal in the *Krajišnik* case where Counsel was admitted as *Amicus* to make submissions "*arguing in favour of Mr. Krajišnik's interests*".[2]

10. Previous *Amici* include international law experts, in the form of judges and academics, human rights organisations, and states.[3] In the *Bagosora amicus decision*, the Chamber stated that "such briefs are filed by a party...with strong interests in or views on the subject matter before the court."[4]

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2 *Prosecutor v Krajišnik*, IT-00-39-A "Decision on Momčilo Krajišnik request to self-represent, on Counsel's motions in relation to appointment of *Amicus Curiae* and on the Prosecution Motion of 16 February 2007," 11 May 2007, para. 19 (emphasis added).

3 Human Rights Watch was permitted to submit a brief on the Rwandan judicial system, on which the Chamber said it had 'significant relevant expertise' (*Prosecutor v Uwinkindi*, ICTR-2001-75-I, "Decision on Human Rights Watch Request for Leave to Appear as Amicus Curiae pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence," 18 January 2011, para.17); In *Blaškić*, amicus briefs were accepted from prominent academics as well as Judge Simma of the ICJ, addressing the power of the ICTY to issue subpoenas: "Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997," 29 October 1997, para.10).

4 *Prosecutor v Bagosora*, ICTR-96-7-T, "Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium," 6 June 1998.

i) **There is no requirement that *amicus* submissions be confined to matters of law**

11. While "*amicus* submissions are generally made on matters of law,"[5] there is no requirement that *amicus* submissions not address matters of fact. Further, there is no requirement that *amicus* submissions not address matters of mixed law and fact.

12. Citing a decision[6] in the *Karadžić* case, the Prosecution argues that the proposed *Amicus* Brief "impermissibly focuses on issues of fact." That decision concerned a brief by a psychiatrist, addressing the 'relationship between ethnic cleansing in the former Yugoslavia and psychiatric science,' a matter the Tribunal said was 'of fact and expertise,' and not relevant to the legal matters at issue.[7]

13. The proposed *Amicus* Brief does not fall into the same category. It addresses a 'legally permissible margin of error,' an issue of mixed law and fact which will likely make an important jurisprudential and practical contribution to IHL. Thus, it is inaccurate to state that the brief 'impermissibly focuses on issues of fact.'

ii) **There is no requirement that *amicus* submissions confine themselves to evidence on the record**

14. Not only is there no requirement that *amicus* submissions confine themselves to evidence on the record, but also the Defence has applied, pursuant to Rule 115, to admit the three new Defence reports endorsed by the *Amicus* brief into evidence. If the reports are admitted into evidence, the Prosecution's concern that prejudice will arise through the introduction of evidence which cannot be met by rebuttal evidence and/or cross-examination will become moot. Following admission, the Prosecution may seek to 'test' the reports. If the reports are not admitted into evidence, then to the extent that the *Amicus* brief refers to or relies on those reports, it will then be moot. It is, therefore, plainly

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5 *Prosecutor v Karadžić*, "Decision on Amicus Request," IT-95-5/18-PT, 6 July 2009, p. 2.
6 *Ibid.*
7 *Ibid.*

premature at this stage to decide whether or not the *Amicus* brief may permissibly refer to the new expert reports.

III. The proposed *Amicus* Submission would assist the Appeals Chamber in its consideration of questions at issue on appeal

15. The Appellant has already submitted, on 28 January 2012, a joinder to "*Ante Gotovina's response to 'application and proposed amicus curiae brief' filed on 13 January 2012*", so it is unnecessary to repeat the reasons for considering that the proposed *Amicus* submission would assist the Appeals Chamber in its consideration of question at issue on appeal, save to state the following.

16. First, the Appellant submits that the Prosecution's assertion (paragraph 21, Prosecution Motion) that the 200M rule has no precedential value and is limited to Operation Storm is simply untenable. There is not one IHL for the former Yugoslavia, and another IHL for the rest of the world. It is a question of principle whether it is permissible *ever* to assume that rounds falling outside *any* determined margin of error (be it 200M or 400M) from a military target may, therefore, be assumed to be targeting civilian objects. More broadly, therefore, the Chamber's methodological approach to determining the lawfulness of shelling operations *is* plainly of precedential value, and if flawed (as it is) as a matter of law, logic and principle, then that needs to be corrected by this Appeals Chamber.

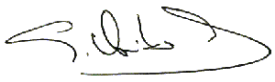
17. Second, the Appellant notes that it has become readily apparent that the Chamber's "*200-metre margin of error*" rule (as the *Prosecution Motion* refers to it) has provoked widespread concern, and indeed criticism. Attached to this Response at **Annex A** is a report of the International Humanitarian Law Clinic at Emory University School of Law entitled "*Operational Law Experts Roundtable on the Gotovina Judgment*", which follows a roundtable discussion on 4 November 2011. While six of the participants are also applicants in the *Amicus* Brief, five other participants are not, yet they all expressed concern that the Trial Chamber's Judgment went "*in the opposite direction*" from "*mak*[ing] *a major contribution to IHL and to future military operations*" (page 15 of the Report, last paragraph).

Relief Sought

18. For the foregoing reasons, the Appellant respectfully requests that the Appeals Chamber reject the Prosecution Motion.

Word count: 1,723

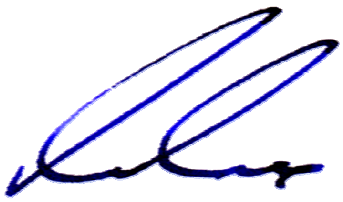
Respectfully submitted,



Mr Goran Mikuličić
Counsel for Mladen Markač

Mr Tomislav Kuzmanović
Counsel for Mladen Markač

Mr John Jones
Counsel for Mladen Markač



Mr Kai Ambos
Counsel for Mladen Markač

ANNEX A

OPERATIONAL LAW EXPERTS ROUNDTABLE ON THE *GOTOVINA* JUDGMENT:

Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law

Produced by the
International Humanitarian Law Clinic
at Emory University School of Law

EMORY
LAW

Effective implementation of and adherence to international humanitarian law (IHL) is essential for protecting victims of war—especially civilians—during armed conflict, facilitating efficient military mission accomplishment, and promoting the rule of law. Application of IHL is not only relevant during conflict and all other military operations, but is a critical component of effective training, operational planning, and post-operation accountability. Each of these components of law implementation thus plays a critical role in both application and respect for IHL during specific military operations, and in the positive evolution and development of the law to meet the humanitarian challenges of future operations.

On November 4, 2011, the International Humanitarian Law Clinic at Emory Law School convened a group of military operational law experts with extraordinary breadth and depth of experience in applying and enforcing IHL. The meeting was convened to analyze the broader legal issues in and implications of the recent judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Prosecutor v. Gotovina*, which focused on Operation Storm, the Croatian operation to re-take the Kraijina region in the summer of 1995. Operation Storm was, as the experts at the November meeting noted, an example of conflict between evenly matched belligerents fighting with limited capabilities, a situation much more common than the ideal of precision-guided munitions and "clean strikes" that is surely more desirable. For this reason, the manner in which IHL is enunciated and applied in the *Gotovina* judgment has extraordinary import for future operations and conflicts. The case is apparently the first—and likely the only—case assessing complex targeting decisions involving the use of artillery against a range of military objectives in populated areas during a sustained assault. In particular, the group of experts, which included several with extensive operational and legal experience in the use of artillery, focused the discussion on the portions of the judgment analyzing artillery attacks against objectives in the City of Knin and the application of IHL to this targeting process.

Given the value of the tribunal's jurisprudence and its contribution to the development and implementation of IHL, it is essential to examine the application of the law in the judgment with a particular emphasis on longer-term first and second order consequences. As with other ICTY judgments, the *Gotovina* judgment has the potential to become a highly persuasive source of authority regarding future understanding and implementation of IHL, and especially the law of targeting. For this reason, the expert group agreed that careful examination of the impact of the judgment on the development of the law and the execution of future military operations is critical. The day-long discussion thus focused on two central issues: 1) potential flaws in the Trial Chamber's application of IHL; and 2) potential institutional concerns and second-order effects resulting from these flaws.

It is important to note the consensus view expressed at the outset of this meeting that the experts strongly share the tribunal's goals of maximizing the protection of civilians and other victims of war during armed conflict and promoting the effectiveness of international law. These two broad themes formed the foundation for the expert group discussion; indeed, it is precisely these two seminal goals of lawful military operations that motivated the discussion and the issuance of this report, goals that in many ways defined the careers of the experts. Two additional themes are important as well for both the application of the law and the longer-term institutional concerns regarding the execution of military operations: clarity and predictability. First, effective implementation of IHL depends on the clarity of the legal principles, their application during the heat of battle, and their credible application post-hoc in investigations and prosecutions. Second, commanders and their troops can best adhere to the law and carry out its central tenets when the law and the obligations it imposes are predictable and operationally logical.

With this focus on maximizing civilian protection and promoting effective operations animating the collective discussion, this report presents the key issues and consensus of the group of experts with an emphasis on the effective application of IHL in future military operations. The first section provides

background information on Operation Storm, the military operation at issue in the case, and on the targeting portion of the *Gotovina* judgment. The second section sets forth the experts' consensus views and concerns regarding the application of the law in the judgment, highlighting four key areas: the imposition of what amounts to a strict liability standard imposed on commanders who attack lawful military objectives in populated areas; the cursory and flawed application of the principle of proportionality; the failure to consider or apply Article 58(b) of Additional Protocol I and its obligations for defending parties to take precautions; and the failure to properly recognize and rest the legal analysis on the operational complexity inherent in the targeting process. In the third section, the report emphasizes a range of institutional concerns and second order effects resulting from the judgment, which fall into three main categories: the effect on future military operations; the consequences for the respect for and development of international law; and specific overarching concerns regarding the role of the commander and the role of legal advisers during military operations.

Perhaps most importantly, the experts overwhelmingly agreed—and stressed—that their concerns are consistent with the Tribunal's key goals: the protection of civilians and the effective implementation and development of international law. The ICTY plays an important role in ensuring accountability for violations of IHL and in building a comprehensive jurisprudence of international law—it is essential in both areas that the tribunal's judgments are based in law that commanders can reasonably apply in the course of military operations and promote continued adherence to IHL. When the effect of a judgment is to leave commanders—the most direct implementers of the law—unable to fulfill their obligations, there is a grave risk that they will simply disregard the law, which poses the most significant danger to civilians.

I. The Military Operation and the Judgment

A. Operation Storm

More than four years after Croatia declared independence from the former Yugoslavia and Croatian Serbs announced the creation of an autonomous Republic of Serbian Kraijina (RSK) soon thereafter, Croatian leaders planned an operation to re-take the Kraijina. Launched over four days in early August 1995, the operation was called Operation Storm. Colonel General Ante Gotovina was the overall operational commander of Operation Storm in the southern half of the Kraijina. After recapturing the strategically important towns of Grahovo and Glamoc, which relieved the pressure from the Serbian attacks on Bihac, the Croatian (HV) forces focused on regaining control of Knin, the capital of the RSK. The re-capture of Knin was strategically the most important objective of the entire offensive in the Kraijina and would mark the end of the RSK.

Often described as the largest land offensive in Europe since the World War II, the operation began early in the morning of August 4, 1995, with 150,000 Croatian troops along a several hundred-kilometer front line. Two Croatian brigades broke through the Serb lines and advanced on Knin. Occupying the high ground outside the city in the Dinara Mountains, the Croatian forces attacked numerous military targets within the city of Knin over two days, capturing the city from retreating Serb forces (SVK) in the morning of August 5. By August 8, Operation Storm was over throughout the Kraijina and Croatian forces had regained control of the region. Over 200,000 Serbs left the Kraijina before, during and immediately after the military operation.

B. The Trial Chamber Judgment in Prosecutor v. Gotovina

On April 15, 2011, the Trial Chamber issued its judgment, sentencing General Gotovina to 24 years for war crimes and crimes against humanity on a joint criminal enterprise theory of liability. The Trial Chamber's opinion rests entirely on the finding that Gotovina ordered a direct attack on civilians in Knin during Operation Storm. The Trial Chamber judgment rests the finding of unlawful direct attack on civilians on the artillery attack on Knin. In analyzing the operation, the Trial Chamber found that all of the pre-

planned targets of the artillery barrage were lawful military objectives. The judgment also recognizes that the Croatian targeting operations were planned with the fundamental law of war principles of distinction and proportionality as guides for the determination of lawful targets. After setting forth, without explanation, a 200-meter radius of error as the means for determining which effects were attributable to lawful objects of attack, the Trial Chamber found that just under 5% of the artillery shells landed beyond that radius of error. It then inferred the intent to unlawfully attack civilians from this 5% of shells landing outside the radius of error, without further explanation or analysis.

The finding of direct attack on civilians in turn serves as the predicate widespread and systematic attack on civilians for the crime against humanity charge and as the central element for the persecution and other inhumane acts charges, as well as the wanton destruction as war crime charge. Lastly, the finding of attack on civilians is one of two contributions the Trial Chamber identifies to the joint criminal enterprise, the other being the failure to prevent and punish foreseeable crimes committed in conjunction with the joint criminal enterprise.

II. Legal Issues

As a starting point, the discussion rested on the basic reality that the Tribunal's judgment will be used and relied upon both in assessing international criminal accountability and in planning and executing military operations. Consequently, the law as applied in the judgment must be consistent with existing law. Here, the military operational law experts emphasized that they address the legal issues and the circumstances of the attacks in Operation Storm from the same perspective as the judges – with a focus on implementing the law as effectively as possible to protect civilians from undue harm during conflict and to hold those who violate that law accountable for their crimes. Precisely because it is the only judgment addressing complex operational targeting considerations, the *Gotovina* case has the potential to be a great beacon for international law by adding significant definition to the legal paradigm that governs such targeting operations and reinforcing that military operations can and must be carried out within both the letter and spirit of the law. The experts generally agreed, however, that the legal analysis as presently conceived is flawed on multiple levels and therefore fails to achieve those goals.

A. Creation of a de facto *Strict Liability Standard*

IHL prohibits both deliberate targeting of civilians and attacks on lawful military objectives that are indiscriminate in relation to civilians and civilian property (attacks executed with the knowledge that excessive civilian losses would occur in relation to the concrete and direct military advantage anticipated). Prosecuting commanders and others responsible for launching such attacks and holding them criminally accountable is fundamental to IHL's goal of protecting civilians and has been central to the ICTY's role and jurisprudence over the past two decades.

The principle of distinction mandates that parties to a conflict "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[1] As the ICTY and other international, hybrid, regional, and national courts have repeatedly stated, civilians are all those persons who are not combatants within the meaning of Article 4(1)–(3) or (6) of the Third Geneva Convention and customary international law. Furthermore, military objectives, as set forth in Article 52(2) of Additional Protocol I, "are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the

[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

time, offers a definite military advantage." These obligations form part of the customary international law of both international and non-international armed conflicts, have been repeatedly reinforced in the jurisprudence of the ICTY, and form the foundation for the elements of crimes in the Statute of the International Criminal Court (ICC) as well. Indeed, throughout the *Gotovina* judgment, the Trial Chamber undertook a careful analysis of numerous targets to assess whether they fit within the definition of military objective, finding that all of the objects targeted by General Gotovina's HV forces for deliberate attack were lawful military objectives.

The lawfulness of the target is only the first step in any targeting analysis, of course, which must assess the anticipated collateral damage and incidental injury to civilians and civilian property. An attack on a lawful military objective will therefore be unlawful if the expected civilian casualties, civilian injury or damage to civilian objects are excessive in light of the anticipated military advantage gained. Here, the experts emphasized two key points. First, IHL does not criminalize all civilian deaths, but rather recognizes that some incidental civilian deaths are the unfortunate and all-too-tragic consequence of war. Indeed, the proportionality rule implicitly acknowledges the legality of the knowing but non-deliberate killing of civilians when incidental to attacking a lawful object. Second, the role of intent in the crime of unlawful attacks on civilians is central to IHL and international criminal jurisprudence. Thus, the phrase "in the circumstances ruling at the time" in Article 52(2) of Additional Protocol I is highly significant. This careful choice of words—along with the words "anticipated" and "expected" in Article 51(5)(b)—shows that the analysis must be taken in a prospective manner from the perspective of the commander at the time of the attack; that is, viewing the situation through the subjective perspective of the commander, did he or she expect, or should he or she have expected, excessive civilian casualties relative to the anticipated military advantage based on the information available at the time of the attack decision. After the fact, the urge to simply count up the casualties and declare a war crime is powerful, as can be seen in the frequent tendency to link civilian deaths automatically with IHL violations.

However, since the time of the Nuremberg Tribunals, the law has required that "an individual should not be charged or convicted on the basis of hindsight but on the basis of information available to him or information he recklessly failed to obtain at the time in question."[2] The ICTY has consistently taken the same approach, holding that in order "to establish the *mens rea* of a disproportionate attack, the Prosecution must prove . . . that the attack was launched willfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties."[3] Similarly, as the participants also noted, countries around the world consistently follow this approach, with statements upon ratification of Additional Protocol I and military manuals instructing that "military commanders and others responsible for planning,

[2] Case No. 47: The Hostages Trial: Trial of Wilhelm List and Others, *reprinted in* 8 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (1949) (hereinafter *Hostages Trial*).

[3] Prosecutor v. Stanislav Galic, Case No. IT-98-29-T, Judgment, ¶ 59 (Int'l Crim. Trib. for Former Yugoslavia, Dec. 5, 2003). This statement directly reflects the understanding set forth in the Commentary to Articles 51 and 85 of Additional Protocol I as well. The Commentary to Additional Protocol I is clear that, by adding "the words 'in the knowledge' to the common constitutive elements set out in the opening sentence[, attacks on civilians are therefore] only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness." CLAUDE PILLOUD, YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 996 (1987). Similarly, the Commentary to Article 51 of Additional Protocol I emphasizes that "in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result." *Id.* at 617.

deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time."[4]

During the experts' meeting, there was general consensus that the legal analysis in the *Gotovina* judgment risks undoing this legal framework for the role of intent in the crime of unlawful attacks against civilians. The judgment, as noted above, finds that all of the HV's targets were lawful military objectives. It then concludes, however, that because a very small percentage (approximately 4.5%[5]) of the artillery effects could not be attributed to a pre-established lawful object of attack, the overall operation constituted an unlawful attack on civilians. In essence, the finding reflects a double failure. First, it rests primarily on an effects-based analysis that either ignores or disregards any investigation or evidence of the commander's knowledge or intent at the time of the attack—information that is central to any valid IHL analysis. Second, the inference derived from these effects seems operationally irrational: instead of focusing on the 95.5% of valid effects to infer a legally compliant state of mind, the Chamber relied on the 4.5% (an attribution ratio that itself is questionable) of invalid effects to reach the opposite conclusion. The experts recognize that the Trial Chamber ostensibly relied on the order to place Knin under artillery fire as direct evidence of the defendant's state of mind. In doing so, however, the judgment places an overwhelming emphasis on post-attack effects, and draws an objectively irrational inference from those effects (the conclusion that a very small percentage of artillery effects resulting from over 900 rounds fired from maximum range cannot be directly linked to a pre-determined military objective indicates an unlawful intent). The experts were concerned that this methodology—judging targeting decisions based on unreasonable and incorrect standards—could become the accepted approach for assessing targeting decisions and operations. Ultimately, it is impossible to ignore the import of this judgment: it encourages a determination of criminality based almost exclusively on effects, without any grasp of what the alleged perpetrator knew or intended at the time of the attack.

Throughout the course of the expert group discussion, the participants emphasized the essential role of accountability in the effective implementation and enforcement of IHL. But the experts also stressed that accountability that rests on relaxed standards of *mens rea*—or *de facto* elimination of *mens rea* altogether—comes at too high a price. The *Gotovina* judgment essentially forces commanders to operate with a standard that accommodates no errors. The legal standard in Additional Protocol I, the ICTY Statute, the ICC Statute and customary international law is that commanders are obligated to make reasonable decisions based on the information available at the time of the attack. The law does not judge commanders based on the outcome alone, nor does it require commanders to be right in all circumstances. Rather, the participants at the November 4, 2011 experts meeting agreed that any assessment of targeting must be based on the commander's intent and whether the decision to launch the attack in question was objectively reasonable

[4] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 332 (3d ed. 2009) (citing Declaration and Reservations Made upon Ratification of Additional Protocol I, Ireland § 9 (May 19, 1999)) [hereinafter CIHL]. For additional statements by countries including Algeria, Austria, Egypt, Germany, Italy, the Netherlands, and Spain, see CIHL, supra at 332–33. See also DIRECTOR-GENERAL, JOINT DOCTRINE AND CONCEPTS CENTRE, UNITED KINGDOM MINISTRY OF DEFENSE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 2.4.2 (2004) ("the responsibility of the officer . . . would be assessed in light of the facts as he believed them to be, on the information reasonably available to him from all sources.").

[5] This number is based on an attribution criterion of questionable validity (the 200-meter radius of error). Based on the collective experience of the participants, applying a 200-meter radius of permissible error for cannon and rocket artillery assets firing on identified military objectives from maximum range (20-24 kilometers) is operationally unsupportable. Accordingly, there was consensus that attributing unlawful intent to an attack based on artillery effects occuring beyond 200 meters from a target is unjustified, and that rounds falling between 200-400 meters from the target under circumstances such as those that existed during Operation Storm would be consistent with attacks directed against only lawful targets. If a more operationally rational radius of permissible error were applied, the number of artillery effects not attributable to lawful objects of attack reduces to 1%.

based on the information available at the time of decision, including the full range of operational execution variables that influence the actual effects of an attack. More important, beyond the incorrect application of the law, the participants voiced a number of concerns regarding the imposition of a *de facto* strict liability standard for targeting determinations.

First, the judgment's approach appears to lower the legal standard of culpability from the ICTY's established standard of willful or reckless to a standard of reasonable but wrong after the fact, rendering reasonable action by a commander culpable based solely on hindsight and outcome-based interpretations. This approach transforms a reasonable judgment (which by definition is not reckless) into an unlawful judgment solely based on the fact that what was prospectively reasonable was not retrospectively perfect: a strict liability standard. In effect, the judgment conflates the criminal standard with the operational standard in IHL, leaving no room at all for commander discretion and the complexity of the modern battlefield and targeting decision-making. The correct standard in IHL is amorphous and subjective in many instances, but it also fairly represents operational realities. The judgment thus fails to recognize that a commander's judgment may be reasonable but ultimately wrong—and not culpable.

Second, no commander will be able to meet the standard set forth in the *Gotovina* judgment, resulting in an oxymoronic result from the broader perspective of the fundamental goals of IHL. Forcing a commander to a "no error" standard is simply ineffective and even dangerous for future operations. Commanders will either refrain from engaging in military operations altogether out of an overabundance of caution in the face of an impossible standard, or will simply disregard the law entirely as no longer relevant to their purposes and mission. Under either scenario, innocent civilians are the ultimate victims—a result directly at cross-purposes with a central goal of IHL and of the ICTY. Finally, the experts were equally concerned about the long-term disillusionment with international law that will be the likely result as the legal standards for international criminal accountability no longer have a rational relationship to the implementation of IHL in military operations, a topic addressed in greater detail in section III.A below.

B. Proportionality in Practice

Proportionality is central to IHL's goal of protecting civilians during armed conflict. As noted above, the principle of proportionality mandates that an attack be cancelled if the expected civilian casualties will be excessive in relation to the military advantage gained. This principle balances military necessity and humanity and is based on the confluence of two key ideas. First, the protection of civilians necessitates that sometimes attacking even a lawful enemy objective is impermissible because the collateral consequences clearly outweigh whatever advantage would result from the attack. Second, the legal proscription on targeting civilians does not extend to a complete prohibition on all civilian deaths. The law has always tolerated "the incidence of some civilian casualties . . . as a consequence of military action,"[6] although "even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack."[7] That is, the law requires that military commanders and decision makers assess the advantage to be gained from an attack and assess it in light of the likely civilian casualties.

[6] Judith Gardam, *Necessity and Proportionality in* Jus Ad Bellum *and* Jus in Bello, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 283–4 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).
[7] Legality of the Threat and Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226, 365 (July 8) (Higgins, J., dissenting) [hereinafter *Nuclear Weapons*].

Additional Protocol I contains three separate statements of the principle of proportionality. The first appears in Article 51, which sets forth the basic parameters of the obligation to protect civilians and the civilian population, and prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[8] This language demonstrates that Additional Protocol I contemplates incidental civilian casualties, and appears again in Articles 57(2)(a)(iii)[9] and 57(2)(b),[10] which refer specifically to precautions in attack.

The Rome Statute also incorporates the principle of proportionality in criminalizing war crimes. Article 8(2)(b)(iv) forbids

> [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[11]

Both formulations emphasize that proportionality is not a mathematical concept, but rather a guideline to help ensure that military commanders weigh the consequences of a particular attack and refrain from launching attacks that will cause excessive civilian deaths.

Few international, regional, or national cases have tackled questions of proportionality directly,[12] particularly in the type of complex operational targeting scenario present in Operation Storm. The experts at the November 4, 2011 meeting stressed that military operational lawyers engage in proportionality analyses as part of the planning and execution of virtually every targeting operation. In view of both the complexity and the importance of proportionality as a key component of targeting decision-making and execution, the experts carefully examined the sole proportionality assessment in the *Gotovina* judgment (with regard to the attack on President Martic's residence) and found it deficient, both with regard to the application of the law in that case and to the ability of commanders to apply the law effectively in future operations. The Trial Chamber appears to assess the proportionality of the attack on President Martic's residence in a retrospective manner using the post-attack effects as the primary factor. The experts firmly agreed that it is axiomatic that any tribunal or court assess the elements of the proportionality analysis—both the military advantage and the civilian casualties—from the perspective of the commander before the attack.

The careful choice of words in Additional Protocol I—"anticipated" and "expected"—manifests the IHL requirement that the analysis must be taken in a prospective manner from the perspective of the commander at the time of the attack; that is, did the commander expect, or should he have expected, excessive civilian casualties relative to the military advantage he anticipated gaining, based on what he knew at the time of the decision to attack the target. After the fact, the urge to condemn a decision to attack based

[8] AP I, *supra* note 1, art. 51(5)(b).
[9] *Id.* art. 57(2)(a)(iii) ("With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: . . . (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").
[10] *Id.* art. 57(2)(b) ("[A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").
[11] Rome Statute of the International Criminal Court art. 8(2)(b)(iv), July 1, 2012, 2187 U.N.T.S. 90.
[12] In *Prosecutor v. Galic*, the ICTY considered proportionality with regard to the shelling of a football game where military personnel were present in the stadium.

on actual casualties may be powerful, as can be seen in the frequent tendency to link civilian deaths automatically with IHL violations (which, the experts noted, renders the judgment even more perplexing because it did not identify any civilian casualties caused by the attack). However, such a methodology utterly undermines the logic of the proportionality rule, which emphasizes the *anticipated* effects of an attack. A retrospective approach falls prey to the challenge of comparing the impact of civilian deaths to military advantage gained or lost. The former are dramatic and emotional and "lend themselves to powerful pictures and strong reactions."[13] Military advantage, in contrast, is abstract, has little or no emotional impact and is difficult to convey in pictures. It will often prove difficult to fairly assess whether collateral damage is excessive in practice because the military advantage from an attack may not be immediately apparent to an observer. The retrospective approach can therefore lead to departures from the accepted application of the principle of proportionality.

In the specific instance of Operation Storm, the participants at the expert roundtable discussed extensively how a proportionality analysis would be conducted in such a situation. The first step is, naturally, to assess the lawfulness of the target—as the Trial Chamber did in finding that President Martic's residence was a lawful target. But the analysis does not end there. It is essential then to examine the value of the target in the context of the entire operation (and not merely as an individual object of attack)—in this case, Martic was the supreme military commander of the SVK during a deliberate attack against improved enemy defensive positions protecting their most vital strategic asset: their capital city. The experts agreed that almost any military commander would consider disrupting the ability of such a commander to influence the command, control, and communication of his forces during the decisive phase of an attack to be one of the highest priority targets. In the context of Operation Storm, Martic was perhaps the most valuable target in the city of Knin.

The experts also emphasized that a legitimate application of the proportionality rule requires an understanding of why a target is valuable—for example, does it make the attacking party stronger, the defending party weaker, and so on. Targets are not attacked merely because they are susceptible; they are attacked to produce defined effects related to the overall tactical and operational end state. Disrupting Martic's ability to influence the battle, whether by targeting him directly, severing his command and control capabilities, or fixing him in place and isolated from his operational command post, for example, therefore offered a tremendously significant military advantage, particularly from the perspective of the commander at the time of the attack. Intelligence showing that Martic was in the building at the designated time would be relevant as well to the determination of the value of the building as a military objective. The Trial Chamber does not address these considerations at all, offering only the cursory statement that Martic's residence was a lawful objective with no examination of the value or the military advantage at the time of the attack.

On the alternate side of the proportionality assessment, the experts emphasized the need for equally careful consideration of the risk to civilians and the likely numbers of civilian casualties. Just as military advantage requires a thorough understanding and analysis of the nature and value of the target at the time of the attack, so the analysis of likely civilian casualties demands that a commander gather information regarding civilians who live and work in the area, and those who are likely to be present at the time of the attack. Again, this assessment is heavily dependent on intelligence to enable the commander to get a picture of the situation on the ground around the target at the time of the attack so as to make the best decision possible. Simply noting that the designated lawful target is located in a civilian area is generally insufficient, but that appears to be the extent of the Trial Chamber's analysis. Such a cursory approach ignores questions of whether civilians were actually still present in the city of Knin, whether they were likely to be present in the area around the target at the time of the attack, where they were at the time of attack, whether they were

[13] Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 2004 Y.B. INT'L HUM. L. 7, 47.

susceptible to the methods and means of attack, and how many civilians might be present and within the blast radius of the artillery attack, just to note a few critical aspects of information necessary for a comprehensive proportionality analysis.

The experts raised concerns about the nature of the Trial Chamber's application of the principle of proportionality in the instant case of the attack on Martic's residence. In particular, although the Trial Chamber correctly referenced proportionality in analyzing the lawfulness of the attack on Martic's residence, it cited no relevant information from the Prosecution on which to base its conclusion of illegality. As a result, the judgment seems to apply a wholly retrospective approach to proportionality and failed to accord proper weight to the information about the commander's intent or analysis at the time of the attack. A second shortcoming, linking directly back to the importance of the target's value, is that the judgment does not appear to consider the operational impact of attacking a target as significantly valuable as Martic. Many of the experts in fact expressed incredulity that such a low number of artillery rounds fired for harassing and/or disrupting effect at a time when civilians were unlikely to be out in public could be considered unlawful. The methodology – to the extent there is one – in the judgment does not represent the requisite marriage of intelligence and battle operating effects that is at the heart of the proportionality assessment at the time of the attack. Beyond these immediate shortcomings, however, the experts shared a number of broader concerns about the impact of this case if the existing proportionality approach were to stand going forward.

First, some suggested that the failure to delineate and assign value to the military advantage to be gained from the target in question will undermine IHL's goal of reducing death and suffering in war generally. Commanders who have no guidance or unhelpful guidance regarding how to assess lawfulness and proportionality in targeted leadership strikes may well simply adopt the tactic of large-scale attacks on enlisted personnel on the assumption that such attacks engage no complicated and amorphous proportionality judgments. Whereas carefully targeted strikes can have substantial efficacy in reducing the enemy's ability and will to fight while causing only minimal casualties, the alternative would lead to extensive casualties and prolonged conflicts, a result neither international tribunals nor military leaders find palatable.

Second, to highlight two of the central themes of the expert discussion, the Trial Chamber's approach does not provide either clarity or predictability for commanders planning and executing future military operations. A commander who is to be judged based on post-attack effects has no way to know, at the time of the attack, how to determine the parameters of lawful conduct. Here, it is important to emphasize that proportionality is more than just a principle; it is a methodology for assessing lawfulness in advance through careful consideration of both the value of the military advantage and the likelihood of civilian casualties. By failing to either enunciate or apply any methodology in its proportionality analysis – by disregarding the numerous factors and variables that bear on a commander's decision-making process – the Trial Chamber provides no guidance to future commanders on the lawful implementation of IHL in targeting. For many of the experts at the Nov. 4, 2011 meeting, this failure of methodology does a great disservice both to commanders of future military operations who seek to adhere to IHL and also to the law itself by undermining efforts to fulfill its goals and obligations.

C. Incentivizing Co-mingling of Civilian and Military Objectives

Both legal flaws above—the disregard for the commander's intent at the time of the attack and the incorrect application of proportionality using post-attack effects—clearly inhibit the ability of commanders to operate effectively within IHL's parameters. As important, the single-lens focus on outcome and effects opens the door to a grave danger: the exploitation of the law by the defending party for its own defensive

and propaganda purposes. The experts at the November 4, 2011 meeting voiced extensive concerns about the impact such developments have on the very persons IHL seeks to protect: the civilians caught up in the combat zone.

IHL mandates that all parties take certain precautionary measures to protect civilians. Without a doubt, the identification of military objectives and the proportionality considerations discussed above are, of course, precautions. But the obligations of the parties to a conflict to take precautionary measures go beyond that. Beginning at the broadest level, Article 57(1) of Additional Protocol I states: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." Article 57 then sets forth a list of precautions to be taken in attack. Recognizing that the party in control of the territory where the conflict is taking place is often best situated to protect civilians from the unfortunate consequences of war, however, Additional Protocol I places obligations on the defending party as well. Most relevant to the instant discussion, Article 58(b) obligates all parties to "avoid locating military objectives within or near densely populated areas." Although Additional Protocol I emphasizes the attacking party's affirmative obligation to take precautions in planning and launching attacks, this obligation in no way diminishes the defending party's obligations.[14] As the Commentary explains, "[b]elligerents may expect their adversaries to conduct themselves [lawfully] and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest."[15] Parties therefore have an obligation to protect their own civilians from the consequences of their own offensive actions as well as those of the enemy. Article 58, which expands on pre-existing norms, is considered customary international law.[16]

Recent conflicts in particular have involved extensive co-mingling of civilian and military objects, which poses a grave danger to civilians and requires that parties scrupulously adhere to IHL's obligations and principles so as to maximize protection for civilians and minimize incidental harm. The fact that objects are co-mingled and that civilians are present in and near military objectives in no way absolves an attacking party of any legal and moral obligations—indeed, it is at such times that the role of law in military operations is of heightened importance. However, focusing only on the attacking party's obligations in recent years has led some to argue that the recent shift in emphasis overall from defender to attacker creates perverse incentives for the defender to use the civilian population as a shield.

The *Gotovina* judgment does not mention Article 58 of Additional Protocol I at all. This inexplicable failure to consider the defending party's obligations during military operations creates strong perverse incentives. As many of the experts noted with concern, when parties face no legal consequences, and a potential operational advantage, for co-mingling civilian and military objects, every apartment will be a command center as militaries and armed groups embed themselves in cities to use the civilian population as a shield. Beyond the tactical advantage parties may seek to gain by co-mingling military objectives in the civilian population, they often have a broader, and more problematic, strategic purpose. This latter goal, which is significantly more insidious, is to use resulting civilian deaths as a broader strategic tool to accuse the attacking party of war crimes, diminish support for the war effort in that country, or otherwise change

[14] Although the obligation to take "constant care" appears in Article 57, which addresses the attacking party, the Commentary suggests that both parties have such an obligation: "The term 'military operations' should be understood to mean any movement, manoeuvres, and other activities whatsoever carried out by the armed forces with a view to combat." COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 3 at 680.
[15] *Id.*
[16] *See e.g.,* Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 524 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2008).

the course of the conflict. Civilians thus become a pawn at the strategic level as well, because they are used not only for tactical advantage (i.e., shelter) in specific situations, but for broader strategic and political advantage as well. Both the tactical and strategic goals are only realized at the direct expense of the civilian population; both goals therefore run directly afoul of the "intransgressible principle"[17] of distinction. When a judgment with the potential to become the most significant jurisprudence on complex targeting operations does not even mention the defending party's obligations or highlight the consequences of co-mingling for the implementation of the central IHL principle of distinction, it will fail to adequately fulfill its promise for the enforcement and development of IHL.

The experts do not believe that the judgment either explicitly endorses such co-mingling, or suggests that commanders responsible for this type of bad faith exploitation of the law are immune from accountability. However, there was general consensus that by subjecting the attacking commander to a *de facto* strict liability standard, the *Gotovina* judgment actually contributes to these perverse incentives. Several of the experts noted that IHL specifically does not create a strict liability standard because it balances military operational considerations with humanitarian concerns. IHL contemplates death of civilians and destruction of civilian property during wartime—precisely for this reason the principle of proportionality and the obligations it imposes to minimize risks to civilians is so critical. The rule of reasonableness in the principle of proportionality thus guards against a "non-rule" that no military can follow and that opens the door to perverse manipulation. In a world of strict liability where commanders are criminally culpable for every artillery projectile that cannot be attributed to a lawful object of attack —including the unforeseen, unanticipated and unintended—the result is not greater protection for civilians. Rather, as the experts warned, the enemy would simply surround himself with civilians in every conceivable location and circumstance, effectively guaranteeing greater civilian casualties and increased civilian suffering. As many of the experts emphasized, the application of the law as it stands in the *Gotovina* judgment thus produces a result directly opposite to the ICTY's central goals—accountability for violations of IHL and increased protection for civilians in armed conflict. Indeed, some of the experts felt strongly that the existing judgment places more civilians in danger than any other decision in IHL jurisprudence, because armies will continue to fight and the judgment effectively ratifies the use of civilians and the civilian population as a shield for defensive military operations.

D. The Complexity of the Legal and Operational Paradigm

Targeting in the context of military operations lies at the heart of a complex operational and legal paradigm. In many ways, the legal flaws and the experts' concerns expressed above stem from the overly simplistic view of this paradigm in the *Gotovina* judgment (which is somewhat perplexing, considering there was extensive evidence offered by both the prosecution and defense regarding this complex process). In the judgment, targeting is presented as a determination of lawful military objective, an assessment of the presence of civilians, and a post-attack analysis of effects. The experts at the November 4, 2011 meeting, many of whom have served in both operational and legal roles, agreed that the judgment's approach does not represent the reality of the combat environment, the targeting decision-making process or the legal analysis inherent in any targeting operation. The judgment's legal conclusions therefore lack the appropriate measure of operational sophistication that is necessary for understanding both how to apply the law and the consequences of that legal application to the implementation of IHL in future operations.

A nearly infinite number of variables impact the execution of combat operations and the use of force against targets, both planned and fleeting targets. Although careful planning for military operations attempts to incorporate as many of these variables as possible, and their attendant effects and variations, it is an axiom of military operations that "no plan survives first contact with the enemy." Some of these variables include: quality and quantity of intelligence (about both enemy and civilian locations), quality of

[17] *Nuclear Weapons, supra* note 7, at 257.

equipment, the training and capability of crews, quality of munitions, timing, terrain, weather, fatigue, location of fire support assets and many others. All of these variables are integral to any targeting process at the time of the planning and the attack; they are all also relevant for a tribunal or court in assessing the reasonableness of the commander's decision-making process. The enemy's tactics, conduct and changes in situation throughout the course of the operation are, of course, significant variables as well—not only in terms of the operational choices the attacking party makes, but also in terms of the effects of the military operations on civilians and civilian objects. And yet the Trial Chamber looked solely at the radius of effects of attacks on pre-planned targets in assessing the lawfulness of the HV attack on the city of Knin. It did not consider that some effects could have been the result of attacks on fleeting or opportunistic targets or the result of SVK defensive action. For many of the experts at the roundtable discussion, the Trial Chamber's failure to recognize or incorporate these considerations into its analysis represents a disregard for the operational realities, a grave error that undermines the important purpose the tribunal seeks to achieve in assessing the legality of the targeting operation.

III. Institutional Concerns and Second-Order Effects

Effective realization of IHL's central goals takes place at multiple levels: training and dissemination, implementation in planning and execution of operations, and enforcement and accountability for violations after a conflict comes to an end. Each is essential to maximize the protection of civilians and ensure effective and lawful military operations; none is sufficient on its own to accomplish these goals. Underpinning these interlocking facets of IHL implementation is a fundamental respect for and reliance on the law as an effective tool and framework. Given their extensive experience at the highest legal and operational levels, the experts at the November 4, 2011 meeting devoted considerable time to the possible broader consequences of the *Gotovina* judgment for the implementation of the law and the effective application of the law during military operations. The legal flaws in the judgment that are outlined and detailed above are without a doubt of serious concern. But on a longer-term and wider-ranging level, the judgment also undoes the balance and relationship between the key features of IHL compliance noted above: training, implementation and enforcement. The participants expressed significant concern that when the legal framework for enforcement no longer makes sense at the operational level, this disconnect undermines efforts to ensure lawful and effective military operations.

A. Respect for International Law

The ICTY and the other international and hybrid tribunals have made an extraordinary—perhaps even immeasurable—contribution to the development of IHL over the past decade and more. Indeed, one of the mandates of the tribunal is the progressive development of IHL. The experts agreed that the *Gotovina* judgment is unfortunately a negative development, one that will contribute to a diminution of the value of international law, particularly in the eyes of those who implement IHL at the tip of the spear—the military commanders and lawyers tasked with carrying out missions in accordance with IHL. The judgment's focus on effects, and particularly the use of a tiny percentage of effects to reach an overarching conclusion of unlawfulness, takes the law in an unwelcome direction. The potential consequence that even one civilian casualty equals a legal violation is not synonymous with IHL, but rather is more akin to human rights law. Militaries can train their troops to act in accordance with such a standard, but the experts seriously questioned whether such developments are desirable not only from the military perspective but from the standpoint of the tribunal and the international community's goals for a robust legal regime to regulate conflict.

First, if the legal standards and approach in the *Gotovina* judgment become the accepted legal framework, the way results are used after the fact will create a culture of unpredictability and uncertainty regarding the law and the application of standards to conduct. Military commanders will hesitate to take even lawful action that could shorten hostilities and will view the law solely as an unreasonable constraint, not as an effective tool for lawful mission accomplishment. Many of the experts emphasized that military force is not something to be undertaken lightly. As unpleasant and unfortunate as it may be, war means

fighting and fighting means killing. Tentativeness has no place on the battlefield, but lawfulness does. Over time, the unpredictability and uncertainty fostered by the legal approach in this judgment could lead to a lack of respect for international tribunals and institutions precisely because of the disconnect between the application of the law by such entities and the operational realities and exigencies military forces face. From there, it is a short step to a reluctance to submit to jurisdiction. Here there was general consensus among the experts that IHL-compliant militaries see international law as a critically valuable tool, leading to grave concerns when the decisions of a respected international tribunal produces such counterproductive results.

Beyond the effects in the U.S. and other western militaries, the experts also voiced a number of worries regarding the implementation and incorporation of IHL by developing countries. If the legal standards are counterintuitive and hard to understand, perhaps even harder to apply, these militaries will be dismissive of the law and its obligations. Furthermore, the strict liability standard is one that militaries with lesser capabilities absolutely cannot meet. Among the participants at the experts meeting, many felt that IHL will thus lose a constituency growing in size and importance, a problematic development especially at a time of increased interest and formative growth among these countries.

B. Future Operations

At the more practical implementation level, the experts at the November 4, 2011 meeting also focused on the need to help commanders of future military operations implement the law as effectively as possible. In the pre-conflict stage, the judgment will affect the development of doctrine at all levels as militaries will need to reformulate their strategic and tactical paradigms in order to come to terms with a strict liability, no error standard and a conflict environment in which defending parties have free rein to exploit civilians and civilian property for nefarious purposes. Similarly, it will have implications for training at all levels, but the implications go well beyond the need simply to develop new training methods and modules. Rather, militaries will have to explore and assess how to train commanders, lawyers, and troops to comply with a legal standard that rests accountability on post-hoc effects and outcomes. Another concern several experts raised is the challenge of drafting and implementing rules of engagement for operations governed by the legal standards at issue here. Rules of engagement distill law, strategy and policy into tactical instructions for military personnel regarding when and against whom they can use force. Properly applied, IHL forms the outer boundaries of lawfulness for conduct during armed conflict and thus is the outer framework for the rules of engagement. Here, the unpredictability and narrowness of the legal standard removes the central role IHL plays and should play in the formation of rules of engagement and strategic decisions regarding the application of force in pursuit of political and military goals.

In many ways, the unrealistic standards in the *Gotovina* judgment turn the policy decisions regarding the desirability of certain targets or operations into legal decisions because the no error legal standard narrows the commander's field of action so dramatically that the space for commander discretion and policymaker discretion begins to disappear. The result is political paralysis: in some situations, one could resolve an issue with less damage and fewer casualties but only if the political leaders are willing to make a courageous decision about target selection and application of force. The Gotovina judgment effectively makes law the last refuge of scoundrels, as one expert explained, enabling policy makers to hide policy decisions behind the law and duck their responsibilities in the face of overly rigid legal norms.

Finally, the application of IHL in the judgment, particularly the no error standard, has consequences for joint operations both now and in the future. Coalition operations in Afghanistan have highlighted the challenges of multiple forces working together with different views of the nature of the conflict, the applicable legal paradigm, and the appropriate way in which such legal regime should be interpreted and applied in practice. The addition of uncertain, hard to apply standards from the entity that many view as a key player in the development and preservation of IHL will only exacerbate those challenges, from joint train-

ing to operational planning to actual implementation and action. Coalition operations have great value and continue to have an important role, as the recent NATO operation in Libya demonstrates. Undermining the effectiveness of joint operations by layering legal confusion and unpredictability on top of existing interoperability challenges is both problematic and undesirable.

C. Institutional Concerns: The Effect on the Military

The U.S. and other advanced western militaries have a carefully developed and demonstrably sound system for the provision of legal advice before and during military operations. Military commanders and military lawyers both have important roles to play in this system, roles that depend on respect for each other and the respect of the troops for both the commander and the lawyer and their respective contributions to lawful and effective military operations. There was unanimous agreement among the expert participants at the November 4, 2011 meeting that the *Gotovina* judgment and the application of the law therein has the dangerous potential to undermine this delicate relationship.

First, as the discussion in Section II above shows, the legal framework the judgment creates does not make sense and cannot be implemented effectively at the operational level. Consequently, military lawyers will face the unenviable task of providing legal advice based on legal paradigms and rules that do not make sense. When the advice of lawyers is nonsensical, the commander will simply disregard the advice and act based on his or her own moral code. In many cases, the commander's own moral parameters may well be an excellent guide for the conduct of military operations, but in others, it may not. And the disregard for the lawyer's advice leads to inconsistency across multiple units and, more problematic, a disregard for the law itself. In essence, as more than one expert noted, IHL will only be relevant to nations that do not fight wars, a perverse result that cannot be in line with the ICTY's own goals and mandate.

On a more institutional level, the experts agreed that the judgment may well have the effect of "silencing" the military lawyer. The legal adviser is the communicator of the law to the commander, and often a voice of reason and reflection in the targeting process. If the law is comprised of absolute rules detached from the pragmatic and inevitable variables of operations, rather than being based on the key principles and concepts central to IHL, then the commander has no reason to turn to the legal adviser for the simple fact that a rule that can never be complied with becomes effectively irrelevant. By undermining the law, the judgment thus undermines the legal advisor, which has a significant effect on the entire culture and institution of the military. Alternatively, the judgment can have an opposite, but equally troubling, consequence by eliminating all opportunities for the commander to exercise discretion and flexibility in the face of changing operational realities. With no error standards, every decision becomes a technical legal one, effectively removing all decision-making from the commander's sphere and leaving it in the hands of the lawyer. Again, the experts expressed grave concern at the potential for such a result because it thoroughly emasculates the commander and turns every decision in combat from a strategic and legal decision into a political decision.

IV. Conclusion

At first glance, a judgment of the ICTY regarding the application of IHL to complex targeting operations involving two warring parties targeting military objectives in populated areas is a welcome development. With the progressive development and effective implementation of IHL in mind, careful consideration of the legal principles, obligations and standards could make a major contribution to IHL and to future military operations. Unfortunately, the *Gotovina* judgment as it stands goes in the very opposite direction. The military and operational law experts gathered at the November 4, 2011 roundtable discussion came together with the goals—shared with the ICTY—of promoting the development of IHL, ensuring the lawful conduct of military operations, and protecting civilians from the ravages of war. Because of the great potential for this decision to become a persuasive authority in the law of targeting, the experts believe

it is important to highlight the legal flaws in the judgment and, even more important, the longer-term detrimental effects that the faulty application of the law will likely cause. Preserving the ability of military forces to conduct lawful military operations and protect civilians accordingly is essential.

List of Participants*

John Altenburg, Jr.
Greenberg Traurig LLP
Major General (ret), US Army JAGC
Former Deputy Judge Advocate General of the Army

Laurie Blank
Director, International Humanitarian Law Clinic
Emory University School of Law

Geoffrey Corn
Professor of Law
South Texas College of Law
Lt. Colonel (ret), US Army JAGC

William Fenrick
Former Senior Advisor on Law of War Matters,
Legal Advisory Section
Office of the Prosecutor, ICTY
Commander (ret), Canadian Armed Forces

Donald Guter
Rear Admiral (ret), US Navy JAGC
Former Judge Advocate General of the Navy

Walter Huffman
Major General (ret), US Army JAGC
Former Judge Advocate General of the Army

Gary Solis
Colonel (ret), US Marine Corps
Former Director, Law of War Department, US Military Academy, West Point

Marc Warren
Colonel (ret), US Army JAGC

Richard Whitaker
Colonel (ret), US Army JAGC
* Participating in personal capacity only and not representing any specific or general position of the United States Special Operations Command

Jamie A. Williamson
IHL and International Criminal Law Practitioner, in personal capacity

Colonel Larry Youngner
US Air Force JAGC
Staff Judge Advocate
Air Force Special Operations Command
* Opinions expressed in this presentation may not reflect United States Air Force regulations or policy. The Air Force does not officially endorse and is not responsible for the accuracy or liability of the information.

International Humanitarian Law Clinic
Emory University School of Law
www.law.emory.edu/ihl