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Monday, 14 May 2012  
[Appeals Hearing]  
[Open session]  
[The appellants entered court]  
--- Upon commencing at 9.00 a.m.

JUDGE MERON: Please be seated.  
[Appeals Chamber and Legal Officer confer]

JUDGE MERON: Good morning, everybody.  
Registrar, could you please call the case.

THE REGISTRAR: Good morning, Your Honours.  
This is case number IT-06-90-A, the Prosecutor versus  
Ante Gotovina and Mladen Markac.

Thank you, Your Honours.

JUDGE MERON: Thank you.

Mr. Gotovina, can you hear me in a language you understand?

THE APPELLANT GOTOVINA: [No interpretation]

JUDGE MERON: Thank you.

[Appeals Chamber and Legal Officer confer]

JUDGE MERON: Mr. Markac, can you hear me in a language you  
understand?

THE APPELLANT MARKAC: [Interpretation] Yes, Your Honour.

[Appeals Chamber and Registrar confer]

JUDGE MERON: Now, appearances of the parties, please, and  
counsel for Mr. Gotovina.

MR. KEHOE: Good morning, Your Honours. Gregory Kehoe; my

1 colleague, Luka Misetic; Mr. Guenael Mettraux; and Payam Akhavan on  
2 behalf of General Ante Gotovina.

3 JUDGE MERON: Thank you, Mr. Kehoe.

4 [Appeals Chamber and Registrar confer]

5 JUDGE MERON: Counsel for Mr. Markac, please.

6 MR. MIKULICIC: Good morning, Your Honours, everybody in and out  
7 of the courtroom.

8 My name is Goran Mikulicic. On my left side is  
9 Mr. Tomislav Kuzmanovic and back row, Mr. Kai Ambos and Mr. John Jones.  
10 Our legal assistant and intern, David Gault and Cameron Russell, and on  
11 our right-hand side, Vlado Rendulic, our Case Manager.

12 JUDGE MERON: [Microphone not activated]

13 MR. STRINGER: Good morning, Mr. President, Your Honours. I'm  
14 Douglas Stringer, appearing on behalf of the Prosecution. I am  
15 accompanied this morning by my colleagues - moving from my left to  
16 right - Matthew Cross, Laurel Baig, Helen Brady and Saeeda Verrall. Our  
17 Case Manager is Colin Nawrot.

18 JUDGE MERON: Thank you, Mr. Stringer. [Microphone not  
19 activated] Mr. Gotovina, and Mr. Markac, appeal from the Trial Judgement,  
20 rendered in this case on 15 April 2011 by Trial Chamber I. According to  
21 the Scheduling Order issued on 4 April 2012, the Appeals Chamber will  
22 presently hear the appeals in this case.

23 I will first briefly summarise the appeals and the manner in  
24 which we will proceed today.

25 This case concerns the responsibility of Mr. Gotovina and

1 Mr. Markac for crimes committed in the Krajina region of Croatia, around  
2 the time of the military action referred to as Operation Storm, which  
3 took place in August 1995. During the indictment period, Mr. Gotovina  
4 served as colonel general in the Croatian army and was commander of the  
5 Split Military District.

6 Mr. Markac was assistant minister of the interior and commander  
7 of the special police in Croatia.

8 The Trial Chamber found that both Mr. Gotovina and Mr. Markac  
9 were members of a joint criminal enterprise for JC -- or JCE, whose  
10 common purpose was to permanently remove the Serb civilian population  
11 from the Krajina region by force or threat of force.

12 Both Mr. Gotovina and Mr. Markac were convicted under the first  
13 form of JCE for persecution and deportation as crimes against humanity,  
14 and under the third form of JCE for persecution and local detentions,  
15 murder, inhumane acts as crimes against humanity and for plunder of  
16 public and private property, wanton destruction, murder and cruel  
17 treatment as violations of the laws or customs of war.

18 The Trial Chamber sentenced Mr. Gotovina to a single term of  
19 24 years of imprisonment. Mr. Markac was sentenced to a single term of  
20 18 years imprisonment.

21 Mr. Gotovina advances four grounds of appeal, challenging his  
22 convictions, and requests that the Appeals Chamber overturn his  
23 convictions in their entirety. In ground 1, he challenges the  
24 Trial Chamber's finding that unlawful artillery attacks on civilians and  
25 civilian objects took place.

1           In ground 2, he challenges the Trial Chamber's findings that  
2 unlawful attacks forcibly displaced Serb civilians.

3           In grounds 3 and 4, he challenges the Trial Chamber's findings  
4 that a JCE existed and that he was individually liable for the crimes  
5 attributed to the JCE.

6           The Prosecution response that all grounds of Mr. Gotovina's  
7 appeal should be dismissed.

8           Mr. Markac presents eight grounds of appeal, challenging his  
9 convictions, and requests that the Appeals Chamber overturn his  
10 convictions in their entirety or, in the alternative, that his sentence  
11 be reduced.

12           In ground 1, he challenges the Trial Chamber's findings that the  
13 JCE existed and that he was a member of, and individually liable for the  
14 crimes attributed to the JCE.

15           In grounds 2, 3, 5, and 6 he challenges the Trial Chamber's  
16 findings with respect to the role of the special police in the  
17 destruction and plunder of Gracac, in the destruction of Donji Lapac and  
18 for scheduled killing number 10.

19           In ground 8 he challenges the Trial Chamber's findings concerning  
20 deportation and forcible displacement.

21           In ground 9 he challenges the Trial Chamber's finding that an  
22 international armed conflict existed throughout the indictment period,  
23 inter alia.

24           Finally in ground 12, he challenges his sentence.

25           The Prosecution responds that all grounds of Mr. Markac's appeal

1 should be dismissed in its addendum to the Scheduling Order for appeal  
2 hearing issued on 24 April 2012. The Appeals Chamber invited the parties  
3 to discuss with references to the record:

4 1, whether the Trial Chamber erred in applying a 200-metre range  
5 of error in analysing the lawfulness of artillery shelling.

6 2, whether the Trial Chamber's conclusions regarding impact sites  
7 should be upheld if its application of the 200-metre range of error is  
8 deemed erroneous.

9 3, whether the Trial Chamber's finding that illegal artillery  
10 attacks took place should be upheld in its conclusions with respect to  
11 impact sites are deemed erroneous and/or whether the Trial Chamber's  
12 finding that the JCE existed should be upheld if its finding that illegal  
13 artillery attacks took place is deemed erroneous.

14 Throughout the hearing counsel may argue the grounds of appeal in  
15 any order they consider suitable for their presentations.

16 However, I would urge counsel not to repeat verbatim or to  
17 summarise extensively the arguments presented in their briefs.

18 The Appeals Chamber is familiar with these arguments.

19 Furthermore, the parties are obliged to provide precise  
20 references to materials supporting their oral arguments.

21 I note that there remains evidence in this case whose admission  
22 on appeal has yet to be decided. I would discourage the parties from  
23 referring to these materials. If such references are made, I ask that  
24 the parties clearly indicate that they're referring to materials whose  
25 admission has not yet been decided.

1           Finally, I reiterate that the appeal process is not a trial  
2           de novo and the parties must refrain from repeating their case as  
3           presented at trial.

4           Arguments must be limited to alleged errors of law, which  
5           invalidate the Trial Chamber Judgement or alleged errors of fact which  
6           occasion a miscarriage a justice.

7           As set out in the Scheduling Order, this hearing will proceed as  
8           follows: First we will hear submissions from counsel for Mr. Gotovina  
9           for one hour, 30 minutes. After a pause of 15 minutes, the Prosecution  
10          will respond for one hour and 30 minutes. Following another pause of 15  
11          minutes, counsel for Mr. Gotovina will have 30 minutes to reply.

12          In the afternoon, starting at 10 minutes past 2.00, we will hear  
13          the submissions from the parties of Mr. Markac's appeal, followed by  
14          optional personal statements from Mr. Gotovina and Mr. Markac.

15          Parties will present their submissions in a precise, clear and  
16          concise manner. The Judges, of course, may interrupt the parties at any  
17          time to ask questions or they may ask questions following each parties  
18          'submissions or at the end of the hearing.

19          Having now stated the manner in which we will proceed, I would  
20          like to invite counsel for Mr. Gotovina to present his appeal. And let  
21          me remind the parties that we have a very tight schedule, and I would be  
22          grateful to the parties if they will adhere to the time allocated to  
23          them.

24          So counsel for Mr. Gotovina, please do start.

25          MR. KEHOE: Thank you, Your Honour.

1           Once again, my name is Gregory Kehoe. I will be presenting the  
2           initial argument on behalf of General Gotovina, basically address two  
3           points, 1 and 2, the questions asked by the Chamber.

4           I will then turn the floor to my colleague -- floor over to my  
5           colleague, Mr. Misetic, who will discuss questions 3 and 4.

6           And then, lastly, Mr. Akhavan will finish our presentation with  
7           some brief remarks.

8           Your Honour, with regard -- before we answer the questions  
9           presented by the Trial Chamber, and -- the Appeals Chamber we will like  
10          to give a brief overview of the case and exactly what the Trial Chamber's  
11          findings were with regard to the Serb civilians who left the Krajina  
12          area.

13          The Trial Chamber concluded, Your Honours, that the Serb  
14          civilians left for reasons unrelated to unlawful contact by the HV in all  
15          places but the four towns at issue. Those towns being Knin, Benkovac,  
16          Obrovac, and Gracac. The reasons the Trial Chamber cited for the  
17          departure of those civilians in places other than those four towns can be  
18          found in paragraphs 1754, 1755, and 1762 of the  
19          Trial Chamber's Judgement. They include information such as information  
20          provided by local committees or SVK unit, Army of Serb Krajina units, the  
21          departure of others and fears of what would happen when the Croats and  
22          the HV arrived, fear of violence commonly associated with armed conflict  
23          and general fears of Croatian forces and distrust of Croatian authority.  
24          The last reason presented by the Chamber was, in fact, the RSK officials  
25          telling habitants to leave on 4 August 1995.

1           However, the Trial Chamber found that the reasons for departure  
2           from all other places could not have been a reasonable explanation for  
3           why they left the four towns at issue. Why? Because of alleged unlawful  
4           artillery attacks which deliberately targeted civilian areas from which  
5           the Trial Chamber concluded that General Gotovina ordered indiscriminate  
6           attacks on the four towns. Was this finding of unlawful attacks really  
7           the only reasonable explanation of the evidence?

8           Let's briefly touch on a few items. The Trial Chamber had  
9           evidence before it that 95 per cent of all projectiles fired in Knin were  
10          deliberately fired at military objectives. I direct the Chamber to  
11          Annex 1 of the Appellant's response to the Prosecution's motion to strike  
12          Appellant's reply brief filed with this -- filed with the Appeals Chamber  
13          7 October 2011. The actual final statistics are on page 2.

14          International investigations by the United Nations Military  
15          Observers in August 1995, the United States government investigators  
16          found that the attacks -- that were highly professional and concentrated  
17          on military targets. No investigation on the ground made any contrary  
18          conclusion that would suggest an unlawful attack. I direct Your Honours  
19          to Prosecution Exhibit P64, which is the provisional assessment by the  
20          UNMOs, the UN -- the United Nations Military Observers, who after their  
21          preliminary assessment or provisional assessment was followed up by a  
22          final assessment. This final assessment proved to be consistent what the  
23          provisional assessment has confirmed by Prosecution witness,  
24          Alun Roberts, the chief information officer of the UN. And this  
25          confirmation is located at trial transcripts pages 7081 to 7082.

1           The United Nations Secretary-General, the  
2           European Community Monitoring Mission and other international leaders  
3           made no mention of an unlawful attack when reporting the events in the  
4           Krajina on 4/5 August 1995. More importantly, no finding that any  
5           civilian was killed or injured and no Serb civilian has ever been  
6           identified who claimed to have left the Krajina due to the fear of  
7           shelling when the lawful or unlawful --

8           JUDGE MERON: Excuse me, counsel, my colleague Judge Robinson --

9           JUDGE ROBINSON: I just want to take you back to that part of  
10          your statement, that you asked the question whether that was the only  
11          reasonable finding that the Trial Chamber could have made.

12          MR. KEHOE: Yes, Your Honour.

13          JUDGE ROBINSON: Implying that if there are other reasonable  
14          findings, then the Appeals Chamber should find that the Trial Chamber  
15          erred.

16          MR. KEHOE: That's correct, Your Honour. If there is a  
17          reasonable explanation of the evidence consistent with innocence, then  
18          the -- the Appeals Chamber should find our clients not guilty and  
19          overturn the Judgement of the Trial Chamber.

20          JUDGE ROBINSON: Even if the finding by the Trial Chamber is  
21          reasonable.

22          MR. KEHOE: The law is, Judge Robinson, that if there is a  
23          reasonable explanation of the evidence, in this instances consistent with  
24          innocence, then the Appeals Chamber must find our clients not guilty.

25          JUDGE ROBINSON: But you will direct us to the other evidence.

1 MR. KEHOE: Yes, Your Honour.

2 JUDGE ROBINSON: All right. Thanks.

3 MR. KEHOE: We will during the course of our presentation,  
4 Judge Robinson, go through some of those items seriatim which will  
5 actually play into the questions that the Appeals Chamber asked,  
6 questions 1 through 4.

7 JUDGE MERON: Thank you, Judge Robinson.

8 Mr. Kehoe, you may continue now.

9 MR. KEHOE: Thank you, Your Honour.

10 As I noted, more importantly no finding that any civilian was  
11 killed or injured and no Serb civilian has ever been identified who  
12 claimed to have left the Krajina due to fear of shelling, be it lawful or  
13 unlawful.

14 Conclusion. Let us talk about what we can conclude from these  
15 matters. For these reasons and those which we will lay out later, the  
16 Trial Chamber acted unreasonably in concluding that the reasons for the  
17 departure which the Chamber found in all other areas of the Krajina which  
18 were not caused by any alleged unlawful conduct by the Croatian army  
19 could not have been a reasonable explanation of the evidence in the four  
20 towns at issue here.

21 Your Honours, we welcome the four questions posed by the Chamber  
22 which we consider to be at the core of the Trial Judgement, whether there  
23 is any sufficient basis other than the arbitrary 200-metre rule that  
24 could establish an unlawful attack by HV forces directed against the  
25 Serb civilian population.

1           I will now turn to the first question that was presented by the  
2 Chamber.

3           Question 1: Whether the Trial Chamber erred in applying a  
4 200-metre range of error in analysing the lawfulness of artillery  
5 shelling. The answer quite simply is yes.

6           I think it is important before we discuss range of error to  
7 discuss exactly what the Trial Chamber concluded and what they noted the  
8 200-metre rule was. It simply says that any shell falling within 200  
9 metres of a known military objective will be presumed to have intended to  
10 strike that military objective because that would be "a reasonable  
11 interpretation of the evidence."

12           Your Honours, this is not a margin of error standard. There was  
13 no establishment of any margin of error standard. This was simply a  
14 rule established by the Trial Chamber. Had we had expert testimony on  
15 the specific margin of error we would have to take many different items  
16 into account when going into that margin of error, not the least of which  
17 is, for instance, rounds falling outside that margin of error, outliers,  
18 and then discussing why, in fact, a round for whatever reason, be it  
19 human error, wrong -- improper information, et cetera, would cause a  
20 rounds to fall outside that margin of error. Well, suffice it to say  
21 that the 200-metre rule is not a margin of error.

22           Why was this 200-metre rule an erroneous standard by which to  
23 analyse the artillery fire? And how and why did the Trial Chamber err in  
24 using this -- this standard? Well, first and most importantly, the  
25 Trial Chamber's first error is in failing to explain why it even needed

1 to do an analysis of shell impact locations at all to determine the  
2 intent behind General Gotovina's attack order. As I noted just briefly  
3 in my earlier comments, the Trial Chamber had evidence before it on the  
4 basis of HV documentation that at least 95 per cent of all rounds fired  
5 were fired with the intent to strike lawful objectives. This should have  
6 been sufficient in itself for the Chamber to determine that there was a  
7 reasonable explanation of the evidence consistent with the Defence's  
8 assertion that General Gotovina's order was not for an unlawful attack  
9 but, rather, was interpreted and implemented as an order for an unlawful  
10 attack -- as a lawful attack. Excuse me. This is exactly what chief of  
11 artillery, Marko Rajcic, testified. He testified that he received  
12 General Gotovina's order and he implemented it as an order for a lawful  
13 attack directed on military objectives. And his testimony was  
14 corroborated by the HV artillery records. And how about deaths or  
15 destruction? There was no finding by the Chamber of any civilian deaths  
16 or injuries in any of the four towns as a result of the shelling. There  
17 was likewise no evidence of extensive destruction of civilian objectives  
18 either. Therefore, it is left unexplained by the Trial Chamber why in  
19 view of these conclusive facts it needed to even look at impact sites to  
20 determine the intend of General Gotovina's order or, further, why it  
21 needed to even devise a methodology, the 200-metre rule, based on  
22 measuring the distance between impact sites and known military  
23 objectives.

24 That leads into the second error by the Trial Chamber, and that  
25 has a -- directed to the 200-metre rule itself. This 200-metre rule has

1 no evidentiary basis in the record whatsoever. It was never discussed  
2 during trial. It was never brought up during trial. It was never a  
3 matter that was briefed during trial. Nothing. The Trial Chamber  
4 established its 200-metre rule at the end of a very long analysis of  
5 evidence of margin of error of HV weapon systems. At paragraph 1898 of  
6 the Trial Chamber's Judgement, by placing the -- this discussion of the  
7 200-metre rule in the context of margin of error suggests that the Trial  
8 Chamber was trying to tie its 200-metre finding to its analysis of margin  
9 of error, but ultimately did not. If we go back to this discussion in  
10 paragraph 1898 where the Trial Chamber wrestles with this margin of error  
11 standard, it ultimately could come to no conclusion as to the margin of  
12 error. For instance, the Trial Chamber cited Prosecution witness Konings  
13 who testified that for 155 metre shell fired at a distance of 14.5  
14 kilometres, the margin of error would be 55 metres in range, plus up to  
15 60 metres for each of the four factors cited: Muzzle velocity, wind  
16 speed, air temperature, density. Those, of course, wouldn't be the only  
17 four but those are the four that are listed.

18 Now, first on a foremost, we have to look at the actual weapon  
19 that Mr. Konings was talking about. There was no 155-metre Howitzer  
20 cannon used in this particular case. The particular gun at issue was a  
21 T-130.

22 In any event, had the Trial Chamber accepted the Konings test,  
23 Konings would have placed the margin of error at up to 295 metres for a  
24 155-metre shell fired at a distance of 14 and a half kilometres. Those  
25 are the general comments that were made by Konings with regard to this

1 155.

2 The firing distance in this case for the T-130 was at  
3 26 kilometres. Clearly at a 26 kilometre any margin of error would have  
4 clearly been grater. Thus, the Trial Chamber did not rely on Konings's  
5 testimony to establish the 200-metre rule because Konings at a  
6 significantly reduced distance had a margin of error of almost  
7 300 metres. Ultimately, the Trial Chamber recognised that the  
8 Prosecution had failed to establish beyond a reasonable doubt what the  
9 ranges of error of the HV weapon systems were. This was a failure of  
10 proof by the Prosecution.

11 The Trial Chamber recognised that failure and I direct the  
12 Chamber to the screen to footnote 932 on page 965 of the Trial Judgement  
13 where the Chamber noted as follows - thank you - the Trial Chamber had  
14 noted that:

15 "Had these impacts which were at a distance of up to 700 metres  
16 from artillery attacks been the result of the inaccuracy of the artillery  
17 weapons used, that would require further consideration of whether such  
18 inaccurate weaponry can be used in the context of an artillery attack on  
19 specific targets within a town."

20 Clearly this finding demonstrates that the Trial Chamber did not  
21 know what the margin of errors were for the HV weapon systems.

22 At this point, because there was a failure of proof by the  
23 Prosecution as to the margin of error, the Trial Chamber should have  
24 found that the Prosecution had failed, simply failed, to meet its burden  
25 of proof. Instead, the Trial Chamber decided to simply ignore the issue

1 of the proper range of error in establishing its 200-metre rule. This is  
2 quite clear. As I just noted for Your Honours, footnote 932, the Chamber  
3 admits that it did not know the proper margin of error. Let's turn our  
4 attention to paragraph 1906 of the Trial Chamber's Judgement which,  
5 likewise, is now on the screen. And it begins at the bottom of the page  
6 and then carries over where the Trial Chamber notes:

7 "In conclusion, the Trial Chamber finds that too many projectiles  
8 impacted in areas which were too far away from identified artillery  
9 targets and which were located around Knin for the artillery projectiles  
10 to have impacted in these areas incidentally as a result of errors or  
11 inaccuracies in the HV artillery fire."

12 Clearly, Your Honours, if the Trial Chamber believed that the  
13 margin of error had been established as less than 200 metres, it would  
14 have simply stated that as a basis for excluding the possibility of the  
15 shells landing more than 200 metres away.

16 Is there some special significance to this 200-metre rule? We  
17 can search the record, Your Honours. The Trial Chamber never explained  
18 why the 200 metres had any specific significance. There 's no evidence  
19 in the record to justify the selection of 200 metres as a standard.  
20 Accordingly, it thus appears that the Trial Chamber chose this 200-metre  
21 standard arbitrarily.

22 Finally, it appears that the parties, including the Prosecution,  
23 now agree that the 200-metre margin of error, to the extent that it is a  
24 margin of error, is overly narrow. Clearly the Trial Chamber erred in  
25 establishing the 200-metre rule. It could not account for the proper

1 margin of error.

2 The third reason why this was an error by the Trial Chamber,  
3 Your Honours, is this: There was no notice of this standard given to the  
4 accused. Appellant's grounds of appeal 1.1.3. notes that the Chamber's  
5 adoption of a 200-metre radius around military objectives was an  
6 assertion, as I noted previously, that was never discussed at trial.

7 So, as we direct our attention to this first question,  
8 Your Honours, whether the Trial Chamber erred in applying a 200-metre  
9 range of error in analysing the lawfulness of artillery shelling, given  
10 that the evidence demonstrated that fire was concentrated on military  
11 targets, given that the 200-metre rule has no relation to margin of  
12 error, given that the 200-metre rule is clearly an arbitrary standard not  
13 discussed at trial for which no notice was given, on behalf of  
14 General Gotovina, we submit that the Trial Chamber did in fact err in  
15 establishing this 200-metre rule as a basis upon which to render a  
16 decision.

17 Let us now turn to question 2.

18 Whether the Trial Chamber's conclusions regarding impact sites  
19 should be upheld if its application of the 200-metre range of error is  
20 deemed erroneous. Clearly the answer is no. And let us go through the  
21 analysis step by step.

22 If the 200-metre rule is deemed erroneous, then the  
23 Trial Chamber's conclusions concerning impact sites must also be  
24 reversed. The Trial Chamber drew several unreasonable inferences which  
25 all rest on the erroneous application of the 200-metre rule.

1           First, the Trial Chamber used its 200-metre rule to establish the  
2 civilian character of "civilian areas in which it said certain shells  
3 fell."

4           The jurisprudence of this Chamber is clear. That the Prosecution  
5 in a criminal case bears the burden of establishing beyond a reasonable  
6 doubt that "an object was indeed dedicate to civilian purposes." And I  
7 cite to Your Honours the Blaskic Appeals Judgement paragraphs 111 and  
8 145.

9           Here, Your Honours, the Prosecution failed to introduce any  
10 evidence of the presence of civilians or civilian objects in any of the  
11 Chamber's so-called civilian areas and failed to introduce any evidence  
12 to establish that any of the Chamber's civilian areas were, in fact, per  
13 Blaskic, dedicated to civilian purposes. In fact, the Prosecution could  
14 not establish that any civilians had been killed or injured by shells and  
15 very few civilian objects were hit by shells in the four towns combined.  
16 Finally, in violation of the Blaskic standard the Trial Chamber itself  
17 failed to make findings that any of these civilian areas were in fact  
18 dedicated to civilian purposes.

19           Your Honours must think, Well, how did this happen? Why was  
20 there no evidence of this? The reason the Prosecution failed to  
21 establish the civilian character of particular objects or areas is  
22 because the Prosecution's case was that there were "few, or in almost all  
23 cases, no identifiable military targets."

24           That was the Prosecution's case as we move into trial, and I cite  
25 for Your Honours the Prosecution's pre-trial brief at paragraph 31. The

1 Prosecution's case was that the HV fire on the town was per se  
2 unlawful -- excuse me, was a per se unlawful attack against civilians  
3 because there were no military objectives in the towns. Accordingly,  
4 once the Trial Chamber found that the Defence had, indeed, established  
5 the existence of many military objectives, the Trial Chamber should have  
6 found that the Prosecution had simply failed to prove its case. Instead  
7 they did something very different.

8           Instead, the Trial Chamber altered the Prosecution's case to the  
9 Prosecution's benefit. Where the Prosecution had failed to introduce any  
10 evidence to prove the civilian nature of specific objects or areas in  
11 Knin, frankly because it took the position that the entire town was a  
12 civilian zone due to the alleged absence of military objectives, the  
13 Trial Chamber proceeded to use its 200-metre rule to do two things. It  
14 chose to arbitrarily treat all areas outside 200 metres of known HV  
15 military -- artillery targets as being civilian in character. What did  
16 this do? First and foremost, it circumvented the need under Articles 51  
17 and 52 of protocol 1 to establish that civilian or civilian objects were  
18 attacked. Instead the Trial Chamber invented the concept of civilian  
19 areas, I quote, "by which the Chamber created zones of presumed civilian  
20 character."

21           What was the net effect of this decision? The net effect was  
22 that the Trial Chamber created a presumption of criminal intent for all  
23 shells falling in a civilian area without regard to whether the civilian  
24 or civilian object was actually targeted.

25           The Trial Chamber thus used the 200-metre rule to fill in huge

1 gaps in the Prosecution's case as pleaded and tried and had already been  
2 rebutted by the Defence. That rebuttal is that there were many military  
3 objectives in the four towns.

4 As a result, the Trial Chamber afforded civilian status to any  
5 area more than 200 metres from a known military objective. And let us  
6 just talk about some of those now described military areas -- excuse me,  
7 civilian areas; for example, the cross-roads in Obrovac was found to be a  
8 civilian area merely because it was more than 200 metres from a known  
9 military objective.

10 The railway fuel storage in Knin was found to be a civilian area  
11 even though the railway station itself was found to be a legitimate  
12 military objective strictly because it was too far away from a known  
13 military objective. Whether -- per Blaskic, whether the railway fuel  
14 storage was actually dedicated to civilian purposes as required by  
15 Blaskic is a question that the Trial Chamber didn't even try to answer.  
16 Why? Because the Prosecution had failed to introduce any evidence on  
17 that point.

18 Let us visualise this a little bit more specifically and examine  
19 how this -- this reversed the burden of proof. We can go up on Sanction  
20 on the screen for one moment. Map A.

21 This would be Map A in the -- in the maps that you have.

22 If we look at this, this is the practical application of the  
23 Trial Chamber's Judgement. And this is a 200-metre radius around  
24 military targets as identified by the Trial Chamber. And unilaterally,  
25 anything that landed within this area was presumed to be directed on a

1 military target, and anything that landed outside this area landed in  
2 this so-called civilian area, and, thus, was presumed to be improper.  
3 That was a conclusion reached with no actual evidence of what was outside  
4 these 200 -- this 200-metre radius as set forth in Map A and without any  
5 evidence that the particular areas that were then designated as civilian  
6 areas were in fact dedicated to civilian purposes per Blaskic.

7           What was the net effect of this? Well, first, this -- as you can  
8 see, it doesn't establish or doesn't satisfy the Prosecution's burden of  
9 proof. As I just noted, the Prosecution had to establish that any object  
10 struck by a shell was dedicated to civilian purposes. Again, the  
11 Trial Chamber made no finding that these areas were dedicated to civilian  
12 purposes and could not do so in the absence of any evidence advanced by  
13 the Prosecution. But more importantly, the 200-metre rule was used to  
14 reverse the burden of proof. It required the accused to bring forward  
15 evidence of military objectives near impact areas. If the accused failed  
16 to bring forward evidence of such military objectives, then the  
17 Trial Chamber applied the 200 metre standard to establish the civilian  
18 character of its civilian areas even where no evidence was submitted by  
19 the Prosecution to identify whether civilians or objects dedicated to  
20 civilian purposes were, in fact, present in these areas.

21           At this point, Your Honour, we would like to take this a little  
22 bit more closely and examine one of the examples advanced by the  
23 Trial Chamber and how it was actually employed in this Judgement. And I  
24 direct your attentions -- of the Chamber to a map on the screen that  
25 we're going to be talking about an impact area that was discussed in

1 paragraph 1904 of the Judgement.

2 Before we do that, if I can just take the Chamber through this  
3 particular map, the area at question is the area in front of the UN  
4 headquarters. If can you see the area circled in yellow, there are three  
5 circles in that area. There's a field in front of the headquarters.  
6 Those impact areas were identified by Prosecution witnesses Dijkstra,  
7 Berikoff and Williams during trial. The red are military targets that  
8 were fired upon by the HV per Marko Rajcic. What we have in 25 and 26  
9 are two military targets that in fact Mr. Rajcic said they did not fire  
10 upon. Using this map -- mis -- classic example and this is the use of  
11 the 200-metre rule, the Trial Chamber analysed the three shells falling  
12 into the empty field in front of the UN barracks and found that the field  
13 was more than 200 metres from a known HV target but less than 200 metres  
14 from other military targets -- objective, excuse me. The Chamber found  
15 that because there was no evidence that the HV fired upon these military  
16 facilities within 200 metres of the empty field, the field was civilian.  
17 Again, this is on 1904. My colleague reminded me this is on 1904 of the  
18 Judgement.

19 It appears that the Trial Chamber found if the HV had targeted  
20 these additional military facilities closer to the 200 metres to the  
21 field, it would have found the field to have been of military character.

22 Let us direct ourselves a little bit more specifically and go to  
23 the next map, which is Map 4. This is directed towards a 25 -- which is  
24 the Ante monastery but was in fact a headquarters of the special police  
25 for the ARSK. And this was a target that was not fired upon by the HV

1 per Marko Rajcic. However, in analysing this, had the HV decided to fire  
2 on this particular objective at 25, we can see from the calculation be it  
3 at 200 metres or 400 metres, at virtually half of this field would  
4 immediately be transformed into a place where any -- any round landing in  
5 that would not have been improper. So you have the rather incongruous  
6 conclusion as a result of this decision made by HV where half this field,  
7 any rounds following in half this field were proper and any rounds  
8 falling outside either 200 or 400 metres fell in civilian areas and were  
9 thus improper.

10 If we go back to the next slide which shows it again coming from  
11 the other direction, in paragraph -- in number 7, this is -- 26 is  
12 another HV facility -- excuse me, I'm sorry, RSK facility. It is their  
13 barracks which is just adjacent to the UN building. If you can see 26  
14 where the RSK barracks are, just south of that on this photograph is the  
15 UN facility. Again, this was not fired upon by the HV per Marko Rajcic.

16 As a practical matter, however, had the HV fired upon number 26,  
17 the RSK southern barracks, what do we have once again? We have once  
18 again the transformation of this field as a proper place upon which  
19 rounds could -- rounds could land and there would be no negative criminal  
20 consequences.

21 We can expand this out yet further and turn this to  
22 paragraph 17 -- excuse me, Map 17. And before we get to that, we can  
23 note that paragraph 1904 demonstrates how the civilian status of a  
24 particular object or area depended exclusively on whether it was in the  
25 200 metres of a military objective actually targeted. Moreover, it is

1 important to note that the 200-metre rule is not based on any margin of  
2 error. We have included this 200-metre standard here because presumably  
3 if the margin of error had been established as 400 metres per  
4 Andrew Leslie, a Prosecution witness and a Canadian officer, it would  
5 have created a 400 metre-rule. This, the civilian status of areas and  
6 objects under the Trial Chamber's methodology depends on either the  
7 200-metre rule or the margin of error of the weapon systems firing near  
8 the locations.

9 Now look at the -- the Map 17 that's on the screen. This is the  
10 practical application of what the Trial Chamber did. What we have done  
11 is put circles on there for 200-metre radius and circles around the  
12 targets for a 400-metre radius, and again, depending on what the HV  
13 targeted or didn't target, transformed this field into what could have  
14 been a civilian area or could have been completely proper because it was  
15 under 200 or 400 metres of a military objective.

16 This completely puts aside any analysis as required by Blaskic  
17 that these particular areas are dedicated to civilian purposes.  
18 Obviously when we analyse a chart such as this, this is an absurd result  
19 because it tells us nothing about whether the object was dedicated to  
20 civilian purposes. But, frankly, Your Honours, this is the nature of the  
21 methodology employed by the Trial Chamber. Accordingly before I turn  
22 my -- this matter over to Mr. Misetic, let us conclude with regard to  
23 question 2, again, whether the Trial Chamber's conclusions regarding the  
24 impact sites should be upheld if its application of the 200-metre range  
25 of error is deemed erroneous. Clearly, it should not. Civilian areas

1 based on impacts alone and not whether the area was dedicated to civilian  
2 purposes, improper. The reversal of the burden of proof by the  
3 Trial Chamber, clearly improper. Any decision whether an area was  
4 civilian based on an arbitrary 200-metre standard as opposed to the  
5 character itself was clearly improper.

6 For all the reasons set fourth above, the Trial Chamber's  
7 conclusions regarding impact sites should not be upheld and should be  
8 reversed in its application -- even if its application of the 200-metre  
9 range of error is erroneous.

10 At this juncture, Your Honours, I would like to turn the floor  
11 over to my colleague, Mr. Miletic.

12 JUDGE MERON: Counsel, could I just ask you a question before  
13 your colleague takes over.

14 You say something about the question whether the Trial Chamber  
15 erred in discounting the possibility of targets of opportunity given the  
16 determination by the Trial Chamber that the evidence did not establish  
17 whether Croatian forces had the ability to monitor areas where  
18 roadblocks, police and military vehicles were present in the relevant  
19 towns.

20 So my question pertains to targets of opportunity.

21 MR. KEHOE: Well, there was, in fact, evidence presented that  
22 there was the capability to examine targets of opportunity. Clearly on  
23 the 5th as they moved into town, there was more than enough time to hit  
24 targets of opportunity and to examine targets of opportunity. So the  
25 premise that there was no ability to see impact sites was simply improper

1 and I believe that the citations set forth in our brief established that.

2 JUDGE MERON: Thank you.

3 MR. MISETIC: Mr. President --

4 JUDGE MERON: Please proceed.

5 MR. MISETIC: -- distinguished members of the Appeals Chamber,  
6 good morning. My name is Luka Misetic. I will be addressing questions 3  
7 and 4.

8 Mr. President, first if I could just supplement my colleague's  
9 response to your last question. We would also draw the Chamber's  
10 attention to the fact that witnesses Leslie, and I believe Dawes,  
11 testified that the HV -- that they witnessed bracketing fire in Knin on  
12 the 4th, and from that they drew the conclusion that the HV could in fact  
13 observe Knin because bracketing fire requires the ability to observe what  
14 your fire is doing. I don't have the citations with me but I know we  
15 have cited that in our briefs, Mr. President.

16 Mr. President and Your Honours, I will be addressing questions 3  
17 and 4.

18 Question 3 from the Appeals Chamber is: Whether the  
19 Trial Chamber's finding that illegal artillery attacks took place should  
20 be upheld if its conclusions with respect to impact sites are deemed  
21 erroneous.

22 The simple answer obviously is no. The finding of illegal  
23 artillery attack cannot be sustained if the conclusions with respect to  
24 impact sites are deemed erroneous because the 200-metre rule was the  
25 necessary precondition to each of the inferences drawn by the

1 Trial Chamber to establish the alleged illegality of the shelling.

2 The Trial Chamber concluded that the shelling operation was  
3 unlawful based on the following inferences. All but one of which are  
4 derived from the Trial Chamber's erroneous 200-metre rule and its  
5 subsequent erroneous conclusions about "shells falling in civilian areas"  
6 described by my colleague, Mr. Kehoe.

7 The six erroneous inferences drawn are as follows: First, that  
8 the HV deliberately fired artillery projectiles at areas devoid of  
9 military targets, i.e., civilian areas; 2, that projectiles could not  
10 have landed in the civilian areas as a result of errors or inaccuracies  
11 in the HV's artillery fire; 3, that General Gotovina's artillery order  
12 was an illegal order to treat whole towns as targets; 4, that reports of  
13 HV artillery units indicated that whole towns were treated as targets; 5,  
14 that the general impression of eye-witnesses was that "the shelling  
15 impacted all over Knin and was indiscriminate"; and, 6, there was a  
16 disproportionate attack against Milan Martić.

17 All but one of these inferences are derived from the 200-metre  
18 rule. If the 200-metre rule was erroneous, then the findings just cited  
19 must also be reversed because they rest on the Trial Chamber's erroneous  
20 conclusion that shells impacted in civilian areas.

21 With respect to the first inference, the Trial Chamber's  
22 conclusion that the HV deliberately targeted civilian areas is based on  
23 its conclusions that projectiles had landed in civilian areas. And  
24 that's at Trial Judgement paragraph 1911. However, as just explained,  
25 without the 200-metre rule the Prosecution failed to prove that any of

1       these areas in the four towns were "civilian areas," and therefore there  
2       was no evidence that the HV deliberately targeted civilian areas.  
3       Therefore, there can be no inference of unlawful intent drawn from a  
4       projectile falling in any particular place in Knin, Benkovac, Obrovac, or  
5       Gracac.

6               Second, the Trial Chamber erred in concluding that shells could  
7       not have impacted more than 200 metres from a military objective due to  
8       the margin of error of the weapon systems. Because the Trial Chamber  
9       erred in establishing a 200-metre rule, it erroneously excluded margin of  
10      error as a basis for reasonable doubt explaining why shells fell more  
11      than 200 metres from military objectives. This finding is at  
12      paragraph 1906, which, again, will be up on your screen and was shown to  
13      you previously. It says:

14              "In conclusion, the Trial Chamber finds that too many projectiles  
15      impacted in areas which were too far away from identified artillery  
16      targets and which were located around Knin, for the artillery projectiles  
17      to have impacted in these areas incidentally as a result of errors or  
18      inaccuracies in the HV's artillery fire. Thus, the Trial Chamber finds  
19      that the HV deliberately fired the artillery projectiles targeting these  
20      areas in Knin."

21              For Benkovac, Obrovac and Gracac, it is the same finding, except  
22      without relying on a finding of too many shells falling.

23              Had the Trial Chamber not made this error, it would have had to  
24      conclude that because it did not have sufficient evidence of the margin  
25      of error, it could not exclude the reasonable possibility that shells

1 fell more than 200 metres from military objectives due to the unknown  
2 margin of error. Alternatively, had the Trial Chamber accepted Leslie's  
3 400-metre standard as the margin of error it would have concluded that  
4 only 13 of 1200 projectiles fired, or 1 per cent, fell beyond the margin  
5 of error of the HV weapons systems. And we have this on a chart in front  
6 of you, Your Honours, on the screen in front of you. We have broken down  
7 the Trial Chamber's findings by the four towns and you have in the four  
8 towns exactly five incidents for a total of 13 total projectiles that  
9 fell beyond 400 metres, beyond what Leslie said was the HV margin of  
10 error.

11 In Knin, if we focus on Knin, the Trial Chamber found 5 out of  
12 900 rounds fell beyond what Leslie said was the margin of error. That  
13 means that .05 per cent of the shells of the projectiles that were fired  
14 in Knin fell outside the margin of error.

15 Your Honours, we submit that 99.5 of projectiles falling  
16 within -- within the range of error of HV weapons systems is powerful  
17 evidence that General Gotovina's orders were in fact interpreted and  
18 implemented to mean that military objectives should be targeted.  
19 Moreover, this finding of five projectiles is remarkably consistent with  
20 the subsequent investigation of the shelling of Knin conducted by the  
21 United Nations military observers, and that is, again, at  
22 Trial Exhibit -- Prosecution Exhibit P64. The United Nations Military  
23 Observers found that only three to five shells were found or were  
24 observed outside the immediate vicinity of military objectives.

25 In other words, the Trial Chamber's own findings are consistent

1 with the conclusions of the United Nations military observers whose  
2 conclusion was that there was no evidence of an unlawful artillery  
3 attack. Had the Trial Chamber used these numbers or applied a 400-metre  
4 margin of error it could not have reasonably concluded that the only  
5 explanation of the evidence is that the HV was shelling towns  
6 indiscriminately. We note however that even with the statistics as they  
7 were before the Trial Chamber, i.e., that only 5 per cent of all rounds  
8 fell beyond 200 metres, this was sufficient to demonstrate that whole  
9 towns were not treated as targets.

10 The third inference of the Trial Chamber is, in fact, that  
11 General Gotovina's artillery order was unlawful but this inference cannot  
12 be sustained if the 200-metre rule is overturned. The following must be  
13 noted: Marko Rajcic was General Gotovina's chief of artillery and, as  
14 such, was the person who both interpreted and implemented  
15 General Gotovina's order. He was the Prosecution's witness, not the  
16 Defence's. And he was the only witness with personal knowledge who  
17 testified about how General Gotovina's orders was implemented and  
18 interpreted. Marko Rajcic testified explicitly that General Gotovina's  
19 order was interpreted as an order only to strike only lawful military  
20 objectives. This testimony was powerfully corroborated by the evidence  
21 before the Trial Chamber that 95 per cent of all rounds fired were fired  
22 at military objectives. Rajcic's testimony was also corroborated by the  
23 subsequent investigations of the shelling of Knin conducted by, amongst  
24 others, the UNMO investigators and the United State's investigators who  
25 did not conclude that there was an unlawful artillery attack. Again,

1 that is trial exhibit P64.

2 Accordingly, even with the 200-metre rule Rajcic's explanation of  
3 Gotovina's order was confirmed by other corroborating evidence in the  
4 record. Yet the Trial Chamber ultimately concluded that Gotovina's order  
5 was unlawful. It first stated at paragraph 1893 of the Trial Judgement  
6 that it would assess the legality of Gotovina's order based on whether it  
7 found Rajcic's testimony to be credible. The Trial Chamber then  
8 proceeded to apply its invented 200-metre rule to conclude that Rajcic's  
9 explanation could not possibly be credible because - and this is at  
10 Trial Judgement paragraph 1911:

11 "The Trial Chamber considers that the deliberate firing at areas  
12 in Knin which are devoid of military targets, i.e., civilian areas, is  
13 inconsistent with Rajcic's explanation of the HV artillery orders.  
14 Instead, it is consistent with the plain text of those orders to put  
15 towns under artillery fire, meaning to treat whole towns, including Knin,  
16 as targets."

17 In other words, the Trial Chamber used its conclusion that  
18 5 per cent of projectiles fell in civilian areas to disregard Rajcic's  
19 evidence and to conclude that Gotovina issued an illegal order. If the  
20 Chamber were wrong in its conclusions about the civilian character of  
21 these "civilian areas," and therefore wrong to conclude that the HV  
22 "deliberately targeted civilian areas" then the Trial Chamber had no  
23 basis to discount Rajcic's corroborated testimony. Even with the  
24 200-metre rule, the fact that the implementation of General Gotovina's  
25 order resulted in at least 95 per cent of all rounds fired at military

1 objectives was more than sufficient to establish that General Gotovina's  
2 order was lawful and interpreted by his subordinates as such.

3 Without the 200-metre rule and thus without the finding that the  
4 HV deliberately targeted civilian areas, Rajcic's testimony is  
5 unassailable.

6 Next we turn to the inference about HV artillery reports.

7 Without the 200-metre margin of error the reports of HV artillery  
8 units do not prove that whole towns were treated as targets. From  
9 contemporaneous reports at HV artillery units, the Trial Chamber had  
10 evidence before it that at least 95 per cent of all projectiles were  
11 fired at military objectives per General Gotovina's order. At  
12 paragraphs 1895 and 1896, the Trial Chamber noted that there were some  
13 entries in HV reports which might be interpreted as evidence that whole  
14 towns were treated as targets. The Trial Chamber also found, however,  
15 that these entries were oftentimes a coded account of the targets fired  
16 at and may have been the result of "lack of details, errors, or other  
17 inaccuracies in the reports."

18 In order to determine whether these entries were evidence of  
19 indiscriminate attack or simply inaccuracies in the reports, Trial  
20 Chamber said that it:

21 "... will further evaluate these reports in light of the findings  
22 on the locations of impacts in Knin."

23 Again, that's Trial Judgement paragraphs 1895 and 1896. Thus,  
24 because the Trial Chamber's conclusions based on the impact areas were  
25 wrong as a result of the mistaken 200-metre rule, the innocent

1 interpretations of HV reports also cannot be concluded as reasonable  
2 explanations of the evidence. Even the Trial Chamber stated as much.

3 Without the 200-metre margin of error, the general impression of  
4 eye-witnesses that the "shelling impacted all over Knin" is actually  
5 consistent with the Chamber's finds that the HV lawfully targeted  
6 military objectives in Knin. The Trial Chamber relied on the testimony  
7 of witnesses in Knin who said that "the shelling was all over Knin and  
8 was indiscriminate."

9 That's at Trial Judgement paragraph 1911. However, we'd like to  
10 put back on the screen which are Maps A and B, which the -- Your Honours,  
11 you have already had distributed to you. This is, again, the map with  
12 the military objectives in Knin and the 200-metre circles around it. Now  
13 the witnesses -- many of the witnesses, indeed most of the witnesses,  
14 relied on were in the extreme right portion of this map, in the UN  
15 compound. The Trial Chamber found that any shells landing in these areas  
16 were presumed to have been intended to strike military objectives. Now,  
17 if a shell landed in these areas, it would both be lawfully fired and  
18 from the perspective of witnesses on the grounds, be perceived as falling  
19 all over Knin. Indeed, that is because military objectives were all over  
20 Knin.

21 The Trial Chamber had evidence that at least 850 projectiles  
22 landed in these areas. Had the Trial Chamber assumed Leslie's 400-metre  
23 margin of error - if we can move to the next line, please - the circles  
24 become even larger. This is where shells would have impacted in Knin  
25 which the Trial Chamber would have considered lawfully fired because they

1 fell within the margin of error of HV weapons systems. The witnesses'  
2 perception that the shells were falling all over Knin is consistent with  
3 the fact that legitimate military objectives were targeted all over Knin.  
4 The UN Military Observer's conclusion that the artillery fire was  
5 concentrated against military objectives also confirms this.

6 Eye-witness testimony is thus of little significance,  
7 particularly - and we emphasise - that there is not a single witness in  
8 this case who was aware of every military target in Knin. And therefore  
9 what basis they would have as to whether a shell could or should be  
10 falling in a particular part of Knin is unexplained.

11 Finally, with respect to the alleged disproportionate attack on  
12 Martić. Although this finding would not be impacted by overturning the  
13 Trial Chamber's finding on the 200-metre rule for reasons explained more  
14 fully in the Appellant's brief, the Trial Chamber erred in concluding  
15 that the attack on Martić was disproportionate. There was no evidence of  
16 the presence of any civilians at his residence and no evidence whatsoever  
17 that Gotovina had "knowledge of circumstances giving rise to the  
18 expectation of excessive civilian casualties."

19 There is no evidence of any harm to any civilians as a result of  
20 the targeting of Martić. Martić as the Commander-in-Chief of SVK forces  
21 was prepares the highest value military objective possible. Moreover,  
22 the Trial Chamber did not conclude that the alleged disproportionate  
23 attack was evidence of a direct attack against civilians, meaning that  
24 the Trial Chamber did not say that the real object of this attack was not  
25 Martić but the civilians around Martić. Instead, it concluded this was

1 evidence of a general disregard for civilian safety, but the  
2 Trial Chamber did not call into question that Martić was indeed the  
3 intended objective of this attack. Accordingly, the Martić incident does  
4 not on its own provide evidence of an attack to target the civilian  
5 population.

6 Thus, all but one of the factors that the Trial Chamber  
7 considered in arriving at its conclusions rest on the 200-metre rule and  
8 the incorrect inferences drawn from impact locations. The Chamber's  
9 finding of indiscriminate attack must fail. If there is no proof beyond  
10 a reasonable doubt that shells impacted in civilian areas there is no  
11 evidence of any unlawful attack. Even if there were proof of impacts in  
12 civilian areas there is no proof that this was not the result of errors  
13 or inaccuracies in the HV weapons systems, i.e., the margin of error,  
14 human error, or intelligence errors. Indeed without the 200-metre rule,  
15 the Trial Chamber could have establish that: 1, Gotovina ordered that  
16 previously identified military objectives be targeted with artillery in  
17 the four towns; 2, of the 900 rounds of artillery fired in Knin, at least  
18 850 were demonstrably fired with the intent to strike military  
19 objectives; 3, in Knin only five rounds out of 900 fell beyond the  
20 400-metre margin of error established by Leslie for HV weapons systems;  
21 4, no civilians were killed or injured in the shelling in the four towns;  
22 5, the damage to civilian structures was minimal and confined to the  
23 vicinity of military objectives; 6, there is no evidence that any  
24 civilian was targeted by artillery fire; and, 7, there is no evidence  
25 that any civilian structure was targeted by artillery fire.

1           Given all of these factors, let us turn our attention to whether  
2           there is any evidence of an actus reus or mens rea of the crime of  
3           unlawful attack. There is no unlawful attack, first, because there is no  
4           proof of an actus reus. There is no evidence that civilians were made  
5           the object of the attack, no evidence that the HV artillery fire was of  
6           such nature to strike military objectives and civilians or civilian  
7           objects without distinction, and no evidence that the HV used inherently  
8           indiscriminate weapons during the artillery operation. Therefore, the  
9           actus reus of unlawful attack does not exist without the 200-metre rule.

10           Second, the Trial Chamber conclusion that there was the relevant  
11           mens rea to commit an unlawful attack as the crime of persecution as a  
12           crime against humanity must also fail. The Chamber expressly found that  
13           its conclusions about the existence of such unlawful intent was based  
14           upon, 1, the language of HV artillery orders, and, 2, the inference that  
15           these orders were unlawful based on the deliberate shelling of areas  
16           devoid of military targets. That's at Trial Judgement paragraph 1912.  
17           Because both of these rest on the erroneous 200-metre finding, the  
18           finding concerning intent to commit unlawful attack must also be  
19           reversed.

20           Your Honours, I will now turn to question 4 posed by the  
21           Appeals Chamber.

22           JUDGE MERON: Judge Robinson.

23           JUDGE ROBINSON: You say that 95 per cent of the projectiles,  
24           there was evidence that 95 per cent of the projectiles were aimed at  
25           military targets.

1 MR. MISETIC: Yes.

2 JUDGE ROBINSON: Does that mean that you accept that there was  
3 evidence that 5 per cent --

4 MR. MISETIC: No, Your Honour.

5 JUDGE ROBINSON: -- was aimed at civilian targets?

6 MR. MISETIC: That is the remaining shells that I discussed in  
7 terms of the ambiguity in HV military artillery reports. We do not  
8 accept that. And, as a matter of fact, the Trial Chamber itself, as I  
9 discussed, said that those entries are ambiguous and would be evaluated  
10 in light of its findings on the locations of impact areas.

11 JUDGE ROBINSON: So they don't help at all in relation to  
12 establishing indiscriminate attack.

13 MR. MISETIC: In answers to the Appeals Chamber's questions and  
14 now yours, if you overturn, in questions 1 and 2, the findings of the  
15 200-metre rule and the subsequent inferences drawn about impact  
16 locations, then the Trial Chamber itself said that it was going to only  
17 draw criminal intent from those entries based on where it found shells to  
18 have back impacted. So if those conclusions about impact areas are  
19 wrong, then the Trial Chamber itself said explicitly, I believe in  
20 paragraph 1895 and 1896 of the Trial Judgement, that the Trial Chamber  
21 said that these entries could have been the result of lack of details,  
22 errors, or other inaccuracy in the reports, but then said it would  
23 evaluate whether they were in fact the result of such errors on the basis  
24 of its findings on the location of impacts on Knin.

25 So we would argue, Your Honours that those remaining 5 per cent

1 in fact were directed at military objectives and that the only question  
2 about them has been resolved and that there is a basis to conclude that  
3 they were in fact simply coded language and language -- they were poor  
4 record-keeping which the Chamber itself found.

5 JUDGE ROBINSON: Thanks.

6 JUDGE MERON: Please proceed.

7 MR. MISETIC: Thank you, Mr. President.

8 Question 4 from the Appeals Chamber asks: Whether the  
9 Trial Chamber's finding that a joint criminal enterprise existed should  
10 be upheld if its finding that illegal artillery attacks took place is  
11 deemed erroneous.

12 The answer is no. Without an illegal artillery attack, the  
13 necessary precondition for the existence of a JCE namely, the "commission  
14 of a crime provided for under the Statute" does not exist. There is no  
15 commission if there is no unlawful attack.

16 The Trial Chamber at paragraph 2314 of the Trial Judgement  
17 defined the common criminal purpose of the alleged JCE. It said that the  
18 common criminal purpose -- excuse me, that the members of the Croatian  
19 political and military leadership shared the common objectives of the  
20 permanent removal of the Serb civilian population from the Krajina by  
21 force or threat of force which amounted to and involved persecution  
22 through the crimes of deportation, forcible transfer, unlawful attacks  
23 against civilians and civilian objects and discriminatory and restrictive  
24 measures, as well as the crimes of deportation and forcible transfer.

25 The purpose of the joint criminal enterprise required that the

1 number of Serbs remaining in the Krajina be reduced to a minimum but not  
2 that the Serb civilian population be removed in its entirety.  
3 Accordingly, the Trial Chamber found that the common criminal purpose was  
4 the permanent removal of the Serb civilian population but not that the  
5 Serb civilian population be removed in its entirety. A few  
6 paragraphs earlier the Trial Chamber found that this common criminal  
7 purpose was to be achieved through an unlawful artillery attack. This is  
8 paragraph 2311, via Sanction. It says:

9 "The minutes of the Brioni meeting show that the participants  
10 were aware of the difficulty situation for the Krajina Serbs, in  
11 particular in Knin, and that they knew that it would not require much  
12 effort to force them out. Under these circumstances, members of the  
13 Croatian political and military leadership took the decision to treat  
14 whole towns as target for the initial artillery attack. Deportation of  
15 the Krajina Serb population was, to a large extent, achieved through the  
16 unlawful attacks against civilians and civilian objects in Knin,  
17 Benkovac, Obrovac, and Gracac, which the Trial Chamber has found were  
18 carried out on discriminatory grounds."

19 At paragraph 2321 of the Judgement, the Trial Chamber also made  
20 clear what was not in the common criminal purpose. It said:

21 "The Trial Chamber finds that the common objective did not amount  
22 to, or involve, the commission of the crimes of persecution, through  
23 disappearances, wanton destruction, plunder, murder, inhumane acts, cruel  
24 treatment and unlawful detentions. And also did not involve the crimes  
25 the destruction, plunder, murder and inhumane and cruel treatment."

1           Accordingly, the Trial Chamber found that the common criminal  
2           objective did not involve deporting Krajina Serb civilians through crimes  
3           such as murder, destruction, plunder, inhumane acts and cruel treatment.  
4           Instead, the Trial Chamber found a common criminal purpose of deporting  
5           Krajina Serb civilians through an unlawful shelling attack on the four  
6           towns and then imposing discriminatory measure to prevent these civilians  
7           from returning.

8           Accordingly, if the Appeals Chamber were to rule that the  
9           Trial Chamber erred in concluding that there were unlawful shelling  
10          attacks on the four towns for the reasons we have previously addressed  
11          this morning, then there would be no actus reus left that could be used  
12          to support the claim that any intent to deport the Krajina Serb  
13          population was actually implemented. In short, the 200-metre margin of  
14          error and the resulting erroneous finding of unlawful attack, without  
15          that, the Trial Chamber could not have identified any actual cause of  
16          departure of Krajina Serbs from the four towns. Just as importantly, it  
17          would not have had any basis to differentiate between the causes of  
18          departure of the Krajina Serb civilians from the rest of the Krajina  
19          which the Chamber found in paragraph 1754, 1755 and 1762 were not caused  
20          by any unlawful conduct by the HV and the causes of the departure from  
21          the four towns. It should be emphasised, however, that without the  
22          finding of actual unlawful attacks the Trial Chamber would not have  
23          established any criminal mens rea to deport the Krajina Serb population  
24          and thus would not have been able to establish the existence of any  
25          common criminal purpose. Indeed the Trial Chamber's findings concerning

1 the Brioni meeting and the discriminatory housing policy all rest on the  
2 Trial Chamber's finds that an unlawful artillery attack actually took  
3 place.

4 Let us turn our attention for a moment to the Brioni meeting  
5 findings.

6 Concerning the Brioni meeting both the Trial Chamber and the  
7 Prosecution have conceded that there is no single statement at the Brioni  
8 meeting from which the unlawful agreement to shell civilian towns can be  
9 inferred. Instead, both the Trial Chamber and the Prosecution explain  
10 that the alleged unlawful intent of the Brioni participants is to be  
11 inferred from the subsequent unlawful artillery attack which allegedly  
12 took place. On your screens, Your Honours, via Sanction this is  
13 paragraph 2310 of the Trial Judgement:

14 "The Trial Chamber considers that the discussion at the Brioni  
15 meeting, at which the participants discussed the importance of the  
16 Krajina Serbs leaving as a result and part of the imminent attack.  
17 Further, it infers from the mass exodus of the Krajina Serb population  
18 within days of the launching of Operation Storm and the immediate  
19 efforts, on a policy and legislative level, to prevent the population  
20 from returning that members of the Croatian military and political  
21 leadership intended to force the Krajina Serbs from their homes."

22 We note the juxtaposition there between the first sentence which  
23 says they discussed the importance of leaving and then drawing the  
24 inference that the conversation was about forcing based on subsequent  
25 events.

1           At paragraph 2305, five paragraphs earlier, the Trial Chamber has  
2 carefully considered the minutes of the Brioni meeting in chapter 6.2.2.  
3 It here further considers them in light of subsequent events as found by  
4 the Trial Chamber. Within days of the discussion at Brioni, Gotovina's  
5 words became a reality.

6           It goes on and says:

7           "The Trial Chamber has found at chapters 4.4 and 5.8.2 (i) in at  
8 least some of the these attacks the entire towns were treated as targets  
9 for the artillery. These attacks therefore constituted unlawful attacks  
10 and civilians and civilian objects."

11           Now, the Prosecution has itself argued to the Appeals Chamber  
12 that the Trial Chamber did not look at the Brioni transcript itself to  
13 draw its inference that the discussion at Brioni was about forcing  
14 Krajina Serbs from their homes. We'll show on the screen now portions of  
15 the Prosecution's respondent's brief. This is respondent's brief  
16 paragraph 234. The Prosecution says:

17           "The Trial Chamber correctly found that an unlawful attack  
18 against civilians and civilian objects was intended and within the  
19 purpose of the JCE. This conclusion was based on many considerations,  
20 not just on four factors as Gotovina claims.

21           "For example, Gotovina's repeated suggestion that the JCE shared  
22 intent must be found in the words of the Brioni meeting alone should be  
23 rejected; the Chamber properly made this finding on the totality of the  
24 evidence."

25           We turn to paragraph 239:

1           "Gotovina appears to suggest that the Chamber found the existence  
2 of a formal decision at the Brioni meeting by the JCE members to target  
3 whole towns. But there is no such finding. Nor would a formal decision  
4 be required to find the existence of the JCE. The Chamber concluded  
5 based on the evidence that under these circumstances a general decision  
6 was taken at Brioni to subject whole towns to the initial artillery  
7 attack. Given the discussions at the meeting where Gotovina and Tudjman  
8 made explicit reference to the shelling and potential destruction of  
9 Knin, the express terms of Gotovina's attack order, and the  
10 indiscriminate shelling of the four towns which occurred shortly  
11 thereafter, the Chamber reasonably found that the JCE members at Brioni  
12 decided to target these towns."

13           We turn to paragraph 268:

14           "Gotovina's references to the accuracy of his comments are beside  
15 the point. The Chamber's focus was appropriately directed at the meaning  
16 of Gotovina's statements and those of the other participants in the  
17 context of the meeting and subsequent events."

18           And, finally, at paragraph 271:

19           "The Chamber's finding that Gotovina intended to target ...  
20 civilians to force them to leave the Krajina and to use artillery for  
21 this purpose, was based on the totality of the evidence, not a single  
22 statement at the Brioni meeting."

23           Accordingly, the Trial Chamber clearly made its findings on  
24 Brioni contingent upon its finding that an unlawful artillery attack  
25 actually took place after Storm and that Gotovina's order was unlawful.

1 The Prosecution concedes in its respondent's brief that the Brioni  
2 transcript, on its own, does not contain evidence of a formal decision to  
3 target towns with artillery nor a single statement in which targeting  
4 civilians with artillery to force them to leave was discussed.  
5 Therefore, if you overturn the Trial Chamber's finding of unlawful attack  
6 you must also overturn its reasoning establishing that a criminal intent  
7 existed at Brioni to target the four towns with indiscriminate artillery  
8 fire.

9 With respect to discriminatory measures, the second element of  
10 the criminal mens rea to permanently remove the Krajina Serb population,  
11 concerns the Trial Chamber's findings about discriminatory housing laws.  
12 This is issue cannot form the basis of a JCE involving  
13 Appellants Gotovina and Markac absent of finding of unlawful artillery  
14 attack because --

15 JUDGE MERON: Excuse me, counsel. I just wanted to make sure  
16 that in your remaining time you will address us of the question of the  
17 evacuation orders.

18 MR. MISETIC: Yes, Your Honours.

19 JUDGE MERON: Thank you.

20 MR. MISETIC: Okay. The Trial Chamber made express findings that  
21 Appellants Gotovina and Markac, and this is at Trial Judgement paragraph  
22 2325-26 concerning General Gotovina and 2562 to 63 concerning  
23 General Markac, the Trial Chamber found that neither Appellant had any  
24 involvement whatsoever in the housing policies or any other allegedly  
25 discriminatory policies. Accordingly, even if the Appeals Chamber were

1 to confirm that there existed a JCE to impose discriminatory measures, it  
2 is clear that the Trial Chamber found that neither Gotovina nor Markac  
3 had any involvement in the core crime of any such JCE, i.e., a  
4 discriminatory measures JCE.

5 Moreover, the Trial Chamber made its findings that these housing  
6 laws were discriminatory contingent upon its findings that the Krajina  
7 Serbs had been unlawful expelled through shelling in the first place,  
8 thus making any obstacles to return unlawful. The Appellant expressly at  
9 trial noted that states have the right to deny the immediate return of  
10 nationals of an enemy state in times of armed conflict, citing a decision  
11 of the Ethiopia-Eritrea Claims Commission, and this is at Trial Judgement  
12 paragraphs 1748 and 1749.

13 The Gotovina Defence expressly noted that this right to prevent  
14 immediate return only existed if the state did not unlawfully expel the  
15 civilians in the first place. The Trial Chamber distinguished this  
16 precedent on the basis that civilians in this case had been subjected to  
17 an unlawful attack against civilians. Thus, if there is no unlawful  
18 attack, then the Trial Chamber's basis for distinguishing this authority  
19 disappears and we are left with the question of whether a state has the  
20 right to prevent the immediate return to its territory of aliens of an  
21 enemy state in an armed conflict. The Trial Chamber avoided this  
22 question when it concluded that it was irrelevant because civilians had  
23 allegedly been unlawfully expelled.

24 Your Honours, in conclusion on the Appeals Chamber's four  
25 questions, as is evident from your questions -- from the answers to your

1 question, the finding of joint criminal enterprise rests fundamentally on  
2 the Chamber's erroneous 200-metre rule from which the Trial Chamber  
3 ultimately drew erroneous conclusions about the civilian nature of impact  
4 areas, about the lawful or unlawful nature of the artillery attack and  
5 about the presence of culpable intent on the part of General Gotovina and  
6 about the existence of a JCE. Should you overturn the 200-metre margin  
7 of error the Appeals Chamber must necessarily overturn General Gotovina's  
8 conviction on all counts because there is no JCE liability any longer.

9 Mr. President, now in answer to your question about the Martić  
10 evacuation order. Mr. Kehoe and I have laid out for you this morning  
11 that the Trial Chamber itself made explicit find in three paragraphs of  
12 the Judgement, 1754, 1755, and 1762, that the Krajina Serb civilian  
13 population left areas outside of the four towns for reasons that did not  
14 relate to any unlawful conduct by the HV. The Trial Chamber, as  
15 Mr. Kehoe pointed out, itemised several factor from which it drew that  
16 conclusion. One of those factors -- in fact, the last fact that  
17 Mr. Kehoe mentioned, and this is at a Trial Judgement paragraph 1762, is  
18 "RSK officials telling inhabitants to leave on 4 August."

19 Now, Your Honour, we submit and you have seen ground 2 of our  
20 appeal. Ground 2 of our appeal, in detail itemises how and why the  
21 Krajina Serb population left en masse and left from the Krajina. The  
22 issue of deportation here, as we know, the crime of deportation involves  
23 forcefully expelling people across a de jure or de facto border. There  
24 is no evidence in this case of any identifiable Serb civilian that the  
25 Prosecution can give you a name of any such person who claimed to have

1       decided to leave the Krajina in fear of unlawful artillery attack.

2               JUDGE MERON: Let me interrupt you, counsel, just for a second.

3               The Trial Chamber concluded the evacuation orders were not the  
4 primary cause of civilian departure. You believe that the Trial Chamber  
5 in this respect acted outside the scope of discretion.

6               Why?

7               MR. MISETIC: Well, Your Honours, first and foremost, I think  
8 the -- as -- I think we would all agree the key issue isn't for the  
9 Defence to explain why they did leave. It's for us to explain why they  
10 didn't leave, and they didn't leave because of artillery shelling.

11              But second -- second, we laid out in our Defence final brief that  
12 the Trial Chamber had more than sufficient evidence before it of all of  
13 the steps taken by the RSK authorities to trigger the civilian flight.  
14 There is a problem between the Trial Chamber's approach to the Martić  
15 evacuation order and what we contend actually happened.

16              The Trial Chamber seems to have been looking at the narrow issue  
17 of whether the evacuation order was implemented in the sense of they were  
18 able to organise fuel and trucks, et cetera, and there was some sort of a  
19 systemic departure from the Krajina. Our position is that once it was  
20 made known to the civilian population that an evacuation order had, in  
21 fact, been issued, people decided to leave. Whether they left organised  
22 or unorganised, in a systematic manner or not, is of little relevance to  
23 the ultimate issue. Our objective is ground 2 is to explain what the  
24 evidence was. Moreover, there was plenty of evidence, including from the  
25 commander of Sector South of the United Nations in Knin who filed a

1 report which is in evidence in which he analysed what happened in  
2 Operation Storm, and he, himself, came to the conclusion that once the  
3 evacuation order was issued everybody decided to leave, civilians and  
4 military. And so we do believe that the Trial Chamber failed to address  
5 key evidence; for example, the Trial Chamber doesn't address that  
6 evidence from the commander of the UN Sector South. There is other  
7 evidence that we have identified in our briefs that the Trial Chamber  
8 simply failed to address, and as we noted the Trial Chamber on critical  
9 issues has a duty to address key evidence in the case.

10 The -- the other factor, Your Honours, to consider is that the  
11 Trial Chamber's basis for excluding the evidence concerning Martić rests  
12 on the testimony of Kosta Novaković, who testified that civilians were  
13 already on the move prior to the evacuation order and who also said that  
14 they issued the evacuation order in order to put some order into a  
15 process that was already taking place. We suggest, Your Honours, that  
16 the Trial Chamber committed an error when it failed to do any assessment  
17 of the credibility of a person -- a military person in the ARSK -- or SVK  
18 who in fact participated in the issuance of the order and had a motive to  
19 downplay the importance of that order. So, Your Honours, we believe  
20 there were several errors committed by the Trial Chamber in failing to  
21 address that evidence. But again I would emphasise that for purposes of  
22 this case, what is important is what didn't cause the departure and we  
23 would argue that there is no basis for the Trial Chamber to conclude that  
24 all of the reasons outside of the four towns could not have been a  
25 reasonable explanation for why civilians left the four towns.

1           Now I will -- unless there are any other questions,  
2           Mr. President, I will turn the floor over for a five-minute submission by  
3           my colleague, Mr. Akhavan.

4           JUDGE MERON: [Microphone not activated]

5           MR. AKHAVAN: Mr. President, distinguished members of the  
6           Appeals Chamber, I'm honoured to make some brief concluded remarks on  
7           this appeal and its wider implications for humanitarian law.

8           This case is simple and straightforward. The Trial Judgement's  
9           fundamental finding is that HV violations of Article 51, paragraph 2 of  
10          protocol 1 was of such an exceptional scale and gravity that it  
11          constitutes crimes against humanity. It finds in particular that the  
12          deliberate targeting of whole towns was so extreme that it was the direct  
13          and primary cause of the mass exodus of 20.000 civilians. In this  
14          context, the persecutory attack of unlawful attack is not merely one act  
15          among other; rather, it is helped to constitute the very essence of the  
16          widespread or systematic attack against the civilian population.

17          What is the proof in support of this far-reaching conclusion?  
18          Quite simply, the totality of the evidence is that 1.200 artillery  
19          projectiles were fired in urban areas but without a finding of even a  
20          single civilian death or injury and without any proof of extensive  
21          destruction of civilian objects under such circumstances is a massive  
22          deliberate attack against a civilian population the only reasonable  
23          inference. The conclusion would have to be that despite a criminal  
24          policy the HV forces were so exceptionally incompetent that none of their  
25          1.200 projectiles succeeded in hitting a single civilian. Needless to

1 say, such a conclusion would be manifestly absurd and no amount of  
2 creative legal reasoning can compensate for this fundamental lack of  
3 proof.

4 This case, we submit, is as simple and straightforward as that.

5 General Gotovina's conviction on these facts is a miscarriage of  
6 justice, but there is a wider consideration here. The Judgement  
7 establishes a precedent that would make lawful warfare practically  
8 impossible. Throughout modern history, humanitarian law has been  
9 relevant to military commander because it has struck a realistic balance  
10 between humanitarian protection and military necessity. The former ICRC  
11 legal adviser Louise Doswald-Beck observes that states negotiating  
12 protocol 1 intended to "codify a law that was acceptable to their  
13 military staff."

14 Eminent publicists have noted however that courts and tribunals  
15 have frequently ignored operational or battlefield practice. In order to  
16 remain credible and relevant the jurisprudence of this Tribunal must  
17 apply humanitarian law consistent with the operational realities of  
18 warfare and not an impossible standard. Consider, for instance, the  
19 observation of Professor Michael Schmitt in the International Review of  
20 the Red Cross, and I quote:

21 "That there is no foundation to claims of the emergence of the  
22 customary norm on the use of precision weaponry in urban settings or that  
23 states which possess precision weapons must always use them."

24 That's in the 2005 issue of the International Review of the  
25 Red Cross at page 460. If General Gotovina is convicted of large-scale

1 unlawful attacks on these facts, what is the practical standard for urban  
2 warfare applicable to the most advanced armed forces of the world?  
3 Surely if General Gotovina is guilty of attacks against whole towns  
4 without a single finding of civilian death or injury then military forces  
5 with precision weapons must be held to an even higher standard.

6 It is evident that despite feasible precautions even the military  
7 operations of the most advanced forces have resulted in thousands of  
8 civilian casualties. Indeed, it is difficult to image any urban combat  
9 in recent history that compares favourably with the HV artillery  
10 operations in terms of civilian impact.

11 Mr. President, distinguished members of the Appeals Chamber, like  
12 Tadic almost two decades ago, this is a landmark case for the Tribunal  
13 that will be widely scrutinised, especially by military experts on the  
14 laws of war. By applying a reasonable standard, informed by operational  
15 and battlefield practice, the Appeals Chamber will ensure a lasting  
16 contribution to the viability of humanity law. Applying such a standard,  
17 we respectfully submit, clearly requires this Chamber to enter a  
18 Judgement of acquittal against General Gotovina.

19 I thank the Chamber for its patience. That conclude our remarks.

20 JUDGE MERON: Thank you, Mr. Akhavan, and thank the counsel for  
21 Mr. Gotovina for adhering to the timetable and for their arguments. We  
22 will now -- yes, Mr. Stringer.

23 MR. STRINGER: Mr. President, I didn't want to interrupt counsel  
24 during their submissions, but in the course of the submissions we were  
25 looking at the maps, and it just appears to us that the legend that

1 appears at the bottom of a couple of these doesn't correspond to the size  
2 of the circles, the 2- or 400 metres. I don't know if it means anything.  
3 I don't know if the Chamber is going to have these, but it is something  
4 that we notice. I'm looking at Map A here. The 200 doesn't appear to  
5 correspond to the 1.000-metre scale that is at the bottom but I just  
6 wanted to note that.

7 JUDGE MERON: We just looked at these without prejudice.

8 I will -- we will now -- unless there is it an answer to that,  
9 that you ... we will now adjourn for a -- until 11.00 a.m.

10 --- Recess taken at 10.45 a.m.

11 --- On resuming at 11.01 a.m.

12 JUDGE MERON: Please be seated.

13 Response by the Prosecutor. An hour and 30 minutes.

14 Mr. Stringer, please.

15 MR. STRINGER: Thank you, Mr. President. Good morning to you,  
16 again, and Your Honours. Counsel.

17 This morning, together with my colleague Matthew Cross, I will  
18 address General Gotovina's arguments in his ground 1 on the unlawful  
19 shelling attack which the Chamber found was directed against the four  
20 towns of Knin, Benkovac, Gracac, and Obrovac on the 4th and  
21 5th of August, 1995. In the course of our submissions, Mr. Cross and I  
22 will address the first three questions that the parties received from  
23 Your Honours. After Mr. Cross and I have concluded, my colleague  
24 Ms. Baig will address the Chamber's fourth question. And after that, my  
25 colleague Ms. Verrall will address the deportation and evacuation order

1 issue.

2 As an overview, Your Honours, our submissions on the unlawful  
3 attack can be summarised as follows. The Trial Chamber correctly found  
4 that the Croatian Army, HV, shelling attack of the 4th and  
5 5th of August was an unlawful, indiscriminate attack on the towns. The  
6 unlawful attack was not a singular event, unconnected to others, but,  
7 rather, was part of a common criminal plan to permanently remove the Serb  
8 civilian population from the Krajina region of Croatia. Its findings on  
9 unlawful attack are amply supported by various sources of evidence, all  
10 of which consistently point to the fact that the towns themselves were  
11 targeted in the attack. This includes the discussion among Gotovina,  
12 Markac, and others, with President Franjo Tudjman at Brioni on the  
13 31st of July, 1995, four days before the attack. The Chamber correctly  
14 concluded that this discussion was "about civilians being forced out."

15 Secondly, the plain language of the attack order issued by  
16 General Gotovina on the 2nd of August to "put the four towns under  
17 artillery fire," as well as the orders of Gotovina's subordinates to the  
18 same effect.

19 Thirdly, the numerous eye-witness accounts and conclusions of  
20 UN military personnel in Knin as part of the UN peacekeeping forces there  
21 who observed that the shelling attack hit all over the town and was  
22 indiscriminate.

23 Also, the finding on lawful attack, the Chamber's finding was  
24 informed by the total disregard of the civilian population in Knin when  
25 the HV shelled several locations, hoping to hit RSK President Milan

1 Martić, even though they knew the chances of hitting him were very  
2 slight. I will refer in greater detail to each of these.

3 The only reasonable conclusion to be drawn from all of this  
4 evidence is that an unlawful shelling attack on the four towns was  
5 planned, ordered and executed.

6 In regard to the issues of margin of error and the significance  
7 of the Trial Chamber's findings on specific impact locations as raised in  
8 the Chamber's questions 1, 2, and 3, this is the Prosecution's position.

9 First, this goes to question 1, if you consider the evidence  
10 available to the Chamber at trial, its use of a 200-metre margin of error  
11 in its analysis of the shelling case was not unreasonable.

12 Our answer to question 2 is that any error involving the  
13 200-metre margin of error does not affect the Trial Chamber's findings on  
14 impact sites. The 200-metre margin of error was used primarily to assess  
15 the testimony of Gotovina's chief of artillery, Rajčić, who claimed that  
16 the HV had precise weapons that targeted only lawful targets.

17 The Chamber's exacting analysis of specific impact sites shows  
18 first and foremost that projectiles hit all over the towns, including on  
19 or near homes, a hospital, a health clinic. The Chamber correctly found  
20 that the location and the spread of known impact sites across the towns  
21 was inconsistent with Rajčić's claims of precise, lawful targeting. This  
22 holds true even if the margin of error was greater than 200 metres.

23 In question 3, the Chamber asks whether the overall finding of  
24 unlawful attack should be upheld if the Trial Chamber's conclusions on  
25 impact sites are found to be erroneous. Again, the answer is yes. Based

1 on the wide range of evidence which I'll refer to in these submissions,  
2 such as the criminal plan discussed at Brioni, and the attack orders  
3 themselves, the use of the 200-metre margin of error in connection with  
4 findings on the limited number of known impact locations does not affect  
5 the overall finding of unlawful attack. Even setting aside margin of  
6 error, you can find that the towns themselves were deliberately targeted  
7 based on all the other evidence.

8 This Chamber should reject the Defence's attempt to elevate any  
9 single item, including margin of error, to such a status that that item  
10 alone determines the lawfulness, or not, of an artillery attack. Judges  
11 must consider the commander's intent based on all the evidence. Intent  
12 is determined by considering all his acts and his omissions, not just by  
13 calculating the margin of error of his weapons.

14 The Chamber's consideration of the shelling attack cannot begin  
15 with the first shells that hit the four towns, beginning at about 5.00 in  
16 the morning on 4th of August. We must first go back to a consideration  
17 of the common criminal plan.

18 Although the unlawful attack on the towns of Knin, Benkovac,  
19 Gracac, and Obrovac formed a significant part of the common plan, it was  
20 not the only part. The plan was wider in scope and wider in its  
21 implementation. Its precisely this wider scope and how the unlawful  
22 attack fits into the overall common criminal plan that support the  
23 Trial Chamber's findings on unlawful attack.

24 Like the Trial Chamber, this Chamber must consider the discussion  
25 and the agreements made four days earlier at Brioni. There, Gotovina,

1 Markac, and other high-level advisors joined Croatian president Tudjman  
2 to discuss the retaking of the Krajina in what was to become known as  
3 Operation Storm. As the transcript of this meeting - it's in evidence as  
4 Exhibit P461 - makes clear, the Brioni discussion was not confined to  
5 legitimate military aspects and goals of the operation. Rather, it  
6 reveals that the objective was to ensure that the civilian population  
7 itself would be driven from the region as part of the military operation.  
8 It is no accident that the removal of the Serb civilian population was a  
9 part of the operation.

10 President Tudjman viewed the Serb population in Croatia as a  
11 strategic threat. Peter Galbraith, the United States ambassador to  
12 Croatia from 1993 to 1998 had frequent meetings and contacts with  
13 President Tudjman. In his evidence, Ambassador Galbraith stated:

14 "President Tudjman preferred a reasonably or basically homogenous  
15 Croatia. He believed that states ought to be ethnically homogenous or  
16 close to it. He believed and stated that the Serbs in Croatia were too  
17 numerous and constituted a strategic threat to Croatia. He very much  
18 approved the population transfers."

19 That's Exhibit P44 [sic], paragraph 31, referred to in the  
20 Judgement, paragraph 1999.

21 Indeed, civilians were one of the issues on which  
22 President Tudjman focussed at Brioni, saying:

23 "But as I've said, and we've said it here, that they should be  
24 given a way out here ... because it is important that the civilians set  
25 out, and then the army will follow them, and when the columns set out,

1 they will have a psychological impact on each other."

2 That's the transcript Brioni, P461, at page 15.

3 In response to this statement, General Gotovina stated that if  
4 the Croatian forces continued to exert pressure, the only civilians left  
5 would be the ones who were incapable of leaving. And you have the  
6 General's remarks on the screens in front of you.

7 "If we continue the pressure possibly for some time to come,  
8 there won't be so many civilians, just those who have to stay."

9 Now, Your Honours, are these the statements that you would expect  
10 from military leaders who intend to honour their obligation to protect  
11 the civilian population during the attack? "It is important that they  
12 set out ... if we continue the pressure ... there won't be so many  
13 civilians left?"

14 The Trial Chamber correctly concluded that the discussion of  
15 civilians at Brioni was not about protecting them but was, rather, about  
16 civilians being forced out. That's paragraph 1995 of the Judgement.

17 The artillery attack that followed four days later must be viewed  
18 in this light. That the Serbian population, viewed as a strategic  
19 threat, was to be forced out as part of the military operation.

20 Other aspects of the criminal plan that occurred after the  
21 shelling attack nonetheless furthered the goal of driving the Serbs out.  
22 This sheds nature on the light of the attack itself. We know that on  
23 completion of the artillery attack, Gotovina and Markac's ground forces  
24 entered the four towns. Gotovina's prediction at Brioni proved to be  
25 true. The few Serb civilians who remained after the shelling attack

1        were, for the most part, those who had been too old or weak to flee.

2                For the next two months, these unfortunate individuals were the  
3        target of an unrestrained wave of crime and retribution at the hands of  
4        Gotovina and Markac's subordinates. Through it all, Gotovina and Markac  
5        took no serious measures to put an end to the crimes.

6                The lack of concern for the protection of civilians that  
7        manifested itself in General Gotovina's remarks at Brioni was all too  
8        apparent in the aftermath of the shelling attack. Another aspect of the  
9        overall plan sheds light on the objective of the attack itself. Once the  
10       Serbian population was removed from the Krajina after Operation Storm,  
11       Croatian government officials took steps to ensure that the Serb  
12       civilians who fled would not be able to return. Ethnic Croats were  
13       encouraged to move into the houses abandoned by the Serbs.  
14       Discriminatory laws were enacted that made it much more difficult for the  
15       Serbs to return and claim their homes.

16               Gotovina and Markac themselves were not personally involved in  
17       developing these policies. They contributed to the common plan in other  
18       ways. However, the policies on preventing Serb returns do tell us about  
19       the overall objective of Operation Storm.

20               Thus, as I have said, the unlawful attack cannot be viewed in  
21       isolation as a singular event, unconnected to the others.

22               JUDGE MERON: Mr. Stringer, in connection with your last point,  
23       are you suggesting that your case does not rest on the occurrence of  
24       unlawful military attacks?

25               MR. STRINGER: No, I'm not suggesting that at all. What I'm

1 suggesting, Mr. President, is that the lawfulness of the attack has to be  
2 assessed in light of all of the events not only that occurred before the  
3 attack but also after. The attack is a reflection --

4 JUDGE MERON: But if the attacks are not unlawful --

5 MR. STRINGER: If the attacks are not --

6 JUDGE MERON: -- are not unlawful, you still have a case?

7 MR. STRINGER: Yes, we do have a case. My colleague, Ms. Baig,  
8 and later today Ms. Brady, are going to address that issue which, as I  
9 understand, goes largely to question 4.

10 My submissions, Mr. President, are assuming and, if I may say  
11 adamantly, advocate the position based on the evidence that the attack is  
12 unlawful.

13 JUDGE MERON: The 200-metres question is sort of overarching in  
14 this case. Now should the Appeals Chambers - and I'm not indicating in  
15 any way that it might or might not - but if the Appeals Chamber were to  
16 reverse the finding of the Trial Chamber regarding the 200-metres range  
17 of error, how is evidence from the impact sites determined by the  
18 Trial Chamber helpful, given that the Trial Chamber itself found that  
19 each of the four towns also contained lawful military targets? Couldn't  
20 the impacts far from those military targets be simply an error?

21 Is there any significance to be attached to the argument made  
22 earlier today by the Defence, pertaining to virtual absence of civilian  
23 casualties?

24 MR. STRINGER: Mr. President, I'll try to move through your  
25 questions as briefly -- or as succinctly as I can.

1 JUDGE MERON: That's the way.

2 MR. STRINGER: 200 metres, as I'm going to say, or as I had hoped  
3 to say a bit later in my submissions, the 200-metre margin was correct  
4 based on the evidence at trial. Now, if it's not correct, this is what  
5 we know and how the 200-metre rule was applied. And I'll bring this back  
6 to the 95 per cent figure that my colleagues continue to rely on.

7 At the trial, the Chamber was only able to determine the specific  
8 location, specific impact sites for about 10 per cent of all the shells  
9 that were fired. We know that at least 1200 shells were fired in the  
10 four towns during the operation, 900 at least were fired into Knin.

11 When the Trial Chamber talks about specific impact locations, it  
12 is only talking about those that it was able to fix, which is only about  
13 10 per cent of the total. If you look at the annex that we attached to  
14 our brief, when you look at the known impact locations, the known impact  
15 locations, 50 per cent of those fall outside 200 metres, roughly. Half  
16 fall in; half fall out.

17 Now, in order to get us to the 95 per cent figure that my learned  
18 colleagues refer to, what they've done is to take the other 90 per cent,  
19 the unknown impact locations, they've assumed that all of those unknowns  
20 actually landed inside 200 metres. There's no basis for making that  
21 assumption. So we know that if 5 per cent of the knowns landed within  
22 200 metres, they've added 90 per cent, which are the total number of  
23 unknowns to get to their figure. Actually, the number that matters is  
24 the spread, the proportion of the known ones. Because if the known  
25 shells fall evenly, roughly evenly across the towns, as the Chamber

1 found, and as the witnesses testified to, then there's no basis for  
2 assuming that the 90 per cent of the unknown impacts all fell within  
3 200 metres. That's especially the case if you now expand the margin of  
4 error out to 400 metres, assume that the weapons they used were twice as  
5 inaccurate as the Trial Chamber gave them credit for.

6 So, what we know about the impacts, the known ones, which are the  
7 only ones that matter for the purposes of the 200-metre rule because the  
8 200-metre rule was only applied to the known impact locations, that means  
9 that roughly half, 50 per cent, fell within 200. Not 95 per cent, as  
10 counsel have stated.

11 If I could just respond to your other question, Mr. President, on  
12 the presence of military targets in the towns. We've done a number of  
13 unlawful shelling cases at this Tribunal, Mr. President, as you and the  
14 Judges well know. The fact that there are lawful targets during the  
15 course of what's found to be an unlawful attack is not remarkable. And  
16 it certainly does not distinguish this case from any of the unlawful  
17 shelling cases that we've had here before. Yes, there are lawful  
18 targets. But in determining the intent of the shelling operation, you  
19 can't simply look at a limited number of places where you know shells  
20 fell. You have to look at all the evidence.

21 And with your permission, Mr. President, if I could return to my  
22 submissions, I would like to talk about some of the other evidence on  
23 this.

24 Apart from the discussion at Brioni, we know that Gotovina issued  
25 his attack order on the 2nd of August, two days later. That's in

1 evidence at P1125. And I want to draw the Chamber's attention to the  
2 language that the Chamber had at the trial on this point. You've got it  
3 in front of you now, Your Honours.

4 What the General has done here was to direct in his order that  
5 specific lawful targets, military targets be hit, strikes against the  
6 enemy's front line, command posts, communications, and by putting the  
7 towns, Drvar, Knin, Benkovac, Obrovac, Gracac, under artillery fire.  
8 This was added in addition to the other targets specified by the General  
9 in his order. I should note Drvar, Your Honours, is located outside the  
10 scope of the indictment in this case. It's in Bosnia and Herzegovina and  
11 was not considered by the Trial Chamber.

12 So, what we see here is language that, as the Trial Chamber  
13 sensibly noted, was based on a plain reading of the text of this order.  
14 The Trial Chamber found this indicates an order to the HV to treat whole  
15 towns in Knin as targets. That's paragraph 1893 of the Judgement.

16 Now, Your Honours, this order and this specific direction was  
17 passed down the chain of command. We see it again in the order issued by  
18 the General's chief of artillery, Chief of Staff of artillery,  
19 Marko Rajic, who, in his order, and you've got the language in front of  
20 you now, directed that, in addition to doing all of these other things,  
21 neutralising, hitting communications centres, command posts, et cetera,  
22 he ordered put the towns under artillery fire. The same language.  
23 That's Exhibit D97.

24 Your Honour, the same language moves down the further down the  
25 chain of command, closer to the people who are going to be firing these

1 guns. Exhibit P1263 is the order of Zadar Operative Group chief of  
2 artillery, Marijan First. He ordered put the following -- excuse me, let  
3 me -- I skipped over Mladen Fuzul, OG Zadar commander, who in language  
4 virtually identical to Gotovina's ordered his subordinate artillery  
5 groups to "lay down fire on the towns of Benkovac and Obrovac." Lay down  
6 fire on the towns. The same thing appears in the order issued by OG --  
7 chief of artillery, Marijan First who again orders:

8 "Put the following towns under artillery fire: Benkovac, Gracac,  
9 Obrovac."

10 Now, the Defence in their submissions made a lot of statements  
11 about firing into civilian areas. Well, these are civilian -- the towns  
12 themselves are civilian areas. We know that in addition to the orders  
13 themselves emanating from General Gotovina, moving down the chain of  
14 command, that contemporaneous reports referred to my colleagues of -- who  
15 were actually -- who were made by the people firing the artillery, also  
16 support the view that they were, indeed, firing on the towns.

17 This Exhibit P1268 is a report of the TS-4 artillery group that  
18 was firing on Knin. Here, in their report, they say that at 1500 hours,  
19 in irregular intervals, they fired a total of 18 projectiles from a  
20 T-130 - that's one of the artillery guns - at the general area, the  
21 general area of Knin. This is perfectly consistent with the language  
22 that we see in the orders of the superiors.

23 Now, at trial, Mr. President, I'd like to draw your attention to  
24 the testimony of the Prosecution's artillery expert witness,  
25 Colonel Konings. Konings was present in Sarajevo during the conflict,

1 and he led UN investigations of shelling incidents there. At trial, this  
2 is what he said in reviewing the artillery report we just looked at about  
3 the shells fired into Knin.

4 He told the Trial Chamber in this case:

5 "And I have to go back to my experience being six months inside  
6 the city of Sarajevo. There was no military purpose. The only purpose  
7 of using artillery in this way was harassing a civilian population with  
8 the objective to make them flee."

9 He continues:

10 "I have to say it in this clear way because that is the  
11 connection that I find in using the word 'irregular intervals,'  
12 18 projectiles in the general area of Knin, and then the connection with  
13 the OP order that we discussed before."

14 And the OP order he refers to there is the artillery -- or the  
15 attack order issued by General Gotovina.

16 There are more reports issued by different groups, different  
17 soldiers in different places who are also reporting the same thing.  
18 Exhibit P2385 comes from a log of the special police. At 8.55 in the  
19 morning and then again at 11.30 in the morning, Your Honours have it,  
20 they say that they are shooting artillery fire. References to artillery  
21 fire targeting Gracac and Medak. 11.30, "artillery fire targeting  
22 Gracac."

23 Again, targeting towns. The towns themselves being the objects  
24 of attack.

25 Another is Exhibit P1200, Your Honours. I'm not going to talk

1 about it in detail. I'll draw your attention to it. These and other  
2 reports that the Trial Chamber had supported its finding, its correct  
3 finding in our view, that the reporting of the artillery units is  
4 consistent with the other evidence indicating that the HV was treating  
5 the towns themselves as targets. Paragraphs 1911, 1923, 1935, and 1943.  
6 We submit that this interpretation was reasonable given the plain  
7 language of the General's attack order, the language of his subordinates'  
8 attack orders, and the view that Gotovina expressed at Brioni, that with  
9 continued pressure the civilian population would depart. What other  
10 explanation can there be for simply shooting projectiles into towns?  
11 There's only one reasonable conclusion to be reached.

12 In addition to the attack orders and the reports of the HV's  
13 artillery, the Trial Chamber justifiably relied on the testimony of  
14 experienced military personnel present in Knin on the 4th and 5th. One  
15 of them was UN Sector South commander Forand. He told the Trial Chamber  
16 that the shelling of Knin was "indiscriminate and was directed against  
17 the civilian population to create mass panic." Another one of these  
18 observers was Leslie, who I will talk about further in my submissions.

19 Finally, the Trial Chamber had evidence and rightfully considered  
20 evidence of the disproportionate attack on RSK President Milan Martić.  
21 The Chamber correctly observed that the manner in which Gotovina's  
22 subordinates attempted to shell him in his apartment building revealed  
23 its attitude toward the civilian population living in Knin. They fired  
24 shells at his presumed location on three occasions on the 4th. The first  
25 of these attacks occurred between 7.30 and 8.00 in the morning on the

1 4th. The HV fired 12, 130-millimetre artillery shells at his apartment  
2 building. The Trial Chamber found that this was an otherwise civilian  
3 apartment building located in a predominantly civilian area of town.  
4 Gotovina's artillery commander, Rajcic, testified that they did this even  
5 though they knew the chance of hitting or injuring Martic was very  
6 slight. It's at Judgement paragraph 1910.

7 The Trial Chamber found that in this attack there was a  
8 significant risk of a high number of civilian casualties and injuries.  
9 Its finding was undoubtedly based in part on testimony of Konings. I  
10 direct Your Honours to his testimony at page 14316 of the transcript  
11 where he talked about what happens when one of these projectiles impacts  
12 a civilian area, when a shell -- the -- I should say the -- what he  
13 called the "absolute lethal distance" within which a shell will kill  
14 everyone in its range.

15 So just to work backward from where I am at this point. During  
16 the morning of the 4th of August, while the HV was firing its  
17 130-millimetre shells at Martic's apartment building knowing that they  
18 had little opportunity to hit him, Forand and others were experiencing  
19 what they concluded was an unlawful attack. The same attack was being  
20 directed against the three other towns at the same time. The artillery  
21 personnel delivering these projectiles were writing down in their reports  
22 that they were firing on the towns, or in the general area of the towns.  
23 This is what they've been ordered to do. Their orders lead directly up  
24 the chain of command back to General Gotovina. And Gotovina himself had  
25 issued this order because, as we know from Brioni, it was necessary that

1 the civilians set out, that they leave.

2 Let me respond to the General's arguments, as well as the  
3 Chamber's questions.

4 This brings us down to Gotovina's challenges based on margin of  
5 error of the weapons systems he fired. He misunderstands the role that  
6 the 200-metre margin played in the Chamber's analysis. In question 1,  
7 Your Honours ask whether the Trial Chamber erred in applying the  
8 200-metre margin of error. The answer is no. Based on the record, based  
9 on the evidence available at the time, it was reasonable.

10 If you look at Judgement paragraphs 1893 to 1911, you'll find  
11 that the primary purpose of the Chamber's margin of error analysis was  
12 not to determine conclusively whether the attacks as a whole were  
13 unlawful. Rather, the margin of error analysis formed part of the  
14 Chamber's assessment of Rajcic's claim that the attack orders, despite  
15 their plain text, were interpreted as only pertaining to lawful targets.

16 After considering the number and location of the known impacts  
17 that fell more than 200 metres from a lawful target, the Chamber  
18 determined that Rajcic's interpretation of the plain language of the  
19 orders issued by General Gotovina himself and the others was not credible  
20 in light of all the other evidence that I've just summarised. Such as  
21 the attack orders, the artillery logs.

22 The Trial Chamber said that it considers that the deliberate  
23 firing at areas in Knin which were devoid of military targets is  
24 inconsistent with Rajcic's explanation of the HV artillery orders, and  
25 the Chamber had every reason to conclude that they were firing

1 deliberately at Knin without respect or without regard to military  
2 targets because we see it in the attack orders, and we see it in the  
3 reports of the HV's artillery, who were delivering the projectiles into  
4 the towns.

5 JUDGE MERON: Counsel --

6 MR. STRINGER: This is how the --

7 JUDGE MERON: -- if the attacks were, as you are suggesting,  
8 deliberate, or even if they were merely indiscriminate, in contrast to  
9 Sarajevo which you mentioned a few moments ago, where there were plenty  
10 of casualties, could you give me a simple explanation as to how to  
11 explain that even if the Defence was not quite accurate in suggesting  
12 there were no casualties whatsoever, how do you explain there were so  
13 very few?

14 MR. STRINGER: Mr. President --

15 JUDGE MERON: There were hundreds and hundreds of shells fired.

16 MR. STRINGER: My colleague Mr. Cross is going to address the  
17 issue of civilian casualties in greater detail.

18 I will say this. The unlawful attack that's charged in this case  
19 was charged as a persecutory act not as an unlawful attack itself. So  
20 that the -- it wasn't required, first and foremost, to prove civilian  
21 death. We don't have an annex attached to this indictment in which  
22 deaths -- specific victims were identified and whose deaths were proved  
23 at trial. It wasn't required because of how the unlawful attack is  
24 charged in this case as part of the persecution.

25 Now, as Your Honour, I believe, indicated, you seem to be aware

1 of the evidence in the record about the many witnesses who saw the many  
2 casualties, injuries, people lying in the streets of Knin, during the  
3 course of the attack on the 4th and the 5th. It bears noting that the  
4 HV's infantrymen, their ground forces did not enter these towns, until  
5 Knin, midday, on the 5th. So if the witnesses, many of them who have  
6 testified about the casualties, the bodies that they've seen on the 4th,  
7 there can only be one cause of that.

8 So we see the issue of casualties as somewhat of a red herring,  
9 Mr. President. It wasn't required to be proved, and it certainly ignores  
10 the fact that the witnesses provide a lot of evidence about the existence  
11 of casualties, and, worse, during the course of a shelling attack.

12 JUDGE MERON: Thank you, Mr. Stringer.

13 MR. STRINGER: If I could just ask for my time.

14 Mr. President, my colleagues were going to start throwing things  
15 at me if I go over 40 minutes and I'm at 40 minutes now. Let me try to  
16 quickly wrap up because I don't believe I have actually gotten to all of  
17 your questions and I would like to do that.

18 Question 1 I've answered. It was reasonable based on the  
19 evidence. We draw Your Honours' attention to the testimony of Gotovina's  
20 artillery Chief of Staff, Rajcic, who spoke about the margin of error of  
21 the 130-millimetre guns that were fired on Knin. The Chamber did have  
22 the testimony, as was pointed out in the Defence submissions, of Konings  
23 about the 155-millimetre weapon, which is a different weapon but which  
24 is -- the Trial Chamber considered in factoring in where it was going to  
25 come down on margin of error.

1           On the 400-metre margin of error, Mr. President, if I could just  
2           add this because now the Defence wants to embrace the testimony of  
3           Mr. Leslie who testified about a 400-metre margin of error on a first  
4           shot. He did not testify at trial as an expert under Rule 94 bis, and  
5           the Defence actually objected to his evidence on that basis at trial.  
6           The fact that the Defence now embraces a 400-metre margin of error is  
7           notable because this accepts generally that the weapons fired into the  
8           four towns were substantially less accurate, less precise than the  
9           Trial Chamber gave them credit for. It is also noted because, as Leslie  
10          testified, he concluded that the attack was indiscriminate. I refer  
11          Your Honours to pages 1990 to 1991 of the Judgement, in which Leslie  
12          testified that the fire was all over the place. If, as General Leslie  
13          observed, Gotovina's men were firing all over the place, then the margin  
14          of error is of little consequence. If they were targeting the towns  
15          themselves, based on the attack orders, as reflected in the artillery  
16          reports that are being written contemporaneously, then the margin of  
17          error doesn't matter. It doesn't affect any findings on the  
18          deliberateness of the attack.

19           Your Honours, I'm going to now summarise, and this goes to  
20          question 3, going to conclude, I should say.

21           In his report, Colonel Konings described how the artillerymen  
22          calculate margin of error. It's mathematics. You refer to firing  
23          tables. You factor in the weather. It gives you a range of error, how  
24          likely you are to hit the target. He never suggested, nor did the  
25          Trial Chamber, that margin of error is the beginning or the end of the

1 analysis.

2 This case does not rise or fall based solely on whether the known  
3 impact locations are within or without a margin of error, whatever the  
4 margin might be. Your Honours must determine the intent of the commander  
5 and his intent is ascertained by considering all the evidence, not simply  
6 by calculating margin of error of the weapons the commander deployed.  
7 Intent must be determined by considering the commander's behaviour. Not  
8 just the behaviour of his weapons, as expressed in margins of error. All  
9 of his acts, his orders, his statements, his omissions must be examined.  
10 In this case, Your Honours, the Chamber did just that, whether the margin  
11 of error of Gotovina's artillery is 200, 400, or 1200 metres, and whether  
12 any given projectile impacted 200 metres from a target, 450 or 700, and  
13 there's evidence of all of those, it does not change what Gotovina said  
14 at Brioni. It doesn't change what he put in his attack order. It  
15 doesn't change what's reflected in the attack orders of his subordinates.  
16 It doesn't change the fact that, as reflected in the HV's own reports,  
17 they were firing into the towns themselves. And it's for those reasons,  
18 Mr. President, and this is in response to the Chamber' question 3, any  
19 error, any flaws in the Chamber's analysis of the 200-metre rule or on  
20 specific impact locations of which only 10 per cent is known does not  
21 affect the overall finding of unlawful attack which was justifiably and  
22 amply based on all the evidence in the case.

23 Now, unless Your Honours have any more questions, I am going to  
24 turn the floor over to my colleague, Mr. Cross.

25 JUDGE MERON: Judge Pocar.

1           JUDGE POCAR: Counsel, may I perhaps ask you a clarification on  
2 your position, just to understand it well. Are you pushing your line of  
3 reasoning up to the point that even if technically the targets, the  
4 targets of the attack, would have been only the military attacks -- or  
5 the military targets, the attack itself would have been unlawful because  
6 it was a part of a means of committing the crime of forced transfer of  
7 the population.

8           Is that your theory?

9           MR. STRINGER: Yes, Your Honour. And you're going to hear more  
10 about that in the submissions from my colleagues, Ms. Baig and also  
11 Ms. Brady.

12           But if the attack was carried out with the intent to forcibly  
13 remove the civilian population, then the -- even if -- and if they were  
14 counting on collateral damage, if you will, to bring that about as -- as  
15 the result of shelling only lawful targets, then if they possessed the  
16 intent, it would, indeed, constitute the criminal -- the triggering event  
17 for the deportation.

18           So in this respect, the lawfulness of the attack or not would not  
19 affect the overall finding on terms of JCE or deportation. Again, it's  
20 our position that the unlawful attack itself was intended and that the  
21 towns were deliberately targeted to bring about that very result.

22           JUDGE POCAR: So your position is that the attack, even if they  
23 have acted against military targets, if they had the purpose of -- not of  
24 getting military advantage simply from the attack by destroying the  
25 targets, the military targets, but in order to commit a crime, the crime

1 of forced transfer, that would make it unlawful? Even if technically, in  
2 theory, justified -- justifiable.

3 MR. STRINGER: As Your Honour knows, the crime of forcible  
4 transfer, deportation, can be carried out by means that are lawful or  
5 unlawful.

6 JUDGE POCAR: I get your position. Thank you.

7 [Appeals Chamber confers]

8 MR. STRINGER: Is the Chamber ready for me to pass now to  
9 Mr. Cross?

10 JUDGE MERON: Please proceed.

11 MR. STRINGER: Thank you, Your Honour.

12 MR. CROSS: Good morning, Your Honours.

13 To answer the second question on the addendum, I shall now  
14 address the evidence and findings concerning particular impact locations.  
15 And my submissions shall address three points.

16 First, that pursuant to Gotovina and Markac's orders, the HV and  
17 special police fired indiscriminately on the towns of Knin, Benkovac,  
18 Gracac, and Obrovac. They hit both lawful targets and civilian objects  
19 alike.

20 Second, That the Trial Chamber's conclusion that the towns  
21 themselves were targeted remains reasonable. If all of the impact  
22 locations throughout the towns can be explained by a margin of error  
23 which is greater than 200 metres, then Your Honours can, and should, draw  
24 an inference from that finding of the weapons' very inaccuracy. And  
25 given the other evidence in the Judgement, the use of such inaccurate

1 weapons would still support the plain text of Gotovina's order to attack  
2 the towns.

3 And, third, Your Honours, this was far from a victimless crime.  
4 The unlawful attack on Knin alone dispossessed 14.000 Krajina Serbs from  
5 their homes.

6 I beg your pardon.

7 JUDGE MERON: Counsel.

8 MR. MISETIC: Your Honours, I apologise for rising. This was an  
9 issue that arose in briefing with the parties. I did want to note for  
10 the record our objection because it appears that the Prosecution is now  
11 arguing disproportionate attack and this was an issue we had raised  
12 before and we'd note our objection to it. Thank you, Mr. President.

13 MR. CROSS: Your Honours, if I may briefly respond to  
14 Mr. Misetic.

15 As Your Honours may recall, the Prosecution made a filing at the  
16 end of last week setting out its position with regard to the centrality  
17 of proportionality to the case at trial. Given the shortage of time,  
18 Your Honours, I do not propose to go through those salient points at this  
19 moment unless it would assist Your Honours at this juncture.

20 JUDGE MERON: I suggest that we let the counsel for the  
21 Prosecution to continue.

22 MR. MISETIC: Thank you, Mr. President.

23 MR. CROSS: I'm obliged, Your Honours. And the Prosecution  
24 adopts its position set out in the filing to which I referred.

25 And thirdly, as I was saying Your Honour, this was far from a

1 victimless crime. 14.000 Krajina Serbs were dispossessed from Knin  
2 alone. Civilian bodies were seen by witnesses lying in the streets and  
3 in the hospital, and widespread damage was done to civilian objects.

4 Turning to my first point in detail, I shall use Knin as an  
5 example, and the Prosecution relies on its written submissions with  
6 respect to the other three towns.

7 In the artillery attack on Knin, the HV did not discriminate  
8 between the lawful targets and the multitude of civilian objects which  
9 surrounded them. The emphasise in the Judgement on particular impact  
10 locations does not mean that the Judgement must be read as saying, These  
11 were the only places that were struck. In fact, the even distribution of  
12 artillery rounds across Knin is implied by the Chamber's analysis and it  
13 supports its conclusion.

14 First of all, the evidence in the trial record is clear that  
15 there was no part of Knin which was not under the umbrella of the HV's  
16 guns and rockets. And in that respect, Your Honours can see Judgement  
17 paragraph 1906, which refers to rounds striking in the north, the south,  
18 and the east. And indeed, Your Honours, those findings of particular  
19 impact locations support that distribution of rounds hitting all over the  
20 town. Thus, rounds hit in the northern borders in a cemetery, and that's  
21 in the Judgement at paragraph 1905; in the southern borders of the town,  
22 in the field near the UN compound of which the Defence has discussed,  
23 that's paragraph 1904; to the very east of the town, by the ECMM HQ, the  
24 hospital, and a house known as "marking J," and that's in the Judgement  
25 at paragraphs 1903 and 1905; and also in the centre and to the west of

1 town, and that's Judgement paragraphs 1899 and 1900, hitting both lawful  
2 targets, civilian objects and residential areas.

3 Now the Chamber reasonably considered that these impacts were not  
4 accidents. For example, the cemetery was at least 700 metres from a  
5 lawful target. The hospital was at least 450 metres from a lawful  
6 target. And that's in the Judgement at paragraph 1905.

7 Likewise, the ECMM HQ was 300 metres from a lawful target. 1903.

8 Nothing in this appeal affects the findings by the Chamber about  
9 those particular impact locations. And they remain significant, whatever  
10 method is used to evaluate them. Given all of the evidence considered by  
11 the Chamber, neither Rajcic's evidence, nor any other evidence in the  
12 record, raised a reasonable doubt about the meaning of Gotovina's attack  
13 order.

14 Second, Your Honours, turning to the point raised by my learned  
15 friends about ratios and statistics. The ratio, as Mr. Stringer said, of  
16 impacts on lawful targets or within 200 metres of lawful targets compared  
17 to impacts on civilian objects or outside 200 metres from lawful targets  
18 also demands the conclusion that the HV fired indiscriminately. Of  
19 course, no Chamber could attempt to identify all of the impact locations  
20 in an attack of this scale, but the fact that almost 50 per cent of the  
21 impact locations are more than 200 metres from a lawful target is  
22 significant. This is consistent with all the other evidence, bearing in  
23 mind the incomplete nature of the artillery logs. And that fact is  
24 referred to in the Judgement at paragraphs 1267, 1367, and 1368.

25 Moreover, Your Honours, the findings in the Judgement supporting

1 the 50 per cent analysis are set out in the annex to our response brief.

2 Now, Gotovina has said, in his brief at paragraph 3, that the  
3 Chamber presumed that about 95 per cent of the artillery fire hit lawful  
4 targets, but there is no justification for that view in the Judgement.  
5 And given the weight of other evidence which supports the indiscriminate  
6 nature of the attack, the presumption of innocence did not require the  
7 Chamber to make such a finding.

8 Thirdly, Your Honour, the particular impact locations are only  
9 part of the story. The reality of the situation in Knin was graver than  
10 these individual episodes imply. More widespread. More hazardous for  
11 the civilian population. Sergeant Dreyer, who marked Exhibits P78 and  
12 P79 to where he had seen artillery impacts, said this:

13 "What I should have done is I should have taken a big pen and  
14 drawn a circle right around Knin and not specify and say: This is the  
15 area of impact. Because that was the area of impact. Knin itself, in  
16 all directions ..."

17 And that's in the transcript at page 1741.

18 As Mr. Stringer briefly mentioned, eye-witnesses in Knin agreed  
19 that artillery fire was evenly spread across the town and not especially  
20 concentrated on those military targets of which the witnesses were aware,  
21 and the Chamber reasonably took this evidence into account. These  
22 witnesses included at least six either serving or retired professional  
23 military officers. And Your Honours can find that in the Judgement at  
24 paragraphs 1278, 1287, 1295 to 1297, 1311, and 1336.

25 Colonel Leslie said, at page 1979 of the transcript:

1           "The fire was, to put it in laymen's terms, all over the place."

2           Moreover, even when the two-day long attack was in its relatively  
3 early stages, its indiscriminate nature was patently obvious. And I  
4 refer Your Honours on that point to Exhibit P331.

5           Your Honours, may I continue? I'm obliged.

6           The artillery fire itself prompted General Forand immediately to  
7 send a letter of protest to Gotovina and the HV commanders, which is in  
8 evidence at P83.

9           Your Honours, I shall now turn to address the second question  
10 from the addendum more directly.

11           Your Honours asked whether the Chamber's conclusion about impact  
12 locations should be upheld if the 200-metre margin was erroneous. And  
13 our answer simply is: Yes.

14           The 200-metre margin did form part of the Chamber's analysis, as  
15 described by Mr. Stringer, but even so, although the margin was relevant  
16 to the Chamber's finding of unlawful attack, it was not necessary to it.  
17 Therefore, even if the 200-metre margin of error is removed from the  
18 Chamber's analysis, Your Honours can still uphold the finding of unlawful  
19 attack.

20           First, on the basis of the comprehensive body of evidence  
21 described by Mr. Stringer. Second, on the basis that if Gotovina can  
22 show all of the impact locations are explained by the margin of error,  
23 then those weapons were inherently unsuitable for use in an urban  
24 environment. And, thirdly, on the basis of the disproportionate nature  
25 of the HV artillery fire.

1           Since Mr. Stringer has already addressed the first point, I will  
2           confine my submissions to the second and briefly also to the third.

3           Your Honours have heard Gotovina assert today that a 400-metre  
4           margin of error would have been a reasonable finding for the Chamber  
5           rather than 200 metres. But even such a margin of error would not  
6           undermine the Chamber's finding. For example, the impacts by the  
7           cemetery, 700 metres from a lawful target, and the hospital, 450 metres  
8           from a lawful target, still could not be explained as accidental,  
9           collateral damage. Indeed, to undermine the Chamber's findings that the  
10          impact locations could not have been accidental, Your Honours would need  
11          to be satisfied that a 700-metre margin of error was applicable. And  
12          Gotovina has pointed to nothing in the record which supports such a  
13          margin, much less that the Chamber was unreasonable for not considering  
14          it.

15          Moreover, even if the evidence were to show that the HV  
16          artillery, in fact, had a 700-metre margin of error or even a greater  
17          margin of error still, then that factor should be taken into account in  
18          assessing the intent behind the attack. The HV gunners were trained and  
19          experienced - that's in the Judgement at paragraph 1183 - and they and  
20          their commanders would have known the error of their weapons. Use of  
21          such inaccurate weapons in the context of these four towns would strongly  
22          indicate the intent to treat the whole towns as targets. And,  
23          Your Honours, the Appeals Chamber has expressly recognised such an  
24          approach in the case of Martić, and that's in the Martić Appeals  
25          Judgement at paragraphs 260 to 261; in the Strugar Appeal Judgement at

1 paragraph 275; and in the Galic Appeal Judgement at paragraph 132.

2 Further still, in the footnote to which my learned friend's  
3 referred, the Chamber itself recognised the application of this approach.  
4 So in footnote 932 of its Judgement, volume 2, the Chamber said of its  
5 findings about particular impact locations:

6 "Had these impacts which were at a distance of up to 700 metres  
7 from artillery targets been the result of the inaccuracy of the  
8 weapons ... that would require a further consideration of whether such  
9 inaccurate weaponry can be used in the context of an artillery attack on  
10 specific targets within a town."

11 This footnote, Your Honours, was not an acknowledgment that the  
12 Chamber could not determine the proper margin of error, but, rather, an  
13 acknowledgment that if the margin of error was much greater than it  
14 appreciated it to be, then it would also have taken that into account in  
15 its analysis.

16 Finally, Your Honours, the Chamber's approach to proportionality  
17 would also support its overall finding even if the 200-metre margin was  
18 unreasonable.

19 The Chamber expressly regarded the three separate attacks on  
20 Martić's location, which it found to be disproportionate, as "an  
21 indicative example." And that's at footnote 935 of volume 2 of the  
22 Judgement. The Chamber also made all the necessary findings to show that  
23 the other attacks on Knin could also have been disproportionate. Since  
24 all of the targets were in the vicinity of civilians and civilian  
25 objects, the Chamber's finding of, and I quote, "a significant risk of a

1 high number of civilian casualties," and that's in paragraph 1910 of the  
2 Judgement, "related equally to them all."

3 As for the limited military advantage, the Chamber expressly  
4 noted that the targets themselves were physical structures, they were  
5 buildings, and the number of troops present in Knin was only about 150.  
6 And that's in the Judgement at paragraphs 1225 and 1397.

7 And also, Your Honour, in the context of Judge Meron's question  
8 earlier about targets of opportunity, in paragraph 1908 where the Chamber  
9 considered this with respect to Knin, they again noted that even if there  
10 were observers, such that they could have been engaged, the number of  
11 those targets within the city on the evidence was not sufficient for such  
12 action.

13 These targets taken together certainly did not require at least  
14 900 rounds of artillery fire, fired for 26 hours out of a 31-hour period,  
15 using both rockets and guns. Such attacks were disproportionate. And  
16 for some of the relevant factors in this analysis, Your Honours can see,  
17 for example, the Judgement at paragraph 1184, and also the report of  
18 Prosecution expert witness Konings, which is Exhibit P1260. That's in  
19 fact the addendum to his report.

20 Your Honours, in the interests of time, I will now touch very  
21 briefly on the aspect of victims and then I shall defer to my learned  
22 friend Ms. Baig.

23 As I have already said, the town of Knin contained approximately  
24 15.000 civilians on the morning of the 4th of August, and that's in the  
25 Judgement at paragraphs 1233, 1577, and 1747. But by the time the HV

1 troops arrived on the 5th of August, just a day and a half later, during  
2 which time the shelling attack was in progress, approximately 14.000 of  
3 these 15.000 people had fled their homes in terror as result of the  
4 attack. And that's in the Judgement at paragraph 1743 and 1747. And all  
5 of these individuals are victims in the sense that they're affected by  
6 the shelling.

7 With regard to findings about civilian deaths or injury or damage  
8 to particular civilian objects, as Mr. Stringer has said, Gotovina and  
9 Markac were charged with persecution by way of unlawful attack, which has  
10 no results requirement, rather than unlawful attack itself. But the fact  
11 that the Chamber didn't make findings on the point doesn't mean that it  
12 did not hear evidence on the point. At least seven eye-witnesses  
13 referred to seeing what they thought were the bodies of civilians killed  
14 in Knin in that period. And Your Honours can find those references at  
15 paragraphs 1287, 1291 to 1292, 1302, 1307, 1333, 1336, and 1390 of the  
16 Judgement.

17 Likewise, Your Honours, at least nine eye-witnesses testified  
18 about the widespread damage done to civilian objects in the town. And  
19 Your Honours can find that in the Judgement also, roughly between 1276  
20 and 1349.

21 Many of these witnesses did note that the damage done was less  
22 than they might have expected from the violence of the shelling that they  
23 had experienced, but this is consistent with the evidence of Prosecution  
24 expert witness Konings as to the effects of the kinds of munitions that  
25 were used. And Your Honours can find that in Exhibits P1259 and P1260.

1           Lieutenant Liborius, who was an eye-witness, also noted that the  
2           use of rockets against Knin would have very limited effect against  
3           targets such as buildings. He said:

4           "The use of especially multiple rocket systems of modest calibre  
5           appeared to me to terrify people as this weapon has no real effect on  
6           hard targets."

7           And, Your Honours --

8           THE INTERPRETER: The speaker is kindly requested to slow down in  
9           order to facilitate the simultaneous interpretation.

10          MR. CROSS: Thank you. And, Your Honours, rockets accounted for  
11          almost 45 per cent of the rounds fired in the unlawful attack. And  
12          that's in the Judgement at paragraphs 1263 to 1265.

13          On my very final point, Your Honours, the damage assessments  
14          carried out by some international observers, as Mr. Gotovina referred,  
15          were in many cases significantly underestimating the extent of the  
16          damage. These matters were fully and reasonably addressed in the  
17          Judgement and the Prosecution relies in that respect on the arguments set  
18          out in its response brief at paragraphs 46 to 49.

19          Your Honours, unless Your Honours have any further questions,  
20          this concludes my submissions.

21          JUDGE MERON: So thank you.

22          Please proceed.

23          MS. BAIG: Good morning, Your Honours.

24          I'm responding to question 4. In doing so, I will touch very  
25          briefly on a few points raised by the Appellant in grounds 2, 3, and 4,

1       concerning deportation and joint criminal enterprise.

2               Unless you have specific questions on these issues, the  
3       Prosecution would rely on its brief.

4               In question 4, the Appeals Chamber has asked whether the  
5       Trial Chamber's findings that a JCE existed should be upheld if its  
6       findings -- that illegal artillery attacks took place is deemed erroneous  
7       because of errors resulting from the application of the margin of error.

8               Your Honours, the Prosecution's short response to this is: Yes.  
9       Because the JCE members intended these artillery attacks to cause the  
10      deportation of the Serb civilian population from the Krajina.

11              Before I go on to explain this position in more detail, I'd like  
12      first to clarify that the Prosecution is not suggesting the  
13      criminalisation of legitimate warfare. Nor is it upsetting the balance  
14      between human protection and military necessity as was suggested this  
15      morning. In the hypothetical situation of a military commander who to  
16      achieve a military objective launches an artillery attack against  
17      military targets and this results in unforeseen and incidental civilian  
18      flight, there could in that situation be no basis for a conviction for  
19      deportation as a crime against humanity. Such a commander would not have  
20      the necessary intention required for that crime, nor would the action  
21      form part of a widespread and systematic attack against the civilian  
22      population.

23              But I must emphasise, Your Honours, that as much as the Defence  
24      attempts to spin the Judgement towards that hypothetical, Gotovina is not  
25      in the position of this hypothetical and innocent commander. Instead,

1       Gotovina and his fellow JCE members shared the direct intention to deport  
2       using the artillery attack as the means to achieve this end, and that's  
3       found at paragraph 2314 of the Judgement. As a result of the shelling,  
4       20.000 Serb civilians fled from the Krajina in a sudden and mass exodus.  
5       Croatian forces didn't just seek to defeat their military opposition to  
6       take control of the region. They also aimed at a crime - emptying the  
7       land of its Serb habitants. Harming the civilian population was an  
8       objective of the military operation.

9               Gotovina's criminal convictions, including the Trial Chamber's  
10       findings that a JCE existed, should therefore be upheld even if the  
11       artillery attack findings are invalidated. Overall, the operation was  
12       still unlawful under the laws and customs of war because it was aimed at  
13       achieving the expulsion of the civilian population. This purpose is  
14       expressly prohibited by basic principles of international humanitarian  
15       law which undoubtedly form part of custom. And I'll briefly touch on the  
16       principles of distinction and humanity as well as the international  
17       humanitarian provisions on deportation.

18               At its most basic, the principle of distinction requires the  
19       parties to direct their military actions against military rather than  
20       civilian objectives. Examples of this provision can be found in  
21       Articles 48, 51(2), 52(2) of Additional Protocol I, and Article 13(2) of  
22       AP 2, as well as many others. As the preamble of the St. Petersburg  
23       Declaration of 1867 states:

24               "The only legitimate object which States should endeavour to  
25       accomplish during war is to weaken the military forces of the enemy."

1           This principle is codified in Article 48 of Additional  
2 Protocol I, the basic rule concerning protection of the civilian  
3 population. The parties to the conflict shall "direct their operations  
4 only against military objectives." Operation Storm in contrast was  
5 directed against a civilian objective - to achieve the removal of the  
6 civilian population.

7           International humanitarian law, of course, also encompasses the  
8 principle of humanity which demands that the parties limit, as much as  
9 possible, the effects of war on the civilian population. Common  
10 Article 3 to the Geneva Convention, for example, prohibits deportations  
11 and transfers as violence to life and person and outrages upon personal  
12 dignity. Again, Operation Storm violated this principle by intentionally  
13 subjecting the civilian population to these harms through deportation.

14           Moreover, forcible movement of civilians is strictly regulated by  
15 international humanitarian law, for example, Article 49 of  
16 Geneva Convention 4 and Article 17 of AP 2, and allowed only under the  
17 most stringent conditions, none of which were satisfied in this case.  
18 Generally speaking, the population can only be moved to ensure its  
19 security or for imperative military reasons. The move can only be  
20 temporary, provision must be made for the safety and care of the  
21 civilians. Violent or arbitrary means or a lack of provision for health  
22 and safety would in themselves make such transfers unlawful under IHL.

23           Thus, under IHL, the shelling in this operation was illegal not  
24 only because it targeted whole towns as explained by my colleagues. It  
25 was also illegal under IHL because it was aimed at causing the

1 deportation of the Serb civilian population. A further violation of the  
2 principles of distinction and humanity. In sum, it wasn't only the means  
3 that was illegal. So too was the intended result. More importantly for  
4 this case, there can be no question that this amounted to deportation as  
5 a crime against humanity, which I will move to shortly.

6 In many cases, Your Honour, if it turns out that the accused  
7 targeted military objectives, then it might be very difficult to infer  
8 any criminal intention. In this case, however, the JCE members illegal  
9 objective for the military operation was clear. We have a transcript of  
10 the JCE members planning their criminal operation. The JCE members then  
11 committed the crime of deportation by shelling the towns and causing the  
12 mass exodus of 20.000 Krajina Serbs. Immediately afterwards, Tudjman,  
13 the president and supreme commander of the armed forces and a key member  
14 of the JCE, bragged publicly about the efficiency of the criminal  
15 expulsion. Gotovina and others encouraged a crime wave against Serbs --  
16 remaining Serbs and their property, causing further deportations.  
17 Finally, to ensure that the Serbs who had left could not return to the  
18 Krajina, members of the JCE instituted discriminatory laws and policies  
19 aimed at preventing their return to Croatia and transferring their  
20 property to Croats in accordance with the Croatian leadership's  
21 demographic re-colonisation policy.

22 Taking these findings as a whole, it's clear that the JCE member,  
23 including Gotovina, shared the intent to deport the civilian population  
24 and then executed this common criminal purpose. This was not a military  
25 attack that led to an unintended consequence as Gotovina would have you

1 believe. It was a crime committed purposefully, in tandem with a  
2 military operation.

3 Let me briefly take you to a few of the details, turning first to  
4 the Brioni meeting.

5 The Trial Chamber found that in the context of a long ethnic  
6 struggle between Serbs and Croats in the Krajina region, JCE members were  
7 planning an attack aimed at expelling the Serb population from the  
8 Krajina and then keeping them out. This is supported by the transcript  
9 of the meeting. As Mr. Stringer has already mentioned, Gotovina suggests  
10 that if the HV continued pressure, then "for some time to come, there  
11 won't be so many civilians, just those who have to stay, who have no  
12 possibility of leaving."

13 And that's at P461, page 15, discussed in the Judgement at  
14 paragraph 2304.

15 Gotovina's comments confirm that he knew that an artillery attack  
16 would cause civilian flight and keep civilians out. Gotovina's attempt  
17 to isolate this comment as an innocent prediction is untenable in the  
18 context of the transcript of the whole -- as a whole, and in the context  
19 of the rest of the evidential record which shows that this was the intent  
20 behind the operation. Equally, his repeated claims that he was not  
21 talking specifically about Serbs must be rejected in light of the  
22 ethnically charged context.

23 Moreover, the Chamber properly rejected the Defence argument that  
24 this exchange concerned moving civilians out of harm's way, explicitly  
25 finding that this was not a reasonable interpretation. It noted that the

1 participants made no reference whatsoever as to how the military  
2 operation could be carried out in a way to minimise civilian harm.  
3 Instead the focus of the discussion was on creating a pretext for using  
4 the artillery and exchanging artillery for "complete demoralisation."  
5 Gotovina confirmed that Knin could be destroyed in its entirety in a few  
6 hours.

7           Statements of the other participants demonstrate that the JCE  
8 members shared this intent to deport, that the objective of the operation  
9 was to cleanse the area. For example, Tudjman proposed using propaganda  
10 to increase civilian chaos and encourage additional civilian departures.  
11 Leaflets in which they would pretend to encourage Serbs to stay, by  
12 "ostensibly" guaranteeing their rights. The Chamber gave very detailed  
13 consideration to the parties' submissions, particularly concerning the  
14 translation and the correct interpretation of this particular exchange,  
15 finding that it was an "expression of the true intent to show Serbs out  
16 but at the same time giving them the impression that they could stay."

17           And that's at paragraph 1994 of the Judgement.

18           The Chamber found that within days of this discussion, Gotovina's  
19 comments that the only remaining Serbs would be the ones who couldn't  
20 leave became a reality. Gotovina planned, ordered and conducted the  
21 artillery attack aimed at cleansing the area of its Serb population.  
22 Whether or not the artillery attack also targeted military objectives,  
23 the Chamber found that as a result of Operation Storm shelling, "large  
24 parts of the civilian population of Knin, Benkovac, Obrovac, and Gracac,  
25 amounting to at least 20.000 people, were forcibly displaced from their

1 homes and fled across the border to Bosnia-Herzegovina and Serbia."

2 At 2305 of the Judgement.

3 This was exactly the result that was planned during the meeting.

4 Gotovina's contributions to the common criminal purpose do not  
5 depend on the artillery attack being found unlawful in and of itself, and  
6 I remind you that a JCE contribution need not be criminal per se. And  
7 you can find that at the Krajisnik Appeals Judgement, paragraph 215.

8 I should point out here that the issue of lawful or unlawful  
9 targeting has no effect on the causation of the mass exodus. Deportation  
10 as a crime against humanity does not require that the underlying means of  
11 carrying out the deportation is unlawful in and of itself. For example,  
12 forcible displacement crimes have been carried out through hate speech,  
13 propaganda, and the driving of buses, which may not be criminal per se.  
14 In this case, the evidence proves that the shelling was the cause of the  
15 mass exodus. Witness after witness confirmed that the civilians left the  
16 Krajina because of the shelling.

17 And to take up the issue raised by my colleagues this morning, I  
18 would point you briefly to Witnesses 6 and 54 as examples of witnesses  
19 who said specifically that they left because of the shelling. There are  
20 many more in the transcripts.

21 And they left because of the shelling, Your Honours, not because  
22 of any evacuation order. My colleague Ingrid Elliott will discuss the  
23 evacuation in more detail in relation to Markac's appeal this afternoon.  
24 But the evacuation order came far too late in the afternoon, once the  
25 civilians were also already fleeing, if it was even distributed. And

1       there is considerable evidence and findings about the evacuation order  
2       coming far too late and questions about its dissemination that  
3       Ms. Elliott will discuss. Regardless of the legal characterization of  
4       the shellings, Your Honour, it was still the actus reus of the  
5       deportation.

6               And what of the few Serbs that Gotovina mentioned at Brioni who  
7       had no possibility of leaving? Well, they were subjected to further  
8       abuse, including additional persecutions, murders, inhumane acts, cruel  
9       treatment, unlawful detentions, wanton destruction, and plunder. These  
10       crimes caused further deportations. The Chamber found that in addition  
11       to ordering and commanding Operation Storm, Gotovina also contributed to  
12       the JCE by failing to make a serious effort to prevent and follow up on  
13       crimes committed by his subordinates against the Serb civilians and Serb  
14       property.

15               JUDGE MERON: You might be going a bit too fast for our  
16       interpreters.

17               MS. BAIG: I'm sorry, I have -- I didn't hear that. I apologise.

18               So the Chamber found that Gotovina also contributed to the JCE by  
19       failing to make a serious effort to prevent and follow up on crimes  
20       committed by his subordinates against the Serb civilians and Serb  
21       property after Operation Storm.

22               This failure further confirms Gotovina's intentions. Instead of  
23       taking the available measures to prevent or punish, Gotovina excused his  
24       subordinates' crimes by claiming that these were acts of understandable  
25       revenge. These actions are inconsistent with Gotovina's claims of

1 innocent conduct or innocent intention.

2 Finally, Your Honours, before I conclude, I should emphasise that  
3 if the Chamber were to find that the JCE conviction was unsustainable,  
4 this would require the Chamber to make further findings on the other  
5 modes of liability as the Appeals Chamber did in the Dragomir Milosevic  
6 case. For example, for the reasons that I've just discussed, Gotovina  
7 would in any event be guilty of aiding and abetting the crimes of the JCE  
8 because he knowingly made a substantial contribution to them. Likewise,  
9 the Chamber would have to consider Gotovina's criminal responsibility as  
10 an aider and abettor or instigator and under the doctrine of superior  
11 responsibility for the follow-on crimes committed after Operation Storm.

12 To wrap up the Prosecution's response on question 4,  
13 Your Honours, even if the Appeals Chamber finds, first, that the  
14 Trial Chamber erred applying the margin of error, then that this affects  
15 the Trial Chamber's conclusion about impact sites and that this leads to  
16 a reversal of the Chamber's findings concerning the illegality of the  
17 artillery attacks themselves, the Chamber's finding that Gotovina is  
18 guilty of participating in a JCE to permanently remove the Serb civilian  
19 population from the Krajina should be upheld. Gotovina and his fellow  
20 JCE members shared the common criminal purpose to deport of civilian --  
21 the Serb civilian population from the Krajina and carried out that  
22 purpose through the shelling attack aimed at harming the civilian  
23 population.

24 Moreover, Your Honours, once one looks at Gotovina's illegal  
25 order to target the whole towns, his subordinates' orders that repeat

1       this down -- down the chain of command in similar terms, the HV reports  
2       back up the chain of command that towns in general had been shelled, the  
3       eye-witness accounts of the attack on those towns, and the effect of the  
4       shelling, this provides additional confirmation of the Trial Chamber's  
5       convictions.

6               Your Honours, may I just wrap up with a final paragraph?

7               Your Honours, Gotovina shared the common criminal purpose of the  
8       joint criminal enterprise to permanently remove the Serb civilian  
9       population from the Krajina. To fulfil this common criminal objective,  
10      he ordered the forces under his command to treat whole towns as military  
11      targets and followed through with an illegal attack against civilians and  
12      civilian objects. Subsequently, he failed to prevent or punish his  
13      subordinates for committing crimes against the remaining Serbs and their  
14      property. As a result of their concerted efforts, some 20.000  
15      Krajina Serbs were forcibly displaced. Many others were killed, injured,  
16      and suffered damage to their -- and suffered damage to their homes and  
17      property in the aftermath of the operation.

18              Gotovina was properly convicted by the Trial Chamber. He has  
19      failed to show any legal error invalidating the verdict or any factual  
20      error occasioning a miscarriage of justice, and his appeal should be  
21      dismissed in its entirety.

22              JUDGE MERON: Thank you. We will now adjourn --

23              MR. JONES: Your Honour --

24              JUDGE MERON: -- until 12 --

25              MR. JONES: Mr. President, sorry, I have an objection. I waited

1       until Ms. Baig had finished, but it's simply this, if I may. The  
2       Scheduling Order envisages that the Prosecution to our submissions,  
3       respond to our submissions in the afternoon. Now they can't -- as  
4       Ms. Baig has twice indicated, she says, We will deal in detail with the  
5       evacuation orders in the afternoon in the response. Well, the response  
6       is going to respond to our oral submissions. We don't plan to deal with  
7       evacuation orders. And so it would be improper for the Prosecution to  
8       reserve the right to make further submissions in effect in response to  
9       Gotovina's appeal in -- under the heading of response to our submissions.  
10      That would be improper, and so I will object if the Prosecution tries to  
11      use their slot for responding to us in fact to respond to Mr. Gotovina.  
12      That would not be right.

13                JUDGE MERON: I take note of your point. Please do remember that  
14      I myself asked a question about evacuation orders, to which they had to  
15      respond --

16                MR. JONES: Yes, but they won't --

17                JUDGE MERON: -- but your point --

18                MR. JONES: We won't --

19                JUDGE MERON: Your point is well taken.

20                MR. JONES: I'm obliged.

21                MS. BAIG: Mr. President, just to mention also that the  
22      evacuation order is also raised by Markac's appeal more fully and it will  
23      be discussed there. Thank you.

24                MR. JONES: But not our oral submissions. This is the chance to  
25      respond to oral submissions.

1           JUDGE MERON: I think that we will let it go as it is. The Court  
2 has listened to the argument and will be fair in their evaluation and  
3 assessment, I can assure you.

4           Okay. 12.45.

5                               --- Recess taken at 12.31 p.m.

6                               --- On resuming at 12.46 p.m.

7           JUDGE MERON: Please be seated.

8           Reply for Mr. Gotovina. 30 minutes.

9           MR. MISETIC: Thank you, Mr. President.

10           In reply, let me start my remarks, Mr. President, by noting  
11 something that must be noted by the Appeals Chamber as well, and that is  
12 the dramatic change in the Prosecution's case from its pre-trial brief to  
13 its remarks today.

14           We, as Defence counsel, we must admit, are a bit flabbergasted at  
15 how we have had to sometimes try this case as if we were trying to catch  
16 a butterfly, and that is trying to pin down the Prosecution on what its  
17 theory of the shelling case is. This started out in the pre-trial brief  
18 as a case of almost, per se, unlawfulness of shelling by the firing of  
19 artillery on towns that contained no military objectives, and today,  
20 after -- through all the years of shifting theories, it went to  
21 indiscriminate attacks and then use of weapons that did not respect the  
22 principle of distinction, and ultimately, today we are discussing whether  
23 the fire on lawful military objectives was the act of deportation that  
24 caused civilian flight.

25           That should reveal something to the Appeals Chamber and I note

1       that that is the first time the Prosecution has ever raised that argument  
2       in this case.

3               That should tell you something about the evidence in this case  
4       and about the strength of the Prosecution's case.

5               The second thing that you should note is that the Prosecution in  
6       its presentation virtually, although it made the pro forma defences of  
7       the Trial Judgement, spent most of its time abandoning the  
8       Trial Chamber's reasoning and adopting brand new reasoning.

9               For example, whereas the Trial Chamber drew its inferences of  
10      criminal mens rea from the actus reus having been allegedly proven, the  
11      Prosecution now says, well, if we haven't proven the actus reus, then we  
12      ask you to infer from the proven criminal mens rea that there was an  
13      intent to deport and therefore you should start looking at whether the  
14      targeting of lawful military objectives constitutes the crime of  
15      deportation.

16              This morning we went item by item, and we will not repeat  
17      ourselves, about how the Trial Chamber inferred criminal intent into HV  
18      artillery reports, how it infer -- how it rejected Marko Rajcic's  
19      testimony from its finding of the commission of an unlawful attack.

20              The Prosecution did not address any of the arguments we raised  
21      this morning.

22              The second issue is the Prosecution now argues disproportionate  
23      attack and that that somehow is consistent with the Trial Chamber's  
24      findings, despite the fact that the Trial Chamber in footnotes 932 and  
25      935 expressly said that it would not consider the proportionality of the

1 overall attack except for the Martić incident.

2 Third, the Prosecution now argues that MBRLs were improper to use  
3 on the towns, despite the express finding of the Trial Chamber to the  
4 contrary at paragraph 1897 of the Judgement.

5 Fourth, and perhaps most importantly, although all of these  
6 points are important, this argument about firing on military objectives  
7 with an unlawful purpose is inconsistent with the Trial Chamber's own  
8 findings. And I draw the Appeals Chamber's attention to paragraphs 1899  
9 and 1900, 1901, 1902, and that's just for Knin.

10 The last sentence of all those paragraphs say:

11 "In light of these findings, the Trial Chamber considers that the  
12 evidence allows for the reasonable interpretation that the HV may have  
13 determined in good faith that firing," in this case, "at the railway  
14 station and post office would have offered a definite military  
15 advantage."

16 The Trial Chamber then in the subsequent paragraphs again says  
17 that the identification of these targets in Knin, Benkovac, Obrovac, and  
18 Gracac, the Trial Chamber found there was sufficient basis in the  
19 evidence to conclude that they were selected in good faith.

20 JUDGE MERON: My colleague Judge Guney has a question.

21 JUDGE GUNEY: [No interpretation]

22 MR. MISETIC: There's no interpretation. We don't have  
23 interpretation.

24 JUDGE MERON: You probably have to change the channel? No, you  
25 are okay.

1 MR. MISETIC: The LiveNote also doesn't have it, the transcript.

2 JUDGE MERON: Can we try again?

3 JUDGE GUNEY: [No interpretation]

4 JUDGE MERON: Are you having interpretation?

5 MR. MISETIC: No. And the court reporter is not either,  
6 Mr. President.

7 JUDGE MERON: So we stop for a second and address this issue Just  
8 wait one second -- or you will ask in English? [Microphone not activated]

9 JUDGE GUNEY: [Interpretation] I repeat my question.

10 I'd like to know to what extent it's been unreasonable for a  
11 Trial Chamber to infer the civilian character of areas where there were  
12 no military targets, since the civilian character seemed to have been --  
13 may have been induced without any evidence to support it.

14 Should I repeat my question?

15 MR. MISETIC: Yes, please, Your Honour.

16 JUDGE GUNEY: [Interpretation] How, and in what was it  
17 unreasonable, for a Trial Chamber to infer the civilian character of  
18 areas where there were no military objectives, military targets? The  
19 civilian character may be -- may the civilian character be inferred from  
20 a general statement without any evidence to support it?

21 MR. MISETIC: Your Honour, it was completely unreasonable for  
22 several reasons.

23 First, as we noted this morning, the Blaskic Appeals  
24 Chamber Judgement says that the Prosecution bears the burden of proving  
25 that a "object was indeed dedicated to civilian purposes."

1           And the Appeals Chamber there rejected the -- what otherwise in  
2 Additional Protocol I is a presumption of civilian-ness unless the  
3 military nature of a target has been established. In a criminal case,  
4 the Prosecution bears the burden of proofing that fact.

5           The second reason it's unreasonable is the Trial Chamber itself  
6 at Trial Judgement paragraph 1267 said that the -- concludes that the  
7 Croatian army fired on more targets in Knin than it is aware of based on  
8 the evidence available to the Chamber.

9           The Trial Chamber thus assumed either that there couldn't have  
10 been additional military objectives in those "civilian areas" or else  
11 assumed that those targets, if they were within 200 metres, were civilian  
12 targets, i.e., unlawful targets of artillery fire.

13           So by simply drawing inferences of civilian areas based  
14 exclusively on whether the area is 200 metres away from a military  
15 objective tells us nothing about that particular area. And we use the  
16 example of the railway fuel storage in Knin. The Trial Chamber found  
17 that the railway station was a legitimate military objective but then  
18 found that the fuel used for the railway system was civilian because the  
19 station was 200 metres away from an objective -- objective that the  
20 Chamber could find in the evidence. Whether the railway fuel was being  
21 used for a military purpose in support of the railway system that was a  
22 military objective is a question the Trial Chamber didn't even attempt to  
23 answer because the Prosecution never introduced any evidence of civilian  
24 purpose of any particular area because its proposition at the beginning  
25 of the trial was the entire town is a civilian zone and there are no

1 military objectives in the town.

2 JUDGE GUNEY: [No interpretation]

3 MR. MISETIC: Thank you, Your Honour.

4 To complete the point that I was making earlier, in terms of the  
5 Trial Chamber's findings that these targets were identified in good faith  
6 as offering a military advantage, the Prosecution's new case would  
7 require that the HV in fact identify those objectives in bad faith.  
8 Because if the targeting of an objective has as its real purpose to  
9 target the civilian population, then by definition that cannot be good  
10 faith and it is by definition bad faith identifying of military  
11 objectives. So the Prosecution is asking you to make a series of  
12 findings in conflict with the Trial Chamber's own. And, unfortunately,  
13 we do not have time in 30 minutes to go through each of the military  
14 objectives that was established at trial as to why they offered a  
15 significant military advantage to the Croatian army in its effort to  
16 liberate its own territory and to seize the capital of a break-away Serb  
17 entity.

18 Next, in addressing some comments that were made about  
19 Mr. Galbraith and the Brioni transcript, the Prosecution talks about  
20 Mr. Galbraith's views of President Tudjman but ignores the more important  
21 issue of Ambassador Galbraith's conclusions about Operation Storm.

22 [Appeals Chamber confers]

23 JUDGE MERON: Excuse me just a moment.

24 [Appeals Chamber confers]

25 JUDGE MERON: I am sorry, but the Bench had to consult and now

1       you can proceed, say something about the procedure with regard to the  
2       point you have raised earlier with regard to the alleged novelty of the  
3       theory advanced today by the Prosecution and how we deal with it.

4               MR. MISETIC: Thank you, Mr. President.

5               The next issue to address is the attempt by the Prosecution to  
6       inject Ambassador Galbraith's views and whatever his views of  
7       President Tudjman were he had very specific views of what happened in  
8       Operation Storm, and I cite the Appeals Chamber to the trial transcript  
9       of his testimony at 5055 to 5056 under questioning by the Presiding Judge  
10      of the Trial Chamber:

11              "First of all, Mr. Galbraith, do you consider the purpose of  
12      operation form primarily to expel the Serbs?"

13              Answer:

14              "No, not all."

15              Judge Orie:

16              "Do you consider that this was or could be a side-effect of  
17      militarily taking over the Krajina territory and have it within Croatia  
18      again?"

19              His answer:

20              "I did not consider that the expulsion of the Serbs would a side  
21      effect but I did consider that the departure of the Serbs would be a  
22      side-effect."

23              And that is the distinction that we have consistently argued at  
24      trial and in our briefing here, and which the Prosecution conveniently  
25      ignores.

1           The participants at the Brioni meeting, as noted in our brief,  
2           had 60 days prior the experience of the events of Western Slavonia where  
3           the entire Serb civilian population left and it was clear based on  
4           investigations and indeed the conclusions of the Secretary-General of the  
5           United Nations that they left for reasons unrelated to any unlawful  
6           contact by the HV.

7           The Brioni participants certainly would have been aware of that  
8           possibility, indeed likelihood, that a similar thing might take place if  
9           they try to liberate their territory in Sectors North and South as well.  
10          That is what the discussion at Brioni is about.

11          Furthermore, the Trial Chamber itself, as we've noted several  
12          times today, found that the Serb civilians left everywhere but the four  
13          towns for reasons unrelated to any unlawful contact. So were the Brioni  
14          participants talking about all of those civilians leaving who did leave  
15          for reasons related to any unlawful contact as found by the Trial  
16          Chamber? Or were they talking about implying that they should target  
17          civilians in four towns to force them to leave?

18          And the question arises: How reasonable is it that if Serb  
19          civilians had evacuated Western Slavonia 60 days earlier and had  
20          evacuated the entire Krajina except for four towns for reasons unrelated  
21          to any unlawful conduct by the HV, that they would have stayed in the  
22          four towns but for the illegal conduct of the HV, or, as we heard this  
23          morning, the lawful targeting by the HV intended to force them to flee.

24          We submit to Your Honours there is no basis for that inference in  
25          the Brioni transcript.

1           They mention General Gotovina's comment at Brioni, and, again, so  
2     I don't repeat myself, General Gotovina's comment was perfectly accurate  
3     as found by the Trial Chamber in all places but the four towns. And you  
4     have military commanders considering, What are we to do if the civilian  
5     population decides to leave en masse as they had done 60 days later?  
6     That is the discussion. And the conclusion is: Let the civilians leave.  
7     What is the alternative? To trap civilians in a war zone? To force  
8     their army to continue to fight for their civilians?

9           Turning again to another issue regarding these 95 per cent of  
10    rounds. The Prosecution twists our position and we need to clarify this.  
11    We have pointed the Appeals Chamber to a chart that was submitted on the  
12    7th of October to the Appeals Chamber in a filing. What we are saying is  
13    the Trial Chamber found that 95 per cent of all projectiles were fired at  
14    military objectives.

15           The second question that then arises which the straw man that the  
16    Prosecution was addressing this morning is, where did those projectiles  
17    land and we only know where a certain number landed. The Prosecution --  
18    it is the Prosecution's case, whether they acknowledge it or not, that  
19    every one of those rounds fired at a military objective, i.e., 850 out of  
20    the 900 rounds, must have landed within 200 metres. Why do we say that?  
21    Because they say and they are defending the 200-metre rule this morning.  
22    And the 200-metre rule says there can be no explanation for a shell  
23    falling outside of 200 metres except if the Croatian army intended to  
24    fire outside of that 200-metre radius. The Prosecution says there can be  
25    no inherently indiscriminate nature of the weapons if the 200-metre

1 survives. Therefore, if the Croatian army intended to fire 850 rounds at  
2 military objectives, then the Trial Chamber's case and the Prosecution's  
3 defence of that case must mean that every one of those rounds fell within  
4 200 metres.

5 The Prosecution discusses General Gotovina's order as well as the  
6 fact that the order was repeated by subordinates. Again, the  
7 Trial Chamber's approach here was to reject Marko Rajcic's testimony on  
8 the basis of its conclusions about impact locations and we need not  
9 repeat our positions already argued this morning. But if Marko Rajcic's  
10 testimony was corroborated and correct and could not be excluded on the  
11 basis of findings on impact areas, then all we are left is a lawful order  
12 that was repeated down the chain of command.

13 We noted and there was some discussion by my learned friend,  
14 Mr. Cross, this morning, about one shell that landed at 700 metres away.  
15 As I noted this morning, and Mr. Cross did not contest, five out of 900  
16 landed beyond the margin of error of the weapons system. Why did one  
17 fall at 700 metres? We're not saying that margin of error is the only  
18 reason that a shell might fall beyond the margin of error of a weapons  
19 system. As I noted to Judge Guney there were additional targets in the  
20 town which the Trial Chamber confirmed at paragraph 1267. Was one of  
21 those targets by the cemetery which was 700 metres away from another  
22 military objectively? The Trial Chamber doesn't answer that question.

23 Were there targets of opportunity? The Trial Chamber, again,  
24 found, no, but that conclusion, as we have noted in our briefs, was  
25 unreasonable.

1           Concerning casualties -- excuse me, let me address one other  
2 point.

3           The Prosecution says that the Trial Chamber considered Konings'  
4 testimony on range of error in establishing the 200-metre rule. We  
5 pointed out this morning that Mr. Konings, as stated by the Trial Chamber  
6 in paragraph 1898, would have set the margin of error at 295 metres for a  
7 weapon T-155 at 14 and a half kilometres. So how that could possibly  
8 corroborate the Trial Chamber's 200-metre finding is left unexplained by  
9 the Prosecution.

10           Concerning casualties, there was a reason that the Trial Chamber  
11 made no finding that any person was killed by shelling. And it is  
12 certainly much more complex than was presented by Mr. Stringer this  
13 morning about if somebody sees a body in the street that person must have  
14 been killed by artillery. First, there is the question of the  
15 credibility of the witnesses and their statements, a fact that the  
16 Trial Chamber does not explore in the Judgement.

17           Second, the Trial Chamber notes in paragraphs 1360 to 1364 that  
18 it only had forensics for three persons alleged to have been killed in  
19 Knin on 4 August and found that those forensics did not prove that anyone  
20 had been killed by shelling. Furthermore, and this is important, it is  
21 18 years since Operation Storm. We don't have anecdotally hearsay-wise  
22 any news report of any family member or any human rights organisation or  
23 anyone who claims to have lost a loved one in the shelling of Knin,  
24 Benkovac, Obrovac, and Gracac. These alleged bodies that were seen in  
25 Knin, to this day, remain completely anonymous.

1           Finally, we note that Witness -- Prosecution witness Mira Grubor,  
2           at trial transcript 1418 and 1419 noted that in the entire southern  
3           Krajina the only hospital with a surgical ward was in Knin. Whether  
4           bodies had been brought there from other locations is, of course, a  
5           question that was entirely possible and there was plenty evidence of ARSK  
6           forces moving wounded from front line positions into Knin town on that  
7           day, a finding that the Chamber made itself in the Trial Judgement.  
8           Accordingly, the Prosecution's assertion that if a body is seen, there  
9           can be no other explanation other than they were killed by shelling is  
10          simply false.

11          Again, on this issue of disproportionate attack I also wish to  
12          make the following note, and I know, Mr. President, you have indicated  
13          you will address this or may address later, I'm not sure. There is no  
14          reference by the Prosecution of proportionality in any filing in this  
15          case prior to the commencement of trial. And to the extent that the  
16          Prosecution wishes to argue that they're entitled to draw or adduce  
17          evidence of proportionality in support of a theory of unlawful attack,  
18          that must be laid out in a pre-trial brief to give the accused proper  
19          notice and we cite the Appeals Chamber to the Prosecution's pre-trial  
20          brief in the Galic case where they did exactly that. And they provided  
21          proper notice to Mr. Galic that he was being accused of direct attack,  
22          including, through disproportionate attack. That was not the case here.

23          A comment was made this morning that Witness 6 and Witness 54  
24          said they left because of shelling. That is completely inaccurate. We  
25          have pointed out in our reply brief in this case that the witnesses said,

1 first of all, these witnesses lived in the immediate vicinity of what the  
2 Chamber found to be legitimate military objectives. So whether they were  
3 afraid of firing on a legitimate military objective, which is, we submit,  
4 a much more likely situation, or whether they were made afraid by three  
5 shells falling in an empty field more than a kilometre away from them was  
6 not explained by the Trial Chamber. Moreover, these individuals  
7 expressly said, and we've cited that in our reply brief, that they only  
8 left to outlying parts of Knin and other villages, intending to return,  
9 but then decided to leave, i.e., cross a de jure or de facto border, to  
10 leave the Krajina because others had started to depart after 6.00 p.m.,  
11 i.e., after Martić issued the evacuation order.

12 There is no person -- and then we were given the general sweeping  
13 statement "there are many other who testified to this," and of course  
14 that has never been cited in any brief by the Prosecution and nor is it  
15 identified in their comments today.

16 Speaking of Knin now.

17 Accordingly, we have no known victims, no hearsay reports of any  
18 dead or wounded in the shelling of Knin, and no even hearsay reports of  
19 persons saying, I decided to leave the Krajina because of a fear of  
20 shelling.

21 Turning now to two additional issues.

22 The Prosecution argues that General Gotovina committed to the  
23 JCE -- committed or contributed to the JCE by failing to take available  
24 measures to stop crime.

25 As the Appeals Chamber is aware, that finding by the

1 Trial Chamber is erroneous on many levels. First of all, as we noted in  
2 our remarks this morning, the Trial Chamber made an express finding that  
3 the common criminal purpose did not involve crimes like murder, burning,  
4 looting, inhumane conduct, et cetera. Therefore, as noted in our appeal,  
5 there is no substantial contribution to that crime, to those -- no  
6 substantial contribution to a JCE through those crimes. Furthermore,  
7 there can be no deportation of persons in furtherance of the common  
8 criminal objective if the Trial Chamber found that those means were not  
9 involved in achieving the common criminal purpose.

10 Accordingly, that argument must fail by the Prosecution as well.

11 Secondly, the Prosecution glosses over the Trial Chamber's  
12 findings about what measures General Gotovina was supposed to take. It  
13 is undisputed or at least it was accepted by the Trial Chamber that  
14 General Gotovina during this time immediately after Operation Storm was  
15 engaged in combat activities against the Bosnian Serb army in Bosnia when  
16 these crimes were taking place. The Trial Chamber found that  
17 General Gotovina, indeed, was allowed to presume that subordinates left  
18 in Croatia would be doing their jobs appropriately. However, the -- the  
19 Trial Chamber found that this presumption was rebutted when  
20 General Gotovina allegedly was put on notice that his subordinates were  
21 failing in their duties.

22 First of all, there is no finding by the Trial Chamber that any  
23 subordinate failed in his duties, or any subordinate entity failed in its  
24 duties. So on what basis the Trial Chamber conclude that  
25 General Gotovina was required to return from Bosnia to address crime in

1 Croatia is left unexplained because we still don't know who these  
2 subordinates were that were not doing their duties properly. As a matter  
3 of fact, the Trial Chamber concluded that, for example, the military  
4 police was working under difficult circumstances and that it was not  
5 proven that there was any intent to not investigate crimes against Serbs.

6 Furthermore, the measures that the Trial Chamber said --

7 JUDGE MERON: Make sure, counsel, that you don't go too fast for  
8 the interpreters.

9 MR. MISETIC: Yes, I apologise to the booths and the  
10 court reporter.

11 Next, the measures that Trial Chamber says General Gotovina  
12 failed to take were completely invented in the Judgement. I say  
13 "invented" because they were never discussed at trial, never raised by  
14 the Prosecution. They include things like failing to make public  
15 statements. That issue was never addressed at trial, and in fact the  
16 Prosecution's case was that the Accused Cermak was the person who was  
17 supposed to be making public statements.

18 The seconds issue is he failed to use adequate resources. That  
19 issue, as well, is vague, because it's unknown what resources he  
20 allegedly failed to deploy. And, third, is that he failed to contact  
21 relevant people, period. Who these relevant people are and why  
22 General Gotovina was required to contact them is left completely  
23 unexplained.

24 The Prosecution had a case on necessary and reasonable measures  
25 that General Gotovina should have taken. The Trial Chamber rejected all

1 of those. At that point, the Trial Chamber should have found in favour  
2 of the accused. Instead, it came up with three more measures that were  
3 never discussed at trial to conclude that General Gotovina's failure to  
4 take these measures amounted to a substantial contribution to a JCE.

5 We submit, Your Honours, that that is entirely unreasonable and  
6 that an accused, certainly in a trial, should be entitled to know what he  
7 is being accused of.

8 Finally, with respect to other modes of liability, the  
9 Trial Chamber made express findings that it was not considering  
10 alternative modes of liability. It would be entirely inappropriate now  
11 for General Gotovina to be convicted of a case of which he has no notice,  
12 with no right of appeal, to challenge any finding convicting him of  
13 something of which he was not convicted in the first instance.

14 It would be unfair to convict him or something that has not been  
15 fully litigated even in front of this Appeals Chamber; indeed these were  
16 comments made in passing in a footnote by the Prosecution in its  
17 respondent's brief without any further elaboration on why  
18 General Gotovina is liable under these alternative theories.

19 Your Honour, if I may, I apologise, just two minutes.  
20 Mr. Akhavan wanted to address Judge Pocar's question that was posed to  
21 the Prosecution, if we may briefly.

22 JUDGE MERON: [Microphone not activated] this will bring our  
23 proceedings this morning to their conclusion.

24 Mr. Akhavan.

25 MR. AKHAVAN: Thank you, Mr. President.

1           In response to Judge Pocar's question, the Prosecution clarified  
2           its view that lawful combat can be a modality for deportation. We would  
3           like to point out that this is in direct contradiction with the  
4           submissions at the Rule 72 hearings before the Pre-Trial Chamber where  
5           they argued that their case is not -- is not that unlawful -- that lawful  
6           combat can be a basis for deportation.

7           We would like to as with as well that the chapeau requirement  
8           under Article 5 clearly requires that the civilian population be the  
9           primary object of the attack. The definition in customary law of  
10          deportation as recognised by the jurisprudence of this Tribunal and the  
11          ICC Statute is that deportation must be on grounds not permitted in  
12          international law, which evidently means unlawful means, unlawful means  
13          towards an unlawful end.

14          Fourthly, the reference to Article 49 of Geneva Convention 4,  
15          which sets forth the customary law standard, is that deportation only  
16          applies to territories under the occupation of a belligerent, or the  
17          equivalent, in internal armed conflict. Clearly conduct of hostilities  
18          is a situation where the territory has not yet been placed under the  
19          authority of an adversary. And finally, we point that Article 51,  
20          paragraph 2, clearly indicates that with respect to, for example,  
21          paragraph 1940 of the ICRC commentary that it is foreseeable that  
22          civilians may be terrified of the consequence of combat operations but so  
23          long as there is a substantial military advantage, the foreseeability  
24          that they may be terrified and the foreseeability that they may even flee  
25          cannot be a violation of Article 51(2).

1           So we submit that it would be an extraordinary result if this  
2 Appeals Chamber was to say that lawful combat can be transformed in the  
3 crime of deportation.

4           Thank you.

5           JUDGE MERON: Thank you, Mr. Akhavan. We will --

6           You will have this afternoon to reply, in any event, to the  
7 Defence of Mr. Markac. It seems to me that you perhaps could combine it.

8           MR. STRINGER: Yes, if it is allowable, if it's acceptable to the  
9 Chamber, we can [Overlapping speakers] ...

10          JUDGE MERON: Or would you like to speak three minutes now in a  
11 quick reply or combine it with your answer later to answer to Mr. Markac.

12          MR. STRINGER: Well, I think the first point is that we don't  
13 accept the characterisation that counsel has just been given of the  
14 position taken by the Prosecution at the hearing to which he referred.  
15 Beyond that, we'll combine it with our responses this afternoon.

16          JUDGE MERON: Yes. The Bench will consider first further the  
17 possibility that we will ask both parties to present a short  
18 supplementary briefing on the question first raised by the counsel for  
19 the Defence regarding novel arguments raised here today for the first  
20 time. But we will work on that and we will talk about it this afternoon.

21          Mr. Kehoe, do you have --

22          MR. KEHOE: Yes, Your Honour. Just with regard to what is being  
23 suggested by the Prosecution, we, of course, object because what we were  
24 doing is rebutting the arguments advanced for the first time by the  
25 Prosecution. And to allow the Prosecution to then go back for another

1 bite at the apple is simply improper and unfair and in violation of the  
2 Scheduling Order.

3 JUDGE MERON: We will probably allow both parties to present a  
4 written brief on that and that will clarify it. I will not mind if the  
5 Prosecution includes a few sentences in its later reply.

6 We will now stop till 1.30.

7 I'm terribly sorry. 2.30, of course.

8 --- Luncheon recess taken at 1.24 p.m.

9 --- On resuming at 2.30 p.m.

10 JUDGE MERON: Please be seated.

11 I would like to start by reading a decision ordering supplemental  
12 briefing. The Judges of the panel have noted the comments made today by  
13 Gotovina's counsel, suggesting that the Prosecution has advanced new  
14 arguments on the merits of the case.

15 The Appeals Chamber requests that Gotovina set out his objections  
16 in a supplemental brief, with a maximum of 3.000 words, submitted by  
17 17 May.

18 The Prosecution may respond within three days of the supplemental  
19 brief, with a 3.000-word submission. No reply will be allowed.

20 Now I would like to read out a decision taken in my capacity as a  
21 Pre-Appeal Judge. It pertains to Rule 115.

22 So in my capacity as a Pre-Appeal Judge, I note Gotovina's  
23 request that the deadline for submitting a reply to the Prosecution  
24 response to his second Rule 115 motion be extended to 18 May. I further  
25 note that the Prosecution has taken no position on this request, and in

1 view of the full schedule of the last few days, I grant Gotovina's  
2 request.

3 And now we will resume our proceedings and we will now hear  
4 submissions by Markac. One hour and 30 minutes.

5 Yes.

6 MS. BRADY: Your Honour, just briefly on the recent ruling that  
7 you have made about our filing of supplemental briefs, the parties filing  
8 supplemental briefs, his is to be submitted 17 May and ours --

9 JUDGE MERON: 18 May, I said.

10 MS. BRADY: 17 May, I think you said, with three days later our  
11 response.

12 JUDGE MERON: Oh, sorry, yes.

13 MS. BRADY: May I confirm that would be a Sunday, Your Honour.  
14 Can -- is that -- is that the day that it is due, the Sunday, or the  
15 following Monday?

16 [Appeals Chamber and Legal Officer confer]

17 JUDGE MERON: Yes, the Rules provide that for calculating. We  
18 will apply the normal Rule.

19 MS. BRADY: Thank you.

20 JUDGE MERON: Always in default, we apply the Rules.

21 Counsel for Mr. Markac.

22 MR. MIKULICIC: Good afternoon to everybody in and outside the  
23 courtroom.

24 My name is Goran Mikulicic, and I'm acting on behalf of  
25 Mr. Markac's Defence.

1           After my brief introduction, I will turn over the floor to my  
2           learned colleagues Mr. John Jones and, afterwards, Mr. Tomislav  
3           Kuzmanovic. And by the end of our submissions, I will kindly request  
4           five minutes granted in a private session to address certain matter to  
5           the Appeals Chambers.

6           Mr. President, Your Honours, at the very beginning of our oral  
7           submissions, we respectfully plea implementation of beneficium cohesionis  
8           principle. That is to say, that we gratefully adopt the submissions made  
9           on behalf of Ante Gotovina. Our submissions will be directed  
10          principally, if not exclusively, to the fourth question posed by the  
11          Chamber in its Scheduling Order; namely, whether the Trial Chamber's  
12          finding that a joint criminal enterprise existed should be upheld in its  
13          finding that illegal artillery attacks took place is deemed erroneous.

14          We say that the answer to this question is plainly: No. There  
15          can be no JCE without a finding of unlawful shelling. This is plain from  
16          a close reading of the Judgement. The Trial Chamber's finding that there  
17          was unlawful shelling permitted, influenced, and indeed determined at its  
18          firing [sic] on every single aspect of the JCE. First, it led the  
19          Chamber to find that the discussions at the Brioni were about a JCE to  
20          remove Serbian population from the Krajina. Paragraphs 2305, 2316, and  
21          2320 of the Judgement.

22          Second, it led the Chamber to find that artillery strikes on  
23          Knin, Benkovac, Obrovac, and Gracac were carried out with the intent to  
24          deport Serbian populations. See also Judgement paragraphs 1745, 1746,  
25          and 1757.

1           It thus led the Chamber to find that the crime of deportation was  
2 committed.

3           Fourth, it led the Chamber to find that the crime of persecution  
4 was within the JCE and that persecution indeed occurred. Paragraph 1862,  
5 1936, in relation to Gracac; 2310 and 2314 of the Trial Chamber's  
6 Judgement.

7           Fifth, it led the Chamber to find that our client,  
8 General Markac, participated in an unlawful shelling. Paragraphs 2561 to  
9 258 [sic], and 2583 of the Judgement.

10           And sixth, this way it led to core findings against Markac;  
11 namely, that he was a member of the JCE, that he shared the objective of  
12 the JCE that he intended to contribute to the JCE, and that he  
13 substantially contributed to the JCE.

14           The unlawful shelling attack is thus the linchpin of all of the  
15 Chamber's findings in relation to the JCE. If one removed that linchpin,  
16 and the notion of the JCE and of Markac's liability falls away.

17           Now, I'm turning the floor to my colleague, Mr. John Jones.

18           JUDGE MERON: Mr. Jones.

19           MR. JONES: Thank you. Your Honours, as everyone knows, a  
20 picture is worth a thousand words and so we have prepared a simple visual  
21 aid, which should be in front of you, to help in answering Your Honours'  
22 fourth question, which I'll paraphrase thus.

23           Assuming no unlawful artillery attacks, can the JCE be upheld?  
24 And we say clearly not, and we say that that is beyond argument.

25           So to explain how the flow chart works, you should have it all in

1 hard copy, and also on your screens.

2 JUDGE MERON: Are you sure you are really simplifying matters by  
3 this not exactly simple picture that you have produced?

4 MR. JONES: Yes, well, Mr. President, I didn't want to blind you  
5 with science. However, at the same time, you will see, I hope, as I go  
6 through it, that this does simplify things and in fact taking it box by  
7 box ...

8 JUDGE MERON: Just one second. [Microphone not activated]

9 [Appeals Chamber and Legal Officer confer]

10 [Appeals Chamber and Registrar confer]

11 MR. JONES: I'm obliged, Your Honour.

12 Hopefully all will, as they say, be revealed as I take you  
13 through it.

14 So the bottom box is captured -- captioned "Unlawful artillery  
15 attack," and so that's the core finding which, ex hypothesi, for the  
16 purpose of answering the Chamber's question 4, is incorrect. And you  
17 have the paragraph references for that finding in relation to the four  
18 towns, and that's what's indications with the sections and the paragraph  
19 numbers.

20 Section, or chapter, 5.8.2(i), and I ask you to remember that  
21 chapter because that comes up time and again in the Judgement, 5.8.2.  
22 It's the unlawful attack finding.

23 And then for Knin, paragraph 1906, so all these numbers are all  
24 references to paragraphs in the Judgement and nothing else.

25 Knin, 1906.

1 Benkovac, 1923.

2 Gracac, 1935.

3 And Obrovac, 1943.

4 So that's where the findings are.

5 So this chart will show how everything, absolutely everything,  
6 depends on that finding. Every JCE finding and every finding of  
7 liability against Markac. So we have in this Judgement the proverbial  
8 pack of cards which if you pull away the bottom card falls down.

9 And this chart shows how and why that is it the case.

10 So first let's see what findings the Chamber directly derived  
11 from the unlawful artillery attack finding. I'll call it "the unlawful  
12 attack finding" for short.

13 All the boxes on the next row, crimes, denote the findings by the  
14 Trial Chamber which derive directly from the unlawful attack finding.

15 And I'll start with the box third from the right, the finding  
16 that the Brioni discussion was about a JCE to forcefully and permanently  
17 remove Serbs. I take it you can all see that. Third from the right.

18 You have that finding in section 6.2.7, at paragraphs 2305 and  
19 2315 of the Judgement. Now what the arrow below the box shows, pointing  
20 up to the box, is how that finding about Brioni and that it was the  
21 discussion of a JCE derives directly from and depends on the unlawful  
22 attack finding. And that's clear from paragraphs, as you see, 2305,  
23 2316, and 2320 of the Judgement.

24 Para 23305 reads, and we'll call it on the screen for everyone:

25 "The Trial Chamber has carefully considered the minutes of the

1 Brioni meeting in chapter 6.2.2. It here further considers them in light  
2 of subsequent events," and I would underline those words, "in light of  
3 subsequent events, as found by the Trial Chamber (see in particular  
4 chapters 4.4 and 5.8.2(i))."

5 So those are the chapters, the sections on unlawful attacks.

6 "Within days of the discussion at Brioni, Gotovina's words became  
7 a reality. Operation Storm was launched in the early morning of  
8 4 August 1995 with artillery attacks on a number of towns and villages in  
9 the Krajina, including Knin. As the Trial Chamber has found in  
10 chapters 4.4 and 5.8.2(i), in at least some of these attacks the entire  
11 towns were treated as targets for the artillery. These attacks therefore  
12 constituted unlawful attacks on civilians and civilian objects. As a  
13 result, large parts of the civilian population of Knin, Benkovac,  
14 Obrovac, and Gracac, amounting to at least 20.000 people, were forcibly  
15 displaced from their homes and fled across the border to  
16 Bosnia-Herzegovina and Serbia. As the Trial Chamber has found in  
17 chapter 4.5 and 5.4.2 this constituted deportation."

18 So the Trial Chamber used the unlawful attacks finding to find  
19 that the Brioni discussions was about a JCE forcibly to displace Serbs.

20 Then we go to 2316, and 2316 - sorry - deals with  
21 President Tudjman, and it says, and I will just reads the beginning and  
22 end:

23 "Franjo Tudjman was a leading participant at all important  
24 meetings at which matters relating to the joint criminal enterprise were  
25 discussed. He ensured that his ideas were transformed into policy and

1 action, through his powerful position as President and Supreme Commander  
2 of the armed forces."

3 So pausing there, the Trial Chamber sees Tudjman as the  
4 mastermind and principal architect of the JCE.

5 So can we then turn the page and read three lines down:

6 "Considering the discussions at the Brioni meeting and the events  
7 that subsequently took place," so again underline those words, please,  
8 "and the events that subsequently took place, the Trial Chamber finds  
9 that he," Tudjman, "for this purpose, intended to remove the Serb  
10 civilian population by force --"

11 Ah, I was wondering how long it would be before the first  
12 injunction to slow down and it has arrived. I will do my best.

13 "Considering the discussions at the Brioni meeting and the events  
14 that subsequently took place, the Trial Chamber finds that he," meaning,  
15 Tudjman, "for this purpose, intended to remove the Serb civilian  
16 population by force, including through the crimes within the purpose of  
17 the JCE."

18 So Tudjman's intentions and thus the meaning of what was  
19 discussed at Brioni, which he led the discussions, is interpreted in  
20 light of the unlawful attack finding, through that prism.

21 And then paragraph 2320, I'll just read three sentences down:

22 "At the Brioni meeting, Tudjman and high ranking military  
23 officials discussed how the military forces should be used to ensure that  
24 not only the SVK but also the Serb civilian population would leave the  
25 Krajina. One of the means ultimately used was in itself a crime, namely,

1 unlawful attacks against civilians and civilian objects in a number of  
2 towns in the Krajina."

3 So we say it is crystal-clear that the Trial Chamber  
4 systematically interpreted the Brioni transcript, itself ambiguous at  
5 best regarding the existence of a JCE, interpreted the Brioni transcript  
6 "in light of subsequent events," namely, in light of its unlawful attack  
7 finding, and in light of its, ex hypothesi, erroneous finding that one of  
8 the means to carry out the JCE was itself a crime of unlawful attacks.

9 Now just to digress, the Prosecution tacitly admit in their  
10 response to our appeals brief that Brioni is not indicative, certainly  
11 not beyond a reasonable doubt, of a JCE. And that's in paragraph 84 of  
12 their response to our appeals brief, where they say:

13 "Third, Markac ignores the relevant context in which to assess  
14 his participation in the Brioni meeting. This includes the subsequent  
15 implementation of the JCE to remove the Krajina Serbs and Markac's  
16 contribution to it. Within days of the meeting, an unlawful artillery  
17 attack was unleashed on the Krajina Serb civilians. As a result, large  
18 parts of the population were displaced."

19 And then it goes down, last sentence:

20 "Given that the Brioni meeting provided the platform for the  
21 unlawful attack on the Krajina Serb civilians, Markac's attempt to  
22 artificially separate his participation at the Brioni meeting from the  
23 ensuing events should be rejected."

24 So, in other words, you can't separate the Brioni assessment from  
25 the later unlawful attacks, which, ex hypothesi, are not unlawful at all.



1 clearly criminal, clearly, obviously criminal, but it isn't. So now,  
2 ex hypothesi, the unlawful attack finding was wrong, and therefore the  
3 Brioni transcript denuded of that incriminating context is innocuous,  
4 plain and simple, and that finding Brioni was about a JCE falls away.

5 In fact, the discussions at Brioni are perfectly consistent with  
6 what the Trial Chamber found was a reasonable interpretation of what  
7 happened in every town and village apart from the four towns. Namely, a  
8 recognition by the Brioni participants of the well-known fact, well  
9 known, as you've heard, Ambassador Galbraith himself recognised it, that  
10 the Serbs would leave the Krajina out of a general fear of the HV,  
11 general fear of hostilities, general living conditions and other  
12 non-JCE-related factors.

13 And on this subject, let's look at paragraph 1762 of the  
14 Judgement. And it should appear on the screen in a moment.

15 Oh, I'm sorry, I'll just have to read it, then. The reference --  
16 I imagine most parties have the Judgement in front of them. It starts  
17 five lines from the bottom:

18 "The Trial Chamber recalls its finding ... that international  
19 armed conflict existed throughout the indictment period and area. The  
20 Trial Chamber considers that the commencement of the armed conflict may  
21 in itself have brought about fears of the violence associated with armed  
22 conflict, as a result of which civilians fled. In this respect, the  
23 tripe also considers the evidence of and its finding in chapter 4.5.3 ...  
24 on persons leaving the RSK in late July and early August 1995," i.e.,  
25 before Storm, "in part because they believed a Croatian military

1 operation was imminent. In the number of aforementioned incidents, the  
2 evidence indicates that the reasons for departure included the departure  
3 of others and a fear of violence associated with the expected imminent  
4 arrival of Croatian armed forces. For instance, Petar Colovic testified  
5 that his family left because many others were leaving. RSK officials  
6 told the inhabitants of Oton Polje to leave on 4 August 1995, because"  
7 so-called "'Ustashi' forces were approaching. Sovilj told his family to  
8 leave Kijani at 1 a.m. on 5 August 1995 for security reasons, because the  
9 HV might have entered the area."

10 And then the important bit:

11 "Considering that persons left the aforementioned locations prior  
12 to the commission of crimes or other threatening acts by members of  
13 Croatian military forces or special police in or near these locations,  
14 the Trial Chamber cannot conclusively determine that acts by members of  
15 Croatian military forces or special police created an environment in  
16 which those present had no choice but to leave. Instead, the  
17 Trial Chamber considers that the evidence allows for the reasonable  
18 interpretation that these persons left because of a fear of the violence  
19 commonly associated with armed conflict, or general fears of Croatian  
20 forces or distrust of Croatian authorities. Consequently, the Trial  
21 Chamber cannot conclude that these persons were forcibly deported [sic]."

22 But in fact without the unlawful attack finding, the evidence  
23 allows for that interpretation in every case, including the four towns.  
24 So if you read the Brioni transcript, it is completely consistent with  
25 nothing more than the participants recognising the basic reality that the

1 Trial Chamber itself outlined at paragraph 1762; namely, that Serbs would  
2 simply leave the Krajina when hostilities began.

3 So I go back to the box and second from the left is captioned --  
4 second from the left, yes, "Serbs were forcibly deported." Section  
5 5.4.2, 1743 to 1745, and 1751. That finding directly derives from, is  
6 based on, and depends on the unlawful attack finding.

7 As the arrow below indicates, this is clear from paragraphs 1745,  
8 2305, and 2311 of the Judgement.

9 1745 is a short paragraph so I will take to you it:

10 "The Trial Chamber considers that the fear of violence and duress  
11 caused by the shelling of the towns of Benkovac, Gracac, Knin, and  
12 Obrovac created an environment in which those present there had no choice  
13 but to leave. Consequently, the Trial Chamber finds that the shelling  
14 amounted to the forcible displacement of persons from ..." those four  
15 towns.

16 2305 we have looked at in another context, so we'll just look at  
17 the last three sentences.

18 "These attacks therefore constituted unlawful attacks on  
19 civilians and civilian objects." As a result, large parts of the  
20 civilian population of the four towns were forcibly displaced.

21 So here the Trial Chamber used unlawful attacks to find that the  
22 exodus of 20.000 people constituted deportation.

23 And then 2311, again I'll just look at the last three sentences:

24 "Deportation of the Krajina Serb population was to a large extent  
25 achieved through the unlawful attacks against civilians and civilian

1 objects" in the four towns. Based on the foregoing, the Trial Chamber  
2 finds that unlawful attacks against civilians and civilian objects, as  
3 the crime against humanity of persecution, were also intended and within  
4 the purpose of the JCE."

5 So the Trial Chamber found that deportation was achieved through  
6 unlawful attacks. In other words, the Trial Chamber used the finding of  
7 unlawful attacks to find that deportation occurred, and from that - and  
8 it is really double counting - the Chamber found it was done on  
9 discriminatory grounds, simply because the people there were  
10 overwhelmingly Serbs. And it then found intent based on nothing else,  
11 really, and thus crimes against humanity, persecution, unlawful attacks  
12 within the JCE. The Trial Chamber piled finding upon finding, spinning  
13 it all out of one finding, unlawful attacks which for our purposes we  
14 assume was erroneous.

15 Now that's the box "Serbs were forcibly deported." You will see  
16 to the right of that box there is an arrow to the adjacent box, which  
17 says "1862." And that shows that the Trial Chamber derived the next  
18 finding, that Serbs were persecuted, both from the finding that Serbs  
19 were forcibly deported and principally from the unlawful attack finding.  
20 And I won't take you to paragraph 1862 as it's not crucial for our  
21 purposes.

22 But what is most important for our purposes is that the Serbs  
23 were persecuted finding derives directly from unlawful attack. And that  
24 is shown by the two references in the arrow below to 1862 and 1936. 1936  
25 relates to Gracac, which is most relevant to my client, so I will take

1 you to that paragraph.

2 "Considering the evidence on the ethnic composition of Gracac ...  
3 the Trial Chamber finds that the unlawful attack on civilians and  
4 civilian objects in Gracac discriminated in fact against the Krajina  
5 Serbs. In establishing the intention with which this unlawful attack was  
6 committed, the Trial Chamber has considered the language of the HV's  
7 artillery orders and the deliberate shelling of areas devoid of military  
8 targets."

9 So again I would underline those words which are the unlawful  
10 attack finding.

11 "The Trial Chamber has also considered its findings in chapters  
12 5.2 [sic]," et cetera. Those are unlawful attack findings.

13 "The Trial Chamber further considers that the unlawful attack  
14 against civilians and civilian objects was committed in the context of a  
15 wider discriminatory attack against Krajina Serbs ..."

16 "The Trial Chamber finds that the unlawful attack on civilians  
17 and civilian objects in Gracac was carried out with the intention to  
18 discriminate on political, racial, or religious grounds."

19 So you get two things there, two inferences by the Trial Chamber.  
20 Unlawful attack equals discrimination. Unlawful attack equals intention  
21 to discriminate, given that there were mostly Serbs in those areas  
22 because Croat civilians were ethnically cleansed in 1991. Or to put it  
23 the other way around, assuming as we do for the purposes of answering  
24 your question 4 unlawful attack is wrong, no unlawful attack means no  
25 unlawful attack qua crime, no unlawful attack as persecution, no unlawful

1 attack as crime against humanity, no discriminatory attack and hence no  
2 discrimination, no intention to discriminate, no JCE involving unlawful  
3 attacks, and no JCE involving persecution. Because all the underlying  
4 core crimes fall away. So all the skittles get knocked down when you  
5 take away unlawful attack finding. It's extraordinary that the  
6 Prosecution should maintain otherwise.

7 Now that analysis takes in some of the other boxes so I can deal  
8 with them more rapidly. To the right of the Brioni box, which we have  
9 already looked at, we have the box: "Those who ordered artillery strikes  
10 did so with the intent to deport," and you see the references in the box  
11 to where that finding is to be found. And that finding, too, is entirely  
12 dependant on the unlawful attack finding as are all the findings on this  
13 chart. And that's clear from paragraphs 1746 and 1757.

14 1746:

15 "The Trial Chamber considered several factors in establishing  
16 whether the HV and special police forces who shelled these four towns on  
17 4 and 5 August 1995 did so with the intent to forcibly displace persons  
18 from the towns. Firstly, the Trial Chamber recalls its findings in  
19 chapter 5.8.2(i)," and that's the magic chapter where unlawful attacks is  
20 dealt with, "that the HV and special police did not limit themselves to  
21 shelling areas containing military targets, but also deliberately  
22 targeted civilian areas in these towns and treated the towns themselves  
23 as targets for artillery fire.

24 "In the same chapter, the Trial Chamber found that the unlawful  
25 attack on civilians," so it presumes an unlawful attack, "and civilian

1 objects in these towns was carried out with the intention to discriminate  
2 against Krajina Serbs on political, racial, or religious grounds. The  
3 Trial Chamber further refers to the evidence reviewed in chapter 6.2.7  
4 regarding the existence and objective of a JCE and particularly the  
5 evidence regarding the Brioni meeting" of 31st July.

6 So the Brioni meeting too was interpreted in light of the  
7 unlawful attack finding.

8 "Based on the aforementioned evidence and conclusions, the Trial  
9 Chamber finds that the HV and special police forces who shelled Benkovac,  
10 Gracac, Knin, and Obrovac did so within the intent to forcibly displace  
11 persons from these towns."

12 Paragraph 1757 shows the Trial Chamber using the unlawful attack  
13 finding even to find that, what I call "non-artillery crimes" --

14 THE INTERPRETER: Please slow down.

15 MR. JONES: -- were committed with the intent to forcibly -- oh,  
16 I'm sorry. Even non-artillery crimes were committed with the intent  
17 forcibly to displace Serbs.

18 1757 you should have on your screens in a moment.

19 "The Trial Chamber has considered several factors in establishing  
20 whether the members of Croatian military forces and special police who  
21 committed the crimes which resulted in the forcible displacement of the  
22 victims of and witnesses to the crimes did so with the intent to forcibly  
23 displace these persons."

24 And then again the Trial Chamber goes back, as is its custom.

25 "Firstly, the Trial Chamber recalls its conclusions in

1 chapters 5.8.2, that the perpetrators committed these crimes with the  
2 intention to discriminate against Krajina Serbs ... the Trial Chamber  
3 further considered its findings in the same chapters that these crimes  
4 were committed as part of an attack against the civilian population.  
5 This attack includes deportation of Krajina Serbs from the towns of," and  
6 then we have the four towns again, "by means of unlawful attack ..."

7 And incidentally, we do have a separate box on the far left of  
8 the row entitled "Non-shelling crimes were intended to deport," so that's  
9 that finding too.

10 And we see from there how that is derived in 1757 from the  
11 unlawful attack finding.

12 So we're mostly finished with this row concerned with the crimes.  
13 We just have a final box on the far right, captioned: "Those who carried  
14 out the artillery strikes did so with intent to persecute." And that  
15 finding is at paragraph 1936 of the judgement. And as you'll see from  
16 the arrow with the same paragraph number, that finding derives directly  
17 from the unlawful artillery attack finding. And we've already reviewed  
18 that paragraph, so I won't do it again.

19 So to pause there, you will see how all of the key core findings  
20 relating to the core JCE crimes, deportation, persecution, crimes against  
21 the humanity, all the elements derive directly from the unlawful shelling  
22 finding. And even its findings on non-core crimes too.

23 So no unlawful shelling means no JCE crimes, and in fact the  
24 unlawful shelling finding was so all-pervasive in the Judgement that it  
25 even led the Chamber to disbelieve President Tudjman's appeal to Serbs to

1 stay in their homes. And you will find that at paragraph 2051, and I'll  
2 summarise it rather than reading it in whole.

3 The Chamber said that it had to treat Tudjman's statement  
4 inviting Serbs to stay in their homes with great caution and the reason  
5 for that was because that had to be considered against the background of  
6 the discussions at Brioni, and then it further went on to say it has to  
7 be considered in light of the unlawful attack findings. And then it  
8 says:

9 "Based on the foregoing, the Trial Chamber finds that the appeal  
10 was not a true reflection of the will and intention of Tudjman at the  
11 time."

12 So without the unlawful attack finding, there's no reason to  
13 suppose that Tudjman's appeal was not a honest appeal to Serbs to stay in  
14 their homes. And certainly that's a reasonable interpretation of the  
15 evidence.

16 So let's go to the next level on this flowchart, and that's the  
17 middle level where you will see just two boxes. Markac, that's obviously  
18 MM, participated in an unlawful attack and Markac participated in the  
19 discussions at Brioni.

20 Now, we'll deal first with the box on the left, Markac  
21 participated in unlawful attack, and that finding was at paragraphs 2580  
22 and 2583 of the Judgement. Now, it's obvious, isn't it, if there was no  
23 unlawful attack, Markac couldn't have participated in it. You can't  
24 participate in what doesn't exist. So we leave that box to one side.

25 Markac participated in discussions at Brioni. Well, there is, of

1 course, nothing criminal about simply participating in discussions. If  
2 Brioni was not about a JCE, then Markac's presence at Brioni and his  
3 participation in the discussions is completely innocuous. So for the  
4 Trial Chamber to use Markac's presence and participation in Brioni to  
5 derive JCE liability, it needs Brioni to be about a JCE.

6 So that box, that finding's significance derives from the box  
7 below, Brioni was about a JCE, and in turn derives from the unlawful  
8 attack finding. Because Brioni was always interpreted by the Trial  
9 Chamber "in light of subsequent events," specifically in light of what  
10 the Chamber to be found to be unlawful shelling. See paras 2305, 2316,  
11 and 2320.

12 And it is no coincidence that the Chamber took that approach.  
13 The reason why the Chamber had to go outside the Brioni meeting to  
14 subsequent events is because there is nothing in the minutes themselves,  
15 in the transcript, which shows a criminal enterprise. There is no  
16 mention of: Let's prevent the Serbs from coming back, for example, which  
17 is meant to be a core objective of the JCE. The JCE, of course, has to  
18 be a criminal enterprise, not an enterprise.

19 The Wannsee Conference was a meeting about exterminating European  
20 Jews. In Argentina during the Galtieri regime there were meetings where  
21 the military junta explicitly said, Let's exterminate the Communists. A  
22 criminal enterprise. But Brioni has nothing at that. It's a military  
23 operational meeting to prepare for Operation Storm. A completely lawful  
24 operation, as the Chamber found Operation Storm and the Prosecution  
25 acknowledged. And it is worth remembering the Prosecution never claimed

1       that there was anything wrong with Operation Storm, but they claimed  
2       there was a JCE wrapped up in Operation Storm.

3               So now hopefully you begin to see how the Chamber's findings are  
4       built up from one finding at the bottom, and what we now need to look at  
5       is how the Chamber took all these building blocks, all based on the  
6       unlawful attack finding, and arrived at this top-most level, Markac's  
7       liability under the JCE. So this is the top level of our chart, four  
8       boxes. Markac substantially contributed to the JCE, including by failing  
9       to prevent/punish. Markac was a member of the JCE. Markac intended to  
10      contribute to the JCE, and Markac shared the JCE objective.

11              We'll take those findings one at a time.

12              Markac substantially contributed to the JCE. That finding  
13      derives directly from the Chamber's finding that Markac participated in  
14      the unlawful attack. So no unlawful attack means Markac didn't  
15      participate in an unlawful attack. And if Markac did not participate in  
16      an unlawful attack, then he didn't substantially contribute to the JCE.

17              So that leaves our three last boxes. All of them are tied up  
18      with paragraph 2583, and it is a key paragraph so I will need to go  
19      through it line by line.

20              "The Trial Chamber now turns to determining whether Markac shared  
21      the objective of the JCE, and whether with his acts and omissions Markac  
22      intended to contribute to it. Markac participated in the Brioni meeting  
23      and took active part in the planning of Operation Storm."

24              Pausing there, there is nothing wrong with Operation Storm and  
25      being involved in the planning of Operation Storm. Even the Prosecution

1 accepts that. And participation in Brioni is innocuous once you knock  
2 out the unlawful attack finding.

3 Now then the Chamber discusses artillery orders and goes on. I'm  
4 going eight lines down:

5 "The Trial Chamber found in chapter 5.8.2(i)," that's the chapter  
6 I've asked you to look out for because it is the key on unlawful attacks,  
7 "that these were orders to treat whole towns, including Gracac, as  
8 targets when firing artillery projectiles during Operation Storm."

9 Pausing there, those orders were only found to be unlawful in  
10 light of the unlawful attack finding. See paragraphs 1911 for Knin;  
11 1915, Benkovac; 1927, Gracac; and 1943 for Obrovac.

12 I go on:

13 "Considering that the purpose of the 3 August 1995 meeting in  
14 Zadar was the co-ordination of artillery, the Trial Chamber considers  
15 that the only reasonable interpretation of the evidence is that Markac,  
16 at the meeting, was aware of the nature of the planned artillery  
17 operations."

18 I pause there. If the nature of the artillery operations was  
19 lawful, then there's nothing wrong with being aware of those operations.

20 Then it goes on:

21 "On this basis, the Trial Chamber finds that Markac was aware,  
22 when he ordered the artillery attack on Gracac, that it constituted an  
23 unlawful attack against civilians and civilian objects."

24 Pausing there. No unlawful attack means no awareness of unlawful  
25 attack by Markac.

1            "It thus shows his intent to contribute to the JCE objective."

2            So then intent must fall away. Ex hypothesi, we assume no  
3 unlawful attack, intent to contribute must go.

4            "In light of this finding," so "in light of this finding" means  
5 that as all those findings are, ex hypothesi, erroneous, that one is  
6 still nowhere. Almost the bottom of this paragraph.

7            "In light of this finding, the Trial Chamber finds that Markac's  
8 omissions in relation to the crimes committed by the special police in  
9 both Gracac and Donji Lapac, as well as through his active role in  
10 covering up the crimes committed in Grubori and Ramljane, were also aimed  
11 at contributing to this objective. "On this basis," I underline that, on  
12 this basis, on this flawed basis if we say there is no unlawful attack,  
13 on this entirely flawed basis, "the Trial Chamber finds that Markac had  
14 the state of mind that the crimes forming part of the objective should be  
15 carried out. Considering all of the above," so all of the above is  
16 erroneous because each is built on the other, "the Trial Chamber  
17 accordingly finds that Markac was a member of the JCE." So that falls  
18 out.

19            "The Trial Chamber finds that Markac thus intended that his  
20 actions contribute to JCE."

21            That too has to fall away. It all falls away, all of 2583 you  
22 can strike a line through it if unlawful attacks is wrong, and everything  
23 of his JCE liability is in that paragraph. The "thus" in that last  
24 sentence means it follows from what went before, and all of what went  
25 before is false if unlawful attacks is false.

1           So you have this tortured passage, with the greatest respect to  
2           the Chamber, but where element upon element of JCE liability is heaped on  
3           each other and in a totally circular, self-supporting way so that every  
4           element simultaneously proves and is proved by each of the other  
5           elements. And so the Chamber pulls itself by its own bootstraps into the  
6           ether.

7           But as I said, it's a house of cards because once the unlawful  
8           attack finding goes, it all goes. It all falls away, all collapses.  
9           Nothing is left when you take that away.

10          So looking at the last three boxes on the table, Markac was a  
11          member of the JCE, intended to contribute to the JCE, shared the JCE  
12          objective, all our arrows show that the Chamber is, to use another  
13          metaphor, building bricks without straw. Each finding points to the  
14          other, but ultimately they're all founded on the unlawful attack finding.

15          Now, another metaphor which might be helpful. The Judgement is  
16          like a knitted sweater. On one thread is the unlawful attack finding,  
17          but it's not just one thread which runs through the whole fabric of the  
18          Judgement. It's the first and central and omni-present thread. It's a  
19          thread which is wrapped in every other fibre of the argument -- of the  
20          garment, so that every bit of this Judgement, wherever you look, has got  
21          an unlawful attack thread wrapped around it. And wherever you cut this  
22          Judgement, there's an unlawful attack finding staring up at you.

23          And it's no accident that the unlawful attack finding permeates  
24          everything, because the Trial Chamber liked its unlawful finding, if I  
25          can put it that way. It didn't shy away from making that finding the

1 centrepiece of the Judgement. Based on this 200-metre rule, which the  
2 Prosecution described in its appeals brief as was generous, it's a  
3 generous rule to Gotovina and Markac, but which it now says is overly  
4 narrow. I don't know how they reconcile generosity and being overly  
5 narrow but they do, but if the Trial Chamber could be represented here  
6 today, I'm sure it would admit, as the Prosecution will not do, that if  
7 the unlawful attack finding goes, the JCE goes. And that the answer to  
8 Your Honours' fourth question is therefore a resounding no.

9 I want to give -- I think I still have ample time. That was to  
10 explain the chart. There are a few questions raised earlier which I  
11 would appreciate dealing with -- having time to deal with.

12 Firstly, this morning, Your Honour, Mr. President, asked a  
13 question about opportunistic targets. In essence, if the Trial Chamber  
14 thought that the evidence was inconclusive about opportunistic targets,  
15 what exactly is the position. This is the answer which I would give.

16 If the Trial Chamber thought that the evidence was inconclusive  
17 as to opportunistic targets, to assume that they were no opportunistic  
18 targets is to fail to resolve any doubts in favour of the accused and  
19 therefore it's a breach of the presumption of innocence. That's the  
20 answer I would give to Your Honour.

21 I will say one thing about the 200-metre rule. First if I could  
22 preface it by saying something by Rajcic because the Prosecution say that  
23 200-metre rule is all about discrediting Rajcic. Rajcic was a  
24 Prosecution witness. It really is worth mentioning that. He was a  
25 Prosecution witness. And when he said that that -- the order to treat

1 whole towns as targets was interpreted by him and by everyone down the  
2 level of command to mean fire on predetermined lawful targets, if he said  
3 that, but they say it's a -- in fact they were firing indiscriminately,  
4 he was a liar. Rajcic would be a liar. And it was their duty to say to  
5 Rajcic -- either have him declared hostile or to say to him: We put it  
6 to you, Mr. Rajcic, you are lying, that is not correct, that is not how  
7 you understood it. They never did it. In flagrant breach of Rule 90(H).  
8 And yet now that's their case. They say Rajcic implicitly must be a  
9 liar, and yet they rely on him as credible when he says that the chances  
10 of hitting Martic was slight. So when it suits them, Rajcic is credible;  
11 when it doesn't suit them, he is essentially a liar.

12 So the unimpeached evidence of their witness is that this is how  
13 artillery orders were interpreted. And so saying that there is  
14 corroboration because this order putting towns under fire -- sorry. That  
15 this order which goes down the lines of command, showing how it is been  
16 sent down from one -- down the chain of command - sorry - that doesn't  
17 get them anywhere if, in fact, everyone interpreted the order as meaning  
18 fire on predetermined lawful targets.

19 So then they link that to the 200-metre rule. Now we adopt  
20 Gotovina's submissions on the 200-metre rule. But can we just add this,  
21 and it is really more a point of logic. The 200-metre rule is only a  
22 rule about military targets. It says: Here is a military target. If  
23 you land within 200 metres, we presume you're aiming at that target. It  
24 doesn't tell you anything about whether civilian targets are being  
25 targeted. And so it does lead to these absurd results that a -- a

1 missile which lands in a muddy swamp, lands in the middle of nowhere, in  
2 the middle of a desert, is against a civilian target, because it's a  
3 negative definition. That's the problem. If it's not military, it must  
4 be civilian. A muddy swamp is not a civilian object. A desert is not a  
5 civilian object, and yet their rule obliges them to say that it is.

6 And it's also -- I don't want to be too -- using philosophical  
7 logic about this but I was a [indiscernible] at university. I did  
8 philosophy at university. But there is a fallacy, a well-known fallacy  
9 which is -- it's the fallacy of denying the antecedent, and it goes like  
10 this. Say if it is a cat, it's a mammal. It's not a cat, therefore it  
11 is not mammal. That is a fallacy because it could be a dog. It could be  
12 a horse. And the same fallacy is here. They say if it is within 200  
13 metres, it's aimed at the targets. It is not within 200 metres,  
14 therefore it is not aimed at the target. Wrong. That's a straight  
15 logical fallacy. And the equivalent of it could be a dog is there are  
16 ample other explanations of why the target was outside 200 metres. And  
17 in paragraph 18 of Gotovina's appeals brief, it refers to these other  
18 explanations. And I quote:

19 "The Trial Chamber failed to consider the following reasonable  
20 explanations for projectiles landing more than 200 metres from known  
21 artillery targets. 1, the range of error of the weapons system employed  
22 was beyond 200 metres; 2, the HV fire at a tactical level unknown to  
23 Rajcic would have provided additional military objectives; 3, there were  
24 other military targets not identified in evidence; 4, the shell's landing  
25 location may for some or all of these cases have been caused by errors,

1       inaccuracies, or negligence; and 5, malfunctioning of weaponry or  
2       ammunition."

3               I mean, it's obvious to the layman that artillery firing at 26  
4       kilometres can be affected by wind, by whether it's on a flat piece of  
5       ground, whether one of the missiles has got a faulty fuse. It is obvious  
6       that there are a host of explanations. And it is a rule which utterly  
7       reverses the burden of proof because --

8               THE INTERPRETER: Would counsel kindly slow down for the  
9       interpreters and the record.

10              MR. JONES: Well, I'll simply adopt the submissions of Gotovina  
11       in that respect rather than repeating them.

12              Now, Your Honour, Judge Pocar, asked the Prosecution what if the  
13       attack were -- were an attack only on military targets, would the  
14       Prosecution still say it was a crime. And the Prosecution said yes. And  
15       one of the things they said is, yes, if you're counting -- quote, if  
16       you're counting on collateral damage. Now you can't -- they can't count  
17       on collateral damage by definition. Collateral damage is what happens  
18       accidentally not deliberately, by definition. And where do they get that  
19       rule from? Where do they get the rule in IHL from, that it's criminal if  
20       you count on collateral damage. I have never seen that rule in the  
21       commentaries on the Geneva Conventions. So that it shows that really  
22       your question -- or, rather, the answer to your question, Your Honour,  
23       shows that the Prosecution will take any position and they will make up  
24       IHL on the hoof. And so they now postulate a JCE using lawful means, and  
25       only lawful means, and so then, firstly it would all depend on whether

1 civilians leave or not. If they stay you're not committing one of the  
2 worst crimes -- and let's remember, that's what we're talking about, the  
3 worst crimes known to man. Crimes against humanity, JCE. If the  
4 civilians don't leave, whether they leave, that's what your liability  
5 depends on.

6 Or it depends on what is floating around your mind. If when you  
7 man the guns and you pull the trigger you think, I hope those civilians  
8 will leave because of this lawful shelling, that transforms into a crime.  
9 A war crime, or a crime against humanity. What you are thinking becomes  
10 a thought crime. This is a thought crime. This is mens rea with no  
11 actus reus. And so they're making up the law and they're making up the  
12 case against Gotovina and Markac as they go along on the day of the  
13 appeal hearing. Their case at trial is that there were no targets, or  
14 almost no targets. Now they say even if there was but targets, they're  
15 still guilty. So 100 per cent different case and they're still guilty.

16 It shows the Prosecution is willing to take any position. And  
17 it's not just they're moving the goal-posts around. They've taken the  
18 goal-posts from one side of the pitch and they've moved it to the other  
19 side of the pitch. And so they may be willing to move the goal-posts  
20 around 360 degrees, but I suggest Your Honours should not follow them  
21 down that sorry path.

22 And Ms. Baig said, well, it's -- sorry, I'll pause.

23 JUDGE MERON: Mr. Jones, I think there was a crime in old common  
24 law wishing the death of the sovereign.

25 MR. JONES: Yes. It is encompassing or something like that.

1 Well, that is a particularly grievous offence so it's probably right that  
2 that's punishable.

3 But it was also said that one would not have a criminal plan  
4 if -- if civilians leaving was unforeseen and incidental, was her phrase.  
5 Again, I don't know where in IHL they get that from, where is that test,  
6 the unforeseen and incidental test. So now you have to not foresee it.  
7 If you don't foresee it, you're not liable. So either you have to be  
8 wilfully blind, you have to close your eyes to what's foreseeable, but  
9 what if it is foreseeable? If you think, I want to conduct this lawful  
10 operation, I can foresee that civilians will leave, what do you do? Does  
11 that mean you can't launch a lawful attack because you foresee that?  
12 It's ludicrous, and that has no basis in IHL. As I say, in fact,  
13 creating thought crimes, no actus reus, but a crime if there's mens rea.  
14 That is not just contrary to IHL, that is contrary to every principle of  
15 criminal law, subject to Your Honours' example which I'll have to  
16 research.

17 So I will leave it there and turn over to my learned friend  
18 Mr. Kuzmanovic unless there are any questions from the Bench.

19 MR. KUZMANOVIC: Good afternoon, Your Honours.

20 My presentation today, Your Honours, will concern mostly  
21 questions 2 and 3 in the addendum, whether the Trial Chamber's  
22 conclusions regarding impact sites should be upheld if its application of  
23 the 200-metre margin of error is deemed erroneous; and number 3, whether  
24 the Trial Chamber's finding that illegal artillery attacks took place  
25 should be upheld if its conclusions with respect to impact sites are

1 deemed erroneous.

2 With respect to the first question, Your Honour, we won't have  
3 any other further submissions other than to answer that question a  
4 resounding yes.

5 With respect to questions 2 and 3, the impact sites and the  
6 200-metre rule, it's a resounding no.

7 Judge Guney asked a very pressing question on page 89 of today's  
8 transcript in lines 3 through 7, which I will also endeavour to answer.  
9 His question was: Was it unreasonable for the Trial Chamber to infer the  
10 civilian character of areas where there were no military objectives?

11 The answer to that question, yes, it was extremely unreasonable.  
12 I will explain why.

13 The second portion of that question was: May the civilian  
14 character be inferred from a general statement without any evidence to  
15 support it?

16 The answer to that is: No. The civilian character cannot and  
17 must not be inferred, as it turns reasonable doubt on its head and  
18 reverses the burden of proof.

19 As the Court is well aware, in the Blaskic case, the Prosecution  
20 bears the burden of proving that an object was indeed dedicated to  
21 civilian purposes.

22 The answer to Judge Guney's question can be vividly illustrated  
23 by the Trial Chamber's analysis of the artillery attack on the military  
24 targets in Gracac. Let's look at what the Trial Chamber did with respect  
25 to Gracac.

1            Paragraphs 1927 through 1932 of the Trial Chamber's Judgement, in  
2 part, discuss Gracac. The Trial Chamber begins by explaining that:

3            "No fewer than 150 projectiles fell on Gracac and its immediate  
4 vicinity on 4 August 1995."

5            Paragraph 1928 of the Judgement. The Trial Chamber doesn't  
6 really explain how it got to that number but that's what we have and  
7 that's what I'm going to deal with.

8            The Trial Chamber further explains that it has only been able to  
9 conclusively determine a small number of precise locations of impacts  
10 relative to a portion of those 150 projectiles. That's also at  
11 paragraph 1928. 150 projectiles, 150 impacts. I guess we can safely  
12 assume that that's what we have in relation to Gracac. How does the  
13 Trial Chamber conclude in paragraph 1934 that a considerable portion of  
14 the locations of those impacts were civilian objects or areas in Gracac?  
15 It does so by reviewing five target areas. Five. We submit that this in  
16 and of itself is unreasonable. However, it first qualifies this  
17 conclusion by stating in paragraph 1934:

18            "... the number of civilian objects or areas in Gracac  
19 deliberately fired at by the HV," and it doesn't define what this means,  
20 "deliberately fired at," "may appear limited in view of the at least  
21 150 projectiles fired at the town."

22            The Trial Chamber further stated and repeated in paragraphs 1928  
23 and 19234 of the Judgement that it was able to conclusively determine  
24 only a small number of precise locations of impact relating to some of  
25 those 150 projectiles. So keep in mind those two qualifications in

1 relation to Gracac that the Trial Chamber made. One, that the civilian  
2 objects or areas were limited that they covered or were able to  
3 determine; and two, they conclusively determine only a small number of  
4 precise impact locations.

5 Let's go through the steps of what the Trial Chamber did there  
6 and see what it did to determine whether or not the attack on Gracac was  
7 unlawful.

8 The first impact area, at paragraph 1929, the Trial Chamber says  
9 there:

10 "... artillery projectiles struck the police station in  
11 Gracac ..."

12 It doesn't tell us how many projectiles, but it assumes that  
13 those projectiles hit their target.

14 The second impact area, in 1929, is the Gracac Brigade command  
15 post. There's no discussion of number of impacts. Both were determined  
16 by the Trial Chamber to be military targets. So as far as the first two  
17 areas of impact are concerned, we don't have any issue relating to  
18 civilian targets or areas.

19 The third area, in paragraph 1930 of the Judgement, a house  
20 located near a factory which served as a Serb military depot. It said  
21 that one or more, doesn't define how many, impacts. The Trial Chamber  
22 determined in that third area that firing at this depot would have  
23 offered a definite military advantage.

24 The fourth impact area, at paragraph 1931, 10 to 20 impacts at an  
25 intersection, in which the Trial Chamber determined that firing there

1 would have offered a definite military advantage.

2 So we have four impact areas, all four either military targets,  
3 or areas that offer a definite military advantage.

4 Let's look at the fifth impact area, at paragraph 1932. Several  
5 projectiles. Now, several can mean usually more than one. In common  
6 conversations, several to me means less than five. Six is a half a  
7 dozen, so we will say several is less than six. Near a witness who  
8 testified in this case, Gacesa, near her house, which the Trial Chamber  
9 determined was 300 metres from a target on the Jagoda list.

10 The sixth area of impact were artillery projectiles. Again, how  
11 many, undeclared, undefined, near Witness Steenbergen's home - Witness  
12 Steenbergen was a UN military observer - that were within 450 metres or  
13 800 metres of a targeted military target on both either the special  
14 police target list or the Jagoda list.

15 So that is 150 impacts, projectiles. One to four of those impact  
16 areas -- one through four of those impact areas analysed were legitimate  
17 military targets or offered definite military advantage. The fifth area  
18 of one impact was within 300 metres - so it fits within the Leslie  
19 estimation range of error - of a target. And the sixth and final impact  
20 area concerning Gracac was within 450 to 800 metres of a target.

21 So the conclusion the Trial Chamber drew from analysing those six  
22 impact areas out of 150 projectiles, that, in Gracac, civilian areas were  
23 deliberately targeted based on its findings in reviewing those six impact  
24 areas.

25 That is unreasonable.

1           The only witness to testify about targeting by the special police  
2 specifically was Josip Turkalj, a Prosecution witness, at paragraph 1437.  
3 Josip Turkalj's testimony regarding the special police targeting in and  
4 around Gracac was that the purpose was to neutralise the target and to  
5 minimise collateral damage. That's at paragraph 1435.

6           In fact, Turkalj testified that he had a conversation with  
7 General Markac the day before Operation Storm began and Turkalj said  
8 General Markac told him:

9           "When selecting targets, make sure that civilians would not come  
10 in harm's way."

11           Turkalj testified not just about targets in and around Gracac,  
12 but about the entire area of special police access of attack, from the  
13 Velebit mountains all the way to Donji Lapac.

14           Now, the Trial Chamber's conclusion that a considerable portion  
15 of the impact areas were civilian objects or areas, based on its own  
16 analysis of six impact areas is wrong. It's completely unreasonable and  
17 it is not supported by its own examples. Considering this flawed impact  
18 analysis, Turkalj's testimony about targeting and that military targets  
19 were targeted in and around Gracac, and the fact that there were no  
20 civilian deaths in or around Gracac, no evidence of civilian deaths as a  
21 result of artillery, or evidence of unreasonable collateral damage in  
22 Gracac due to artillery in the entire analysis of the Gracac artillery  
23 attack, the finding that an unlawful attack against civilians and  
24 civilian objects was widespread and systematic and an attack against the  
25 civilian population must be overturned.

1 [Appeals Chamber confers]

2 JUDGE MERON: Sorry, question from Judge Robinson.

3 MR. KUZMANOVIC: Yes, Your Honour.

4 JUDGE ROBINSON: You said out of 150 projectiles that were  
5 launched in Gracac, the Trial Chamber examined six impact areas.

6 MR. KUZMANOVIC: Correct.

7 JUDGE ROBINSON: And that finding, you say, was unreasonable.

8 MR. KUZMANOVIC: No. I say it was unreasonable for them to find  
9 that they were deliberately targeting civilian areas based on their  
10 analysis of the impact areas. Four of the six which were legitimate  
11 military targets.

12 JUDGE ROBINSON: But could they have found reasonably that those  
13 six areas had been deliberately targeted?

14 MR. KUZMANOVIC: Based on the fact that both the special police,  
15 the Jagoda list, the special police targeting list found in four of those  
16 six areas were military targets, yes. They deliberately targeted  
17 military targets in four of those six areas, and within the two areas in  
18 which there was an error of 400 metres for one from a target and an error  
19 of 450 to 800 metres of the second, and there was no evidence of  
20 collateral damage.

21 JUDGE ROBINSON: And that would not be a sufficient basis --

22 MR. KUZMANOVIC: To determine that the entire city of Gracac was  
23 unlawfully attacked by artillery, correct.

24 JUDGE ROBINSON: This is what I'm trying to get at. What is  
25 vitiated by the unreasonable finding? The entire finding that Gracac

1 is -- was attacked as a whole?

2 MR. KUZMANOVIC: Yes, I -- as a whole, as an entire town, without  
3 any selectivity between military and civilian areas. Correct. Based on  
4 one, that analysis; two, the number of impacts were analysed; three, the  
5 number of projectiles that were launched on Gracac; and four, the fact  
6 that four of the six areas that were attacked were military targets --  
7 actually, five of the six, one -- one of which the range was in the  
8 acceptable, if you use Leslie's number, 400 metres, five of the six were  
9 with -- were legitimate military targets.

10 JUDGE ROBINSON: So that you can't extract from Gracac, say,  
11 four -- four impact areas and if those had been properly determined by  
12 the Trial Chamber as having been unlawfully attacked, that, you say, is  
13 not a sufficient basis for a finding that Gracac as a whole.

14 MR. KUZMANOVIC: I agree, Your Honour, because it's just not --  
15 it is not enough. You have 150 artillery rounds. You have six areas of  
16 impact which, giving the Prosecution the benefit of the doubt, maybe have  
17 20 total impacts, it is simply not enough to make a determination that  
18 the civilian areas, per se, were attacked intentionally by the special  
19 police and the HV, in Gracac.

20 JUDGE ROBINSON: Thank you.

21 MR. KUZMANOVIC: Thank you, Your Honour.

22 Your Honours, I just wanted to address one more issue on the  
23 JCE 3 issue as it pertains to General Markac.

24 One particularly troubling aspect of the finding in JCE 3 as it  
25 relates to General Markac is this particular finding. And it's the

1 finding in paragraph 2586 of the Trial Chamber Judgement. As the Court  
2 is well aware, if there is no JCE 1, there is no JCE 3, but I would be  
3 remiss if I did not address the Trial Chamber on this particular issue  
4 and essentially the main and almost sole finding of JCE 3 culpability in  
5 terms of mens rea for General Markac. The Chamber recognised that  
6 General Markac chose troops who were not local to the area in which  
7 operations were carried out so that revenge crimes could be avoided. So,  
8 in other words, if a unit was going into Gracac or Donji Lapac or in any  
9 other area of special police area of operations during Operation Storm,  
10 General Markac said, I don't want local guys to go there, even though it  
11 probably would have been better from the standpoint of knowing the  
12 terrain, he wanted someone from the Vukovar unit or the Osijek unit or  
13 some other unit to go because he wanted to even avoid the possibility  
14 that there might be revenge crimes.

15 But the Chamber's inference of that goes totally against common  
16 sense. The Chamber found, in 2586, that Markac's attempt to prevent  
17 crimes this way showed that Markac was aware of the possibility that  
18 members of the Croatian military forces and special police would  
19 perpetrate acts of revenge.

20 That makes no sense. One sentence earlier, the Chamber says:  
21 Markac choice these troops "so as to avoid sentiments of revenge against  
22 people and to avoid possible conflict." And that is evidence of his  
23 mens rea for JCE 3. I submit to you that that is completely  
24 contradictory. And that is a crucial part of the Chamber's determination  
25 of JCE 3 liability for General Markac.



1 JUDGE MERON: So perhaps we would now go into a private session  
2 and deal with both of these remaining questions.

3 MR. MIKULICIC: Okay.

4 JUDGE MERON: So, Registrar, private session, please. Tell us  
5 when we are ...

6 [Private session]

7 (redacted)

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15 (redacted)

16 [Open session]

17 JUDGE MERON: So if so, we will now -- sorry.

18 THE REGISTRAR: We're back in open session, Your Honours. Thank  
19 you.

20 JUDGE MERON: Yes. We are in open session again. Yes.

21 So we will now have a pause of 15 minutes.

22 --- Recess taken at 3.56 p.m.

23 --- On resuming at 4.14 p.m.

24 JUDGE MERON: Please be seated.

25 Response by the Prosecution. 30 minutes.

1 MR. MIKULICIC: Your Honour, if I may, just a brief word.

2 JUDGE MERON: Well, is it to the point?

3 MR. MIKULICIC: Now --

4 [Appeals Chamber confers]

5 JUDGE MERON: Also, my ... oh, terribly sorry. I meant 1 hours  
6 and 30 minutes.

7 MR. MIKULICIC: Just a brief word, Your Honour. As it goes with  
8 the consent of my client that we spoke on a private session.

9 As we speak of the consent of my client that we just spoke.

10 JUDGE MERON: Do we need to go into private session.

11 MR. MIKULICIC: Now, we don't now. We don't have to go to  
12 private session. He is consenting that his records, medical records will  
13 be also revealed to the Appeals Chamber. But, unfortunately, they were  
14 only revealed to the Registry. It was kind of mistake, so --

15 JUDGE MERON: So this will be corrected and we will look at it.

16 MR. MIKULICIC: Thank you very much, Your Honour.

17 JUDGE MERON: Thank you so much.

18 1 hour, 30 minutes, Ms. Brady.

19 MS. BRADY: Thank you very much and good afternoon, Your Honours.

20 My name is Helen Brady, and together with

21 Mr. Francois Boudreault, Mr. Todd Schneider, and Ms. Ingrid Elliott, we  
22 will be responding now to Mr. Markac's appeal.

23 Your Honours, just to give you a batting order and a road map of  
24 this afternoon's presentation, first, I will address the Trial Chamber's  
25 conclusion that a joint criminal enterprise existed to permanently remove

1 the Serb civilians from the Krajina through deportation and forcible  
2 transfer, unlawful shelling and restrictive and discriminatory measures.  
3 This is directly responding to the first ground of appeal, 1A.

4 In the course of my submissions on JCE, Your Honours, they will  
5 proceed on the basis of Trial Chamber's conclusion that an illegal  
6 artillery attack occurred during Operation Storm; that is, in accordance  
7 with the Trial Chamber's finding. However, Your Honours, I will also  
8 brief address the JCE findings on your premise of your question 4; that  
9 is, if the Trial Chamber's finding on the illegal artillery attacks were  
10 to be found to be erroneous.

11 After me, Mr. Boudreault will then address the conclusion by the  
12 Trial Chamber that Markac was a member of that JCE, that he significantly  
13 contributed to it and he had the mens rea for the JCE crimes.

14 In relation to the unlawful shelling findings, my colleagues,  
15 Mr. Stringer and Mr. Cross, this morning have already dealt at length  
16 with this issue, and they've given very complete answers to our position  
17 on questions 1, 2, and 3, so we will be fairly short in that regard. We  
18 will be adopting the position in our submissions this morning. However,  
19 Mr. Schneider will briefly address you on this issue in light of the  
20 submissions that were made by Markac Defence.

21 And, finally, Your Honours, Ms. Elliott will respond briefly on  
22 some features regarding the deportation findings, and, in particular,  
23 that the shelling was the primarily and direct cause of the departure of  
24 the Serb civilian population from the Krajina. And for the remainder of  
25 the grounds we rely on our briefs.

1           I will turn first to the findings about joint criminal  
2     enterprise.

3           Only one reasonable conclusion emerges from all the evidence, and  
4     that is that by no later than July 1995, a common criminal plan existed  
5     to remove the Serb civilian population from the Krajina on a permanent  
6     basis through forcible displacement, unlawful shelling and restrictive  
7     and discriminatory measures and Markac was a member of that JCE.

8           Now, this afternoon, Markac, just as he did in his brief,  
9     deconstructs the factual findings. I think his flow chart he -- going so  
10    far to say that the factual findings are inverted, and he artificially  
11    isolates factual findings and the evidence. Your Honours, that is not  
12    how a reasonable fact finder assesses evidence and makes finding, and nor  
13    should it guide your review. Instead, just as the Trial Chamber did,  
14    this Chamber needs to take a holistic view based on all the evidence  
15    considered together and not examine the facts and the evidence in this  
16    deconstructed an artificial way and today in this afternoon's submission,  
17    what I would like to do is to put this picture, the evidence and the  
18    facts, back together again, as they were properly understood by the  
19    Trial Chamber.

20          The first point I'd like to make is the critical importance of  
21    examining the discussions at Brioni in their context. In light of both  
22    preceding and the later events, that's the context in which Brioni needs  
23    to be examined. Now, the actual discussion as recorded in the  
24    transcript, P461, do form a very important part of the Trial Chamber's  
25    findings. I'd like to take Your Honours to key parts of those

1 discussions in just a moment.

2 But it is equally important to stress that these discussions are  
3 one component within a much broader complex of evidence and facts and  
4 must be considered in that light. And these events confirm that the  
5 meeting's true criminal objective. The participants were not merely  
6 discussing and planning a military operation designed to defeat the SVK  
7 and retake the territory in the -- in that part of the Krajina. They  
8 were discussing and planning an operation designed to take part that  
9 territory cleansed of the Serb civilians. And this removal of the Serb  
10 civilians was to be achieved by force or threat of force, including by  
11 forcible displacements and shelling.

12 Your Honours, you cannot properly understand the Brioni  
13 transcript, and I want to take you to these before I go to the details of  
14 that discussion. You cannot properly understand the Brioni transcript and the  
15 purpose behind this operation without considering the events preceding  
16 that meeting.

17 This operation was, in many ways, the crowning achievement of a  
18 policy which Croatian president and supreme commander of the armed  
19 forces, Franjo Tudjman, had been pursuing for years, to create an  
20 ethnically homogeneous Croatia or as ethnically as possible.  
21 Ambassador Peter Galbraith, who -- a man who had frequent contact with  
22 Tudjman and his associates over the relevant years, stated that:

23 "Tudjman thought that the Serbs in Croatia were too numerous and  
24 constituted a strategic threat to Croatia."

25 That's in his 92 ter statement, paragraph 31, and it's in the

1 Trial Judgement at paragraph 1999.

2 A month before Operation Storm, Tudjman had actually met with his  
3 national security council to discuss the settling of Croat emigres from  
4 abroad into the tens of thousands of Serb houses which had been abandoned  
5 in Western Slavonia during Operation Flash in May 1995. And that comes  
6 from Trial Chamber finding 2060.

7 Your Honours, just as importantly, you cannot approach the Brioni  
8 discussions without considering them in light of later events, what did  
9 unfold after this meeting. And, briefly, within days of that meeting,  
10 Croatian forces subjected the towns of Knin, Benkovac, and Obrovac, and  
11 Gracac to an indiscriminate, unlawful artillery attack causing the mass  
12 exodus of 20.000 civilians. This finding is not -- the unlawful attack  
13 findings were an important part of the Trial Chamber's analysis but we  
14 disagree that it is linchpin in the way presented by Mr. Markac's  
15 Defence. In fact, all these pieces of evidence, Your Honour, have to be  
16 seen as strands in a cable of evidence which point towards the guilt of  
17 the accused rather than links in a chain. Once one falls out, the rest  
18 of the house of cards - or however it was put - topples. That is not the  
19 case.

20 Your Honours, another factor, apart from the actual  
21 indiscriminate and unlawful attacks themselves is that after this  
22 operation, Operation Storm, Tudjman did set about implementing his  
23 demographic policy. He and other senior Croatian politicians and  
24 military leaders expressed views, promulgated policies aimed at  
25 encouraging ethnic Croats to come to the Krajina, to re-populate it,

1 while, at the same time, advocated against the Serbs' return. And hand  
2 in glove with that vision, policy and legislative measures were taken to  
3 prevent their return or at least make it much, much more difficult and  
4 therefore unlikely. And I'm referring here to the laws and decrees  
5 passed in the ensuing months in August and September imposing very  
6 strict, tight 30- and 90-day deadlines for Serb civilians to reclaim  
7 their property or risk losing it to the state and given to Croats.

8 And, finally, Your Honours, you must bear in mind that throughout  
9 the two-month period after this operation in August and September,  
10 Croatian armed forces, the HV and special police, continued to commit  
11 further crimes against Serbs and their property on a mass scale, torching  
12 houses, looting property, carrying out murders and other inhumane acts  
13 against the Serbs who did remain there and this triggered further  
14 civilian departures from the area.

15 I'd like to now turn to take a closer look at the discussions at  
16 Brioni themselves because, in our submission, the Trial Chamber reached  
17 the only reasonable conclusion about these discussions. And,  
18 Your Honours, I point out that their finding about the discussions is in  
19 paragraph 1995 of the trial Judgement, that the Trial Chamber found that  
20 this discussion, this set of discussions, was, in itself, something from  
21 which they could infer was a conversation about forcing civilians out,  
22 rather than protecting civilians. So that finding, they make that  
23 finding about Brioni, independently, as it were, from the other findings.  
24 But, of course, because they're making findings in light of their  
25 previous findings, it would be very artificial if they tossed their

1 unlawful -- their decision on unlawful attacks out the window and then  
2 began to look at Brioni on its own. That would not be a reasonable way  
3 of having approached Brioni. But it is important to note that on its  
4 own, the Chamber was prepared to make that finding about the import of  
5 the Brioni discussions.

6 So I'll turn to have a look now at the discussions themselves.

7 As Tadjman and the others were pouring over maps, and this is in  
8 the presence of Gotovina and Markac, their main focus was whether, how,  
9 and when to launch an artillery attack against the SVK. That is  
10 something the Trial Chamber did find at paragraph 1990. But these  
11 operational discussions occurred within discussions aimed not just to  
12 take back territory but to take it back cleansed or without the Serbs in  
13 it by forcibly displacing them from that area.

14 Your Honours, you'll need to read the whole transcript, of  
15 course. And, today, in the time, I'll just highlight four exchanges that  
16 we say shed particular light on what the discussions were truly about.

17 I think Mr. Jones said something like there's nothing in there to  
18 show that there was this intent to deport. And we think a very different  
19 intent arises from these and other parts of -- of the discussions.

20 I will take you to the first one. I think it should be on your  
21 screen. It's P461, the transcript of Brioni, and it's page 10. This is  
22 relatively early on in the meeting. Tadjman observes that when they  
23 undertake a general offensive "even greater panic will break out in Knin  
24 than has to date."

25 President Tadjman then reminds them to remember "how many

1 Croatian villages and towns have been destroyed."

2 And makes the remark, "but that's still not the situation in Knin  
3 today."

4 After he urges them to resolve the UNCRO matter and by that it is  
5 how to avoid hitting it. You can see this in another part of the  
6 discussion. Tudjman then says this:

7 "But their counter-attack from Knin and so forth, it would  
8 provide very good justification for this action, and accordingly we have  
9 the pretext to strike, if we can with artillery, if you can, for complete  
10 demoralisation ... not just this ..."

11 And Gotovina replies:

12 "... if there is an order to strike at Knin, we will destroy it  
13 in its entirety in a few hours."

14 Your Honours, turning to a second exchange, this one at page 15,  
15 Tudjman here is speaking about giving ...

16 [Appeals Chamber confers]

17 MS. BRADY: Tudjman here is speaking he has just made the comment  
18 about giving the civilians a way out and explains his reasoning for this.  
19 He says because it is important that those civilians set out and then the  
20 army will follow them, when -- then the army will follow them and when  
21 the columns set out, they will have a psychological impact on each  
22 other."

23 Gotovina responds:

24 "A number of civilians are already evacuating Knin and heading  
25 towards Banja Luka and Belgrade. That means that if we continue this

1 pressure, probably for some time to come, there won't be so many  
2 civilians, just those who have to stay, who have no possibility of  
3 leaving."

4 The final set of exchanges or comments during this meeting that I  
5 draw Your Honours' attention to are at pages 23 and 29 of the transcript.

6 At this point, the discussion turns to using propaganda, and  
7 Miroslav Tadjman has suggested that information be given on the radio and  
8 TV as to the open routes. Tadjman agrees with this idea, and he adds,  
9 it's on your screens:

10 "Yes, that should be said, not the fact that the routes are open,  
11 but that it has been noticed that civilians are getting out by using such  
12 and such route."

13 And then at page 29, Tadjman embraces the idea thrown out by  
14 Susak of throwing leaflets as a further means of propaganda and  
15 suggesting that they report a general chaos and Croatian victory with the  
16 world's support. And Tadjman makes a suggestion about what these  
17 leaflets should say:

18 "Serbs, you are already withdrawing via, et cetera, ... and we  
19 are calling upon you not to withdraw. We guarantee you ...," and there's  
20 a space, and he explains to the meeting. This is a meeting at which both  
21 Gotovina and Markac are at and participating or making suggestions on how  
22 certain parts of the operations should be conducted. He explains, "...  
23 so in that way, to give them a road, while ostensibly guaranteeing them  
24 civilian rights, et cetera ..."

25 And after which on the tape he is heard to give a laugh, a

1 chuckle.

2 Now, Your Honours, several things stand out from these  
3 discussions. In the first exchange, Tudjman notes the large number of  
4 destroyed Croatian villages and towns and notes that -- that's still not  
5 the case with Knin. He and Gotovina then discuss striking Knin. But  
6 unlike other parts of the discussion, when they do actually go on to  
7 discuss military strategy and even some targets in -- in -- targets in  
8 quite some detail, for other bits and pieces of the operation, when it  
9 comes to Knin, the discussants in the conversation say nothing about  
10 striking only military targets there. They say nothing about how to  
11 protect Knin's civilian inhabitants. Instead the comment is really about  
12 using artillery strikes for complete demoralisation.

13 Your Honours, Gotovina's continuing pressure comment that we've  
14 heard a bit about already today is also very telling. This comment  
15 acknowledges that the -- oh, I see my friend has stood up.

16 MR. MISETIC: Mr. President, I think it was perhaps noted this  
17 morning, and I sincerely regret interrupting the flow of the  
18 Prosecution's presentation, but if we're going to continue to focus on  
19 General Gotovina at Brioni with excerpts that were not put during the  
20 Prosecution's response this morning to our appeal, and the focus thus far  
21 has been on General Gotovina and Mr. Tudjman, then we would request that  
22 if it continues at this pace that we be allowed at least five minutes to  
23 respond or reply at the end.

24 Thank you.

25 JUDGE MERON: I believe that Ms. Brady did not cite materials

1       which were not before us already. But I was wondering, you are  
2       mentioning in the conversations in which Mr. Gotovina participated, did  
3       Mr. Markac take an active part in those discussions?

4               MS. BRADY: Your Honours --

5               JUDGE MERON: I mean, we are now on the Markac part.

6               MR. KEHOE: Yes, I realise that. But, Your Honours, I have to, I  
7       guess, describe the conversation as it's going during the course of that  
8       meeting, when two major members of that meeting are having discussions of  
9       this nature. It's true that Markac, when actually his words are recorded  
10      in the discussion, his comments are about what might be called very  
11      military matters. He's not the direct discussant. However, in our  
12      submission, and Mr. Boudreault will go into this in greater detail, he's  
13      present at a discussion where the only clear meaning is one thing. And  
14      that's why we need to set the scene, as it were, about what Gotovina  
15      says.

16              And just to take the other point that Mr. Misetic has -- has  
17      said, actually, this morning, in my colleague's submissions, Ms. Baig and  
18      Mr. Stringer, they both referred to this pressure comment by Gotovina.  
19      But having said that, if he wishes to have a five-minute reply to what we  
20      say, I have no objection to that.

21              JUDGE MERON: Okay. We will let you reply. Five minutes when  
22      this is over.

23              MS. BRADY: Your Honours, Gotovina's continuing pressure comment  
24      is also telling. It acknowledges that the pressure that they be  
25      applying - that is it, the shelling - would be the cause or the trigger

1 of the Serbs leaving the area. And in our submission, their comments  
2 show that the departure of the -- this comment shows that the departure  
3 of the Serbs was, indeed, the object of this and not merely an unintended  
4 foreseeable but unintended consequence.

5 JUDGE MERON: Counsel --

6 MR. MISETIC: I apologise again --

7 JUDGE MERON: -- you will have your few minutes to answer.

8 Please so let Ms. Brady continue.

9 MS. BRADY: Your Honour, in other words, in this discussion they  
10 are planning to exploit the facts that the Serbs were in a demoralised  
11 state and by the shelling to trigger their departure.

12 The exchanges on propaganda are also very revealing. It makes  
13 little or no sense to even discuss this kind of propaganda if the  
14 discussants had simply been seeing this Serb departure as merely a  
15 temporary measure or even an inevitable consequence of their attack  
16 rather than its intended outcome. And Tudjman's comment about giving  
17 them a road while ostensibly guaranteeing their civil rights also, as the  
18 Trial Chamber found, shows the true intent of this operation: To show  
19 the Serbs out, while at the same time giving the impression that they  
20 could stay. There would be no place for this sort of cynical comment if  
21 the true intent was -- sorry, Your Honours. This cynical comment would  
22 have no place unless the true purpose was in fact to forcibly, that is,  
23 to push out the Serbs from the region.

24 JUDGE MERON: Ms. Brady, I really have some doubt whether you  
25 should -- the gravamen of your argument to such an extent to be things

1 connected to Mr. Gotovina. I did not interrupt you. I listened to the  
2 counsel. I think it would be more correct to focus on Mr. Markac now.

3 MS. BRADY: Yes, Your Honour. But as I did explain, the meeting  
4 is taking place with various discussants, and he's present and making his  
5 contributions towards a certain -- certain angles of that discussion.

6 Markac's interpretations of Brioni are not reasonably plausible.  
7 He basically argues that the discussions about leaving civilians a route  
8 out simply reflected a recognition that the Serbs were demoralised, they  
9 wouldn't stay in the area, if they were once again to be Croatian, and  
10 would leave once the shelling began. So he says their comments really --  
11 merely aimed to serve legitimate military goals of further demoralising  
12 the enemy and speeding up military victory and reducing their own  
13 casualties.

14 This argument lacks evidentiary support and it doesn't stand up  
15 to scrutiny.

16 Firstly, his argument calls for an assumption that the  
17 discussants were planning a shelling attack against strictly military  
18 targets. But in this case, why would the participants assume that the  
19 Serb civilians would simply, en masse, up and leave the towns and  
20 villages where their families had lived for hundreds of years in the face  
21 of such an artillery attack? Witnesses in fact testified that they'd not  
22 left during previous shelling attacks. But even accepting for the  
23 argument's sake that the discussants could have assumed that a number of  
24 civilians would flee the attack, the shelling, we would expect to see in  
25 their discussions a concern for civilian protection. But as the

1 Trial Chamber found, there were no such discussions. Instead, the  
2 discussions about civilians really focussed or were centred on ensuring  
3 that they would have a way out and then using those departures of the  
4 civilians to induce the army out and vice versa.

5 Your Honours, while a swift military victory and a reduction in  
6 combatant losses may, in theory, be legitimate aims, that is, in a --  
7 when we have a military operation aimed at a military objective, they  
8 provide no justification when, as here, the operation is itself aimed at  
9 forcibly displacing a civilian population from the territory so that the  
10 land can be taken without its inhabitants, a certain -- the Serb  
11 civilians. This is a patently illegal purpose.

12 My colleague, Ms. Baig, has already answered question 4, and I  
13 won't rehearse what she said there. But, in short, it's impermissible  
14 for an army to plan an artillery operation with the aim or purpose of  
15 deporting a civilian population. This is the case even if it serves  
16 another military purpose. This is a very obvious proposition when an  
17 artillery operation with a criminal purpose of deportation is carried out  
18 by the criminal means of directly attacking civilians and civilian  
19 objects in an indiscriminate shelling attack as the Trial Chamber found  
20 in this case.

21 But it remains our case, it remains the case, even if the  
22 artillery attacks were not found to be unlawful in the strict sense of  
23 Articles 51 and 52 of Additional Protocol II. IHL permits an army to  
24 treat only --

25 JUDGE MERON: Additional Protocol I.

1 MS. BRADY: Sorry. I meant Additional Protocol I, yes. Sorry,  
2 Your Honour.

3 IHL permits an army to treat only the enemy soldiers and military  
4 objects as objects of attack, while civilians may be removed from a  
5 conflict zone if imperative military reasons demand or for their own  
6 protection. This has to be on a temporary basis and follow certain  
7 strict conditions. If the true aim of the artillery attack is in fact to  
8 deport a civilian population, what may on its surface look like a legal  
9 artillery attack, is, in fact, unlawful because of that purpose. And it  
10 can amount to deportation and persecution as a crime against humanity, of  
11 course, assuming the other elements are met. There's no inconsistency  
12 here between these crimes against humanity, convictions and the  
13 applications of the laws of war.

14 What the Brioni discussions show, Your Honours, is that when you  
15 look at these discussions in light of preceding events and later events,  
16 is that the participants were -- were aware of the difficult situation  
17 facing the Serbs in Krajina and they knew that this could be exploited to  
18 force them out. And with this in mind, they planned a military artillery  
19 attack with the aim of taking back the land and, at the same time,  
20 forcibly displacing the Serbs from it.

21 Your Honours, events after Operation Storm confirm that the true  
22 purpose was the removal of the Serb civilian population from the Krajina  
23 by forcible means. I won't repeat what's already been said about the  
24 shelling attack itself which led the 20.000 civilians to flee in fright  
25 nor about the crimes that happened in the ensuing two months against the

1 Serb civilians. But, again, I'll highlight the many speeches, statements  
2 and policies made by Mr. Tudjman, President Tudjman, and others, in  
3 high-level positions about repopulating the area with Croats by placing  
4 Croats informally in Serb homes and all measures to prevent the Serbs  
5 from returning.

6 When asked in an interview a month after the operation if the  
7 Krajina Serbs would return home, Tudjman replied that:

8 "The return of all of them is virtually unthinkable."

9 At the same time, Croatian authorities were passing laws making  
10 it very difficult, if not impossible, for the expelled Serbs to reclaim  
11 their property and homes given those restrictive time limits and  
12 difficulties they faced in re-entering the country from which they had  
13 just been expelled.

14 Your Honours, the Trial Chamber rejected these laws were simply  
15 aimed at protecting property and solving a temporary housing problem, but  
16 were, in fact, passed to provide those Serb homes to incoming Croats and  
17 thereby deprive Krajina Serbs of their homes and properties. And the  
18 many speeches, the Trial Chamber goes into some detail on the speeches  
19 and the statements made publicly by Tudjman in the weeks and months after  
20 Operation Storm. I point Your Honours to just two of them. On -- he is  
21 speaking -- Tudjman is speaking at a public gathering in Knin on the  
22 26th of August, a few weeks only after the operation, and he refers to  
23 Knin and the Serbs who had fled like this. He says referring to Knin:

24 "But today it is Croatian Knin and never again it will go back to  
25 what it was before when they spread cancer which has been destroying

1 Croatian national being in the middle of Croatia and didn't allow  
2 Croatian people to be truly alone on its own."

3 Later he said of the Serbs who fled:

4 "They were gone in a few days as if they'd never been here. They  
5 did not even have time to collect their rotten money and dirty  
6 underwear."

7 And on the 5th of August, 1996, this is the one-year anniversary  
8 of the operation, when Tudjman was addressing the troops in Knin, he  
9 said:

10 "We have returned Zvonimir's Croatian town to the fold of its  
11 motherland Croatia as pure as it was in Zvonimir's time."

12 Your Honours, the Trial Chamber's JCE conclusion is firmly based  
13 on all of the evidence: Tudjman and others' ideas and policies for  
14 Croatia, the Brioni discussions, the indiscriminate attacks which did  
15 actually occur after this, the ensuing mass departures, the crime wave in  
16 the August/September period, the policies, the speeches, the property  
17 laws. From this, only one picture emerges that there was a common  
18 criminal plan to remove the Serb civilian population from the Krajina on  
19 a permanent basis by the crimes of forcible displacement, unlawful  
20 attacks and restrictive and discriminatory measures.

21 Markac's appeal on this ground must fail. Your Honours, unless  
22 you have questions for me, Mr. Boudreault will now address on grounds 1B  
23 and C, more specifically on how Markac links to that JCE which I've just  
24 shown was the only reasonable conclusion [Overlapping speakers] dealing  
25 with membership and contribution --

1 JUDGE MERON: Ms. Brady, I mentioned, I think, earlier today,  
2 that the Trial Chamber concluded that the evacuation orders were not a  
3 primary cause for departure. So did it have any role to play? How would  
4 you assess the role of the evacuation orders issued by the Serb  
5 authorities?

6 MS. BRADY: Yes, Your Honour. My colleague Ms. Elliott will  
7 briefly address you on that question.

8 JUDGE MERON: Thank you.

9 MS. BRADY: In effect, it did not -- it was not the cause or the  
10 trigger for the departures as a causation [Overlapping speakers] ...

11 JUDGE MERON: So it had no impact?

12 MS. BRADY: No, Your Honour. Unless you can read something about  
13 that into the intent for the JCE. But in our submission, it would not  
14 affect either the mens rea for the JCE, the fact that discussions were  
15 going on. If Your Honour is meaning the fact that discussions were going  
16 on to evacuate and that's something that the participants knew about,  
17 that might have affect the finding on JCE intent --

18 JUDGE MERON: No, my question is very simple: Did the evacuation  
19 order cause some people to depart in listening, in abiding with the order  
20 or not at all?

21 MS. BRADY: Sorry. Not the bulk. The mass, the en masse  
22 departure of the Serb civilians was occurring much earlier; indeed, early  
23 hours of the morning up through the middle of the day. And this  
24 evacuation order came too late, Your Honours, in our submission.

25 JUDGE MERON: So the answer is: Partially yes. Some people left

1 in response to it. None. Some thousands. Some hundreds?

2 MS. BRADY: Your Honour, if I may leave that for Ms. Elliott --

3 JUDGE MERON: Please.

4 MS. BRADY: -- she is really the expert on that issue.

5 JUDGE MERON: Please.

6 MS. BRADY: Thank you.

7 MS. ELLIOTT: Your Honours, slightly out of order, but in order  
8 to answer this specific question on evacuation order, perhaps I can very  
9 briefly address you now.

10 I think it is helpful to consider a short time-line of a day's  
11 events to illustrate and support the reasonableness of the  
12 Trial Chamber's findings on the cause-and-effect relationship between the  
13 shelling and the sudden civilian flight.

14 The shelling attack in Knin, Benkovac, and Gracac started at  
15 5.00 a.m. Civilians initially hid in their basements in fear and panic.  
16 At 7.00 a.m., the attack in Obrovac town started. Civilians there  
17 immediately fled. Later in the morning, first in Gracac, and then  
18 towards noon in Knin, lulls in the intense shelling allowed people to  
19 escape from their basements and flee. The mass flight continued during  
20 the afternoon, including from Benkovac. By 5.00 p.m., the civilian  
21 population was already leaving Knin on a massive scale. And I would  
22 refer you to Trial Judgement paragraph 1531. The only escape route from  
23 Knin left open by the HV was clogged. Witness describes some of the  
24 towns are deserted by evening.

25 So turning to the evacuation order, the existence of this order

1 is not in doubt. However, the time-line shows that the evacuation order  
2 revealed only to civilian protection for the first time at 6.00 p.m.  
3 could not be the trigger for the mass civilian flight which started 11  
4 hours earlier.

5 As you have already heard, by 5.00 p.m. the population flight was  
6 described as massive. The Chamber's extensive and reasonable analysis of  
7 the role of the evacuation order also showed that the RSK authorities  
8 were panicked, disorganised, and unprepared to effect any evacuation  
9 plan. The evacuation request for assistance to the UN were not followed  
10 up. The evacuation order was poorly disseminated by the RSK authorities  
11 and I would also pause here to note that there was civilian -- there was  
12 Croatian propaganda also involved in this point, as planned in Brioni.  
13 And I would refer Your Honours to the Trial Judgement at paragraphs 1526  
14 to 1527, and 1538.

15 The order was simply ineffective. The Chamber was reasonable to  
16 dismiss the evacuation order as an alternative trigger.

17 That would be our answer on the evacuation order, unless I can  
18 assist further.

19 Thank you.

20 MR. BOUDREAULT: Good afternoon, Your Honours. As my colleague,  
21 Ms. Brady announced, I will respond to grounds 1B and 1C of Markac's  
22 appeal and show that he was reasonably and correctly convicted under JCE.

23 In our submissions, this remains whether the Appeals Chamber  
24 agrees with our primary contention that the artillery attack was unlawful  
25 or whether our alternative submission that the attack was unlawful

1       because it aimed at removing the civilian population in violation of the  
2       principles of distinction in humanity. In either case, Markac  
3       contributed to the criminal plan to remove the Serb population in the  
4       following ways:

5               First, he was involved in the planning of the operation which led  
6       to the forcible removal of thousands of Krajina Serbs.

7               Second, he ordered the unlawful shelling of Gracac which  
8       triggered the flight of the town's inhabitants.

9               Third, he failed to prevent, punish or report the crimes of his  
10       subordinates against Serb civilians and their property. In this climate  
11       of impunity, his subordinates were encouraged and continued to commit  
12       crimes which led to further forced departures.

13              Markac's participation in the criminal plan was intentional and  
14       determined. He was involved from the very beginning in planning and  
15       ordering the unlawful attack. He saw the massive flight of civilians  
16       this attack caused and knew that only a limited number of vulnerable Serb  
17       civilians would remain in the Krajina, those who had no possibility to  
18       leave.

19              As the commander of the special police, he should have been  
20       protecting those remaining Serbs, but, instead, he gave impunity to his  
21       subordinates to continue persecuting them. He was even actively involved  
22       in covering up some of these crimes. Given all of this, the Chamber came  
23       to the only reasonable conclusion, that Markac had JCE intent.

24              Markac was also aware of the possibility and willingly took the  
25       risk that JCE 3 crimes be committed. He knew that the criminal plan was

1 to expel as many Serbs as possible by using force or threat of force. He  
2 was aware of the heightened ethnic tensions surrounding the operation,  
3 the revenge motivations harboured by Croatian forces and the vulnerable  
4 position of the remaining Serbs in the area.

5 The Chamber properly convicted Markac for the JCE 1 and JCE 3  
6 crimes.

7 In grounds 1B and 1C Markac fails to show any legal or factual  
8 error in the Chamber's findings, much less an error which would affect  
9 the verdict. These grounds should be dismissed in their entirety.

10 Now, today, I will discuss Markac's participation in planning  
11 Operation Storm, his order to shell Gracac, and his failure to act  
12 against the crimes of his subordinates. For the remainder, and in  
13 particular with respect to legal issues, the Prosecution relies on its  
14 written submissions.

15 I turn first to Markac's involvement in planning Operation Storm.

16 As explained by my colleague Ms. Brady, at Brioni, the Croatian  
17 leadership agreed not just to an operation to retake the Krajina but also  
18 to force out the Serb population. Markac actively participated in this  
19 meeting. He and President Tudjman discussed the operations on Gracac  
20 with Tudjman instructing Markac to enter and report that he has entered  
21 Gracac as soon as possible, as this would lead to even greater panic than  
22 shelling the town for two days. That's's Exhibit P461 at page 18.

23 Markac proposed accusing the Serbs of having launched a sabotage  
24 attack as a pretext for launching Operation Storm. That's Exhibit P461  
25 at pages 19 and 20.

1           Markac also discussed details with Gotovina and Tudjman,  
2 including destroying the enemy's communication system to bring about  
3 total chaos. It's at pages 24 and 25 of the exhibit.

4           He then met with Gotovina and Rajcic to co-ordinate the artillery  
5 attack on the towns. He then ordered the attack on Gracac. That's at  
6 Trial Judgement 2583.

7           In these circumstances, the Chamber reasonably found that  
8 Markac's participation at Brioni and in the following meeting of the  
9 3rd of August furthered the criminal plan to expel the Krajina Serbs.  
10 The Chamber also properly relied on this, together with other facts, to  
11 conclude to Markac's JCE intent.

12           I turn next to Markac's order to shell Gracac. The Trial Chamber  
13 reasonably found that Markac ordered an unlawful artillery attack on  
14 Gracac and that it was a significant contribution to the common plan in  
15 and of itself. It also reasonably relied on Markac's order to conclude  
16 to his JCE intent. I will highlight four key points that confirm the  
17 reasonableness of the Chamber's conclusion.

18           First, Markac knew full well of the criminal plan to use an  
19 attack to forcibly remove the Krajina Serbs. He was present at Brioni.  
20 He was then involved in the discussions with Gotovina and Rajcic to  
21 co-ordinate the use of artillery on the Krajina towns.

22           Second, a report of the special police to Cervenko states that at  
23 5.15 a.m. on 4 August 1995, "on the orders of operation commander  
24 Colonel-General Mladen Markac," the chief of artillery launched the  
25 artillery attack in the area of the responsibility of the special police.

1 That's Exhibit P614 at page 6, discussed at Trial Judgement at  
2 paragraph 2555.

3 It's around that time, 5.15 a.m. on 4 August that shells started  
4 landing on Gracac. That's at paragraph 1451 of the Judgement.

5 Third, the unlawful attack on Gracac was perpetrated by the  
6 special police and HV assets that had been resubordinated to the special  
7 police. That's at Trial Judgement 1452 and 2561.

8 Markac could command and control both these groups. Trial  
9 Judgement, paragraph 194 and 196.

10 The fourth point that I want to mention is the fact that the  
11 attack on Gracac was a major operation, was carried out in an organised  
12 manner, and was reported up the chain of command. There's nothing to  
13 suggest that the shelling of Gracac was done by Markac's subordinates at  
14 their own initiative and without his approval.

15 So the Chamber was faced with an unlawful attack in accordance  
16 with the criminal plan known to Markac which fit squarely with the order  
17 given by Markac, perpetrated by units controlled by Markac and which was  
18 carried out in an organised way and reported up the chain of command. In  
19 these circumstances, the Chamber reached the only reasonable conclusion  
20 that Markac ordered the unlawful shelling of Gracac.

21 I turn now to Markac's behaviour in relation to the crimes of his  
22 subordinates. This is a point that has been completely ignored in  
23 Markac's submission today. Markac took no steps to prevent, report or  
24 punish crimes committed by his subordinates in Gracac on the 5th and  
25 6th of August and in Donji Lapac on the 7th and 8th of August. He then

1 failed to address the crimes of the special police in Grubori and  
2 Ramljane, even participating in their covering up. Markac's conduct  
3 contributed to the creation of a climate of impunity. It encouraged the  
4 commission of further crimes against Krajina Serbs and led to further  
5 Serb departures.

6 The Chamber properly found that these deliberate and repeated  
7 failures to address the crimes contributed to the criminal plan to  
8 forcibly remove and persecute the Krajina Serbs, and that Markac intended  
9 that result.

10 Markac says in his written submissions that he did not know about  
11 the wanton destruction by subordinates in Gracac and Donji Lapac. Now, I  
12 would simply refer to our submissions in our respondent's brief on this,  
13 and say that, first, the special police burned and destroyed Gracac on  
14 the afternoon of 5 August and the morning of 6th August while Markac was  
15 present in town with them. The Chamber found that he would have seen the  
16 burning by his subordinates. Paragraph 2571. This is the only  
17 reasonable conclusion given that all the houses in Gracac had been  
18 partially or totally burned during that time. That's Trial Judgement  
19 697.

20 Markac was also informed of the wanton destruction in Donji Lapac  
21 while his subordinates were there on 7 and 8 of August. The Chamber  
22 reasonably inferred this fact because Markac was regularly informed of  
23 developments on the grounds by a variety of sources. The destruction of  
24 Donji Lapac by the special police was a major event on the 7th of August.  
25 Markac's deputy Sacic admitted that he was told on 9 of August, 1995,

1       that Donji Lapac was burning. That's noted at Trial Judgement 611,  
2       referring to transcript 27791-27792. This would certainly have been  
3       reported to Markac. In fact, the burning of Donji Lapac by the  
4       special police was so widely known that it was even discussed at a  
5       meeting between Tudjman, Cervenko, Gotovina and other high ranking  
6       military officials. That's exhibit 470, pages 53 and 54, Trial Judgement  
7       2039.

8               Markac also argues that he did not cover up the crimes of his  
9       subordinates at Grubori and Ramljane but he fails to show the Chamber's  
10      findings were unreasonable. In relation to Grubori, the Chamber found  
11      that the Lucko Unit of the special police murdered five Serb civilians in  
12      the course of an operation on 25 August. The Lucko Unit also burned  
13      houses and shot or burned animals without military justification. The  
14      murder victims were elderly and vulnerable, exactly the people Gotovina  
15      had predicted would not be able to leave the Krajina. They included two  
16      elderly men and two women, one of which was aged 89 or 90. That's at  
17      Trial Judgement 389-390.

18             Josip Celic, the assistant commander of the Lucko Unit, first  
19      reported up the chain of command that nothing particular had happened  
20      during the operation. However, Markac and his deputy Sacic soon became  
21      aware that something had gone wrong, that persons had been killed. This  
22      was also widely known among international observers. Instead of  
23      investigating and taking measures to report or punish the responsible  
24      persons, Markac and Sacic had Celic change his report to state that the  
25      killings and burning had occurred as a result of a clash with "armed

1 Chetniks" or terrorists. That's at Trial Judgement 2297 and 2300.

2 Markac then forwarded this report to Cervenko. He sought to  
3 strengthen this false account by ordering renewed reports by the  
4 Lucko Unit matching the clash with terrorists story. Markac was also  
5 involved in efforts to prevent on-site investigation into these crimes.  
6 Trial Judgement 2300.

7 In these circumstances, the Chamber reasonably concluded that  
8 Markac participated in the cover-up of the Grubori crimes. Markac simply  
9 fails to show any error in those findings.

10 With respect to Ramljane, Markac knew on the afternoon of  
11 26 August 1995 that members of the Lucko Unit had committed arson.  
12 That's at Trial Judgement 2302. He learned this from various sources.  
13 He was present just outside the village the same day and saw the smoke  
14 rising from the building. Trial Judgement 1077, 2297.

15 One of the group leaders in the Lucko Unit admitted to Markac  
16 that he had deliberately burned Serb property. Trial Judgement 1077.

17 Markac allegedly declared that there would be investigations and  
18 disciplinary matters, but instead on following through on his word, he  
19 advanced a false account that the incident was a response to terrorist  
20 activity. That's at Trial Judgement 2238 and 2302, and the exhibit is  
21 P579, page 3. It's a report of this false account of Markac to Cervenko.

22 Markac also argues that his failures to take actions in relation  
23 to his subordinates' crimes and his participation in the cover-ups did  
24 not contribute to the criminal plan. The Chamber carefully considered  
25 this question. It gave example of how Markac's conduct led to his

1 subordinates committing further crimes and further deportation. That's  
2 at Trial Judgement 2581. Markac fails to show this was unreasonable.

3 He also fails to show the Chamber erred in finding that his  
4 failure and his involvement in the cover-ups showed his JCE intent.  
5 Markac knew that further crimes against Serb civilians would lead to  
6 further forced departure; yet, he encouraged those further crimes. This  
7 was reasonably found an indication of Markac JCE intent.

8 So to conclude on ground 1B, Markac simply fails to show an error  
9 in the Chamber's finding that he significantly contributed to the  
10 criminal plan and did so with JCE intent. I will be very briefly on  
11 ground -- on ground 1C in relation to the JCE 3 conviction.

12 We submit that the Chamber reasonably found that the crimes were  
13 committed were a natural and foreseeable consequences of the JCE and that  
14 Markac was aware of the possibility. I would refer you to paragraphs 139  
15 to 156 of our response brief. But I would say this: Markac has argued  
16 today that he chose people from outside the region to limit the risk of  
17 crimes such as murder, plunder, and wanton instruction. Now the  
18 Trial Chamber noted this assertion that Markac had made in his interview  
19 with the Prosecution. But it found this purported measure was obviously  
20 insufficient to dispel the possibility of crimes being committed against  
21 Serb civilians. The measure did not address the broader revenge  
22 sentiment held by members of the Croatian forces which were based not  
23 only on the specific connection with the local areas but also on the  
24 general enmity towards the Serb takeover of Croatian territory. In the  
25 past, these ethnic tensions had resulted in crimes on both sides: So,

1 Serb crimes against Croats and Croat crimes against Serbs. Particularly  
2 in previous Croatian military operations, such as Medak and Flash, there  
3 had been some incidents of deportation of Serb civilians and attacks on  
4 them and their possessions. Markac knew that the -- of the accusation of  
5 international observers that Croatian forces had destroyed Serb property  
6 when withdrawing after the Medak pocket operation in 1993.

7 Now you can find more on this in paragraphs 149 and 150 of our  
8 respondent's brief, and we refer to Trial Judgement paragraph 1683, 2003  
9 and 2585.

10 So for these reasons Markac's grounds 1B and 1C should be  
11 dismissed.

12 Your Honours, we do not intend to go and address grounds 2, 3, 5,  
13 and 6 of Markac's appeal. But I only want to raise an argument -- I want  
14 to address an argument that has been raised for the first time in  
15 Markac's reply, in relation to ground 6. And I want to deal with a  
16 question Your Honour raised a little earlier concerning P82.

17 So concerning ground 6. At paragraph 153 of his reply, Markac  
18 asserts that he was not on notice that the Orahovac murders were  
19 perpetrated by the special police. However, the Prosecution pre-trial  
20 brief at paragraph 124 specifically alleges that the special police was  
21 responsible for these murders. In addition, both parties addressed the  
22 issue of who murdered the Serb civilians and the uniform they were  
23 wearing during Witness Ilic's testimony. As to Markac's  
24 cross-examination on this, I would refer you to transcript 7574 to 7578.

25 Now the point about P82. I don't think we need to go into closed

1 session. I will stick to the Judgement.

2 The Trial Chamber was well aware that there were laps of memory  
3 and significantly inconsistency that emerged during the testimony of  
4 Witness 82, and that's at paragraph 625 of the Trial Judgement. It found  
5 that it would rely on this testimony only to the extent it was  
6 corroborated by other evidence.

7 Now, it is important to understand corroboration doesn't need to  
8 be on every single detail. I would refer you -- Your Honours, in this  
9 connection, to the Nahimana Appeal Judgement at paragraph 428. So the  
10 Trial Chamber here found that there was corroboration on the story of  
11 P82, on all the major elements of his testimony. The Defence today  
12 simply failed to show any error in this by referring to vague problems  
13 relating to P82.

14 So unless Your Honours have further questions, Mr. Schneider will  
15 now show the Chamber properly found Gracac was unlawfully shelled.

16 JUDGE MERON: Mr. Schneider.

17 MR. SCHNEIDER: Good afternoon, Your Honours.

18 At General Markac' order, special police and HV artillery units  
19 treated the whole town of Gracac as its target when they fired at least  
20 150 rounds into this town on 4 and 5 August 1995. This was an unlawful  
21 attack. The Trial Chamber's findings were reasonable and Markac's  
22 arguments should be dismissed.

23 In addition to responding to his arguments, I will answer  
24 questions 1, 2, and 3 from the Scheduling Order addendum. To be clear,  
25 the Prosecution's answers this morning to questions 1, 2, and 3 apply to

1 all four towns, including Gracac. I am just going to highlight a few  
2 points specific to Gracac itself that were overlooked by Markac in his  
3 answers to these same questions.

4 With regard to the unlawful shelling of Gracac, I will not repeat  
5 our submissions this morning on why the attack on all four towns,  
6 including Gracac, was unlawful. I am focussing on Gracac but the  
7 shelling of this town cannot be examined on its own. It must be  
8 considered in the context of the overall unlawful attack and the overall  
9 common criminal plan.

10 The Chamber relied on wide range of evidence on finding there was  
11 an unlawful attack against Gracac. First, we have the plain text of  
12 three orders instructing artillery units to put Gracac itself under  
13 artillery fire. This is in Gotovina's order and Exhibit P1125. This is  
14 in his chief of artillery Rajcic's attachment to that order,  
15 Exhibit D970. And, at this point, I would clarify Prosecution counsel  
16 this morning referred to this exhibit as D97. It was D970.

17 Finally the third order was in the order of Marijan First, the  
18 Operation Group Zadar chief of artillery. That is Exhibit P1201. In  
19 line with the three orders to put the town under artillery fire, we have  
20 reports that the artillery units did just that. So we have special  
21 police units, artillery units reporting several times they fired simply  
22 at Gracac. That's at Exhibit P2436.

23 These units noted other times that there is artillery fire  
24 targeting Gracac at Exhibit P2385. Apart from these orders to the units  
25 and the reports in response to these orders we have the co-ordination of

1 the unlawful attack of Gracac with the unlawful attacks against the other  
2 three towns. On this point, I would first note the 3 August 1995 meeting  
3 between Markac and Gotovina, the JCE members, and others, to plan the  
4 illegal attack on Gracac. Also, the artillery units that opened fire on  
5 Gracac did so at the same time other units were firing into the towns of  
6 Knin, Benkovac, and Obrovac. This co-ordination was the result of the  
7 fact that shelling of Gracac was just one part of the unlawful attack on  
8 the four towns, which itself was one part of the common criminal plan to  
9 permanently displace the Serb civilian population.

10 All of the evidence I've just discussed demonstrates the  
11 reasonableness of the Trial Chamber's finding that there was an unlawful  
12 attack against Gracac.

13 I turn now to question 1.

14 The Trial Chamber did not err in applying a 200-metre margin of  
15 error in analysing the lawfulness of the artillery shelling in Gracac  
16 itself. Special police and Croatian army units fired on Gracac with a  
17 specific type of weaponry, 130-millimetre guns, at paragraph 1452.  
18 Rajcic had given evidence on the margin of error for these same guns.  
19 His calculation for this margin was based on these 130-millimetres guns  
20 being 26 kilometres away from Knin. And I refer you to paragraph 1237 of  
21 the Judgement. For Gracac, these exact same guns were 3 kilometres  
22 closer at 23 kilometres away. Again, paragraph 1452.

23 Prosecution artillery expert Harry Konings explained that the  
24 margin of error for a particular weapon goes down as the guns are moved  
25 closer to a target. This is in paragraph 1165 of the Judgement. Given

1       this evidence from Konings, the fact that the 130-millimetre guns fired  
2       on Gracac were 3 kilometres closer than those of Rajcic's evidence, and,  
3       again, recall he had presented a margin of error of 70 to 75 metres front  
4       or back, and 15 metres right or left. And this is at Judgement  
5       paragraph 1237.

6               His figures should be adjusted lower for the shelling of Gracac  
7       itself. Given this, the 200-metre margin of error was reasonable based  
8       on the evidence available to the Trial Chamber. As an aside at this  
9       moment, I would like to respond to arguments raised today about an  
10       alleged inconsistency in the Prosecution relying on certain evidence by  
11       Rajcic, such as this, versus his other evidence that there was no order  
12       to treat the towns as targets. There is no inconsistency in this regard.  
13       Rajcic's testimony on the interpretation of Gotovina's order went not  
14       only to that piece of evidence but to Rajcic's own order itself which  
15       repeated the same direction to artillery units to put the towns under  
16       fire. If Gotovina's order was illegal, so was Rajcic's.

17               In the Judgement, Trial Chamber correctly observed that personal  
18       bias or motive to avoid incriminates oneself could affect the credibility  
19       of a witness's testimony. This is noted in the Judgement paragraph 31.  
20       This consideration fully applied to the Trial Chamber's assessment of  
21       Rajcic's strained interpretation of the attack order that he and Gotovina  
22       issued. And I would add that this applies with equal force to the  
23       evidence of Turkalj relied on today by the Markac Defence. Like Rajcic,  
24       Turkalj fell within the class of witnesses who wanted to avoid  
25       incriminating themselves because Turkalj was the commander of the special

1 police artillery unit that had fired into Gracac and treated the whole  
2 town as target. Trial Chamber reasonably rejected this self-serving  
3 account, in light of the other evidence I've already discussed today.

4 As to who called -- and I should have followed up when I was on  
5 Rajcic, but to return to Rajcic for a moment as to who called Rajcic as a  
6 witness. We note that the Defence submitted a witness statement from  
7 this same witness, Rajcic, at D1425. More importantly than that, no  
8 party owns or controls a witness. It is for the Trial Chamber to  
9 evaluate on its own, regardless of which party called a witness, the  
10 credibility of the witness's evidence.

11 Turning to question 2. The Trial Chamber's conclusions about  
12 impact sites in Gracac should be upheld even assuming the margin of error  
13 used by the Trial Chamber was erroneous. What is important is that the  
14 Trial Chamber found that shells landed in locations all over Gracac, all  
15 four corners of the town, and in the middle. I refer you to Judgement  
16 paragraphs 1456 through 1459 and the map exhibits cited there. This  
17 spread of fire across the entire town helped show the town itself was a  
18 target.

19 Secondly, the Chamber found that some of these shells landed near  
20 homes, civilian objects. Of these, some landed up to 800 metres away  
21 from the nearest military target. And to briefly address a point raised  
22 today, the Prosecution did establish the civilian nature of these homes  
23 that were hit. There was no reversal of the burden of proof. What is  
24 instead important is that this large distance up to 800 metres between  
25 military targets and shell impact again helps to show an intent to target

1 the town itself and not just military targets within it.

2 Today, you've heard different figures as to the distance between  
3 UN observer Hermann Steenbergen's house and the nearest military target.  
4 The Markac Defence has asserted it was only 450 metres away from an item  
5 on the Jagoda list; Exhibit D1447. However, this was an unsigned,  
6 undated list of possible targets from which actual targets might be  
7 selected. I refer you to Judgement paragraph 1403.

8 More importantly, the Trial Chamber did not accept that items on  
9 this list were actually aimed at during the shelling of Gracac. That is  
10 noted in the Judgement at paragraphs 1423 and 1454.

11 Given this, the shells that struck Steenbergen's house were 800  
12 metres away from the nearest military target, no reliance should be  
13 placed on the Jagoda list.

14 On related matter as a possible target, the argument today that  
15 there were potential targets of opportunity in Gracac being aimed at when  
16 the shells hit these houses hit -- at or near these houses has no merit.  
17 The Chamber reasonably rejected this possibility based on the following:

18 First, the shells that impact -- did near -- forgive me,  
19 Your Honours.

20 The shells that impacted near Gacesa and Steenbergen's houses did  
21 so at 5.00 a.m. on 4 August 1995. This is noted in the Judgement,  
22 paragraph 1932. The Trial Chamber found there is no enemy troop movement  
23 from the SVK at this time in the morning to be possible targets of  
24 opportunity and no forward observers is being used at that time to help  
25 identify any such targets. Indeed, the town itself had, as the Trial

1 Chamber found, minimal, if any, SVK presence. Given all of this, there  
2 was no reversal of the burden of proof as to targets of opportunity or  
3 the lack thereof, rather, as the Trial Chamber's reasonable evaluation of  
4 this evidence as a whole that led it to reject the possibility of such  
5 targets in this particular instance. Turning now to question 3, the  
6 Trial Chamber's finding that an illegal artillery attack took place  
7 against Gracac should be upheld even assuming any error with impact site  
8 conclusions noted in the Judgement for Gracac itself. We have the three  
9 borders to put the town itself under artillery fire. We have the  
10 corresponding reports from artillery units showing that the town itself  
11 was treated as the target. We have JCE members Markac and Gotovina  
12 planning this illegal attack. Beyond Gracac itself, we have the unlawful  
13 attack on the other three towns occurring at exactly the same time as  
14 this attack. In particular, for those other towns, I would refer to the  
15 evidence cited this morning by Mr. Stringer and Mr. Cross, but would note  
16 in particular the eye-witness accounts of indiscriminate shelling and the  
17 disproportionate attack on Martic to show that the unlawful attack on all  
18 four towns was a reasonable finding.

19 All of this evidence I've just mentioned does not change based on  
20 a margin of error or impact site conclusions. When all this evidence is  
21 considered as a whole, it leads to the only reasonable conclusion that  
22 Gracac was unlawfully attacked pursuant to Markac's order.

23 This is especially true given the very limited number of known  
24 impact sites we had within the town of Gracac itself. That cannot  
25 outweigh the other very strong compelling evidence I've just mentioned.

1           At this point I want to note that earlier today Markac Defence  
2           accepted that the fact that shells impacted near the two houses in Gracac  
3           was the result of error and could have been up to 20 rounds itself. The  
4           point here is whatever the margin of error was, it remains that Croatian  
5           forces disregarded the risk of civilian casualties when they shelled  
6           Gracac. We know this based on the following: The artillery units fired  
7           at least 150 rounds into the small town of Gracac in just a day and a  
8           half. They did so using artillery that was inaccurate anywhere between  
9           300 and 800 metres. They did so when aiming at a handful, as noted  
10          earlier, of military targets that in truth were a limited military  
11          advantage. They did so into a town with minimal, if any, enemy troop  
12          presence. All of this shows a disregard for civilian casualties, which  
13          helps further show the attack itself was unlawful.

14          The Trial Chamber's findings that the special police and Croatian  
15          army artillery units at Markac's order treated the whole town of Gracac  
16          as a target and thus engaged in an unlawful attack should be upheld.

17          To draw the Prosecution's response to Markac to a close, the  
18          Chamber properly found that Gotovina, Markac and others, acted together  
19          in a joint criminal enterprise aimed at permanently removing as many Serb  
20          civilians from the Krajina as possible. To achieve this, they unleashed  
21          a concerted intensive and unlawful attack against the civilians of Knin,  
22          Benkovac, Obrovac, and Gracac, which sparked the terrified flight of at  
23          least 20.000 civilians from the region. Further deportations were  
24          triggered by the unchecked wave of crimes by HV and special police as  
25          they swept through the territory after the initial attack, killing,

1       abusing, looting, and burning. The implementation of discriminatory  
2       measures cemented the deportation, making return for the Serb civilians  
3       impossible.

4               Markac's appeal should be dismissed in its entirety. He has  
5       failed to show that the Trial Chamber any error which would invalidate  
6       the Judgement or any unreasonable factual findings that would result in a  
7       miscarriage of justice.

8               This concludes my submissions, unless you have questions.

9               JUDGE MERON: Thank you. We have no questions, so therefore we  
10       will now have a pause of 15 minutes.

11               We will reconvene at five minutes before 6.00.

12                               --- Recess taken at 5.40 p.m.

13                               --- On resuming at 5.55 p.m.

14               JUDGE MERON: Please be seated.

15               We will now have reply by Markac, 30 minutes, and then the  
16       counsel for Mr. Gotovina as agreed will have five minutes or so to  
17       respond. After that, Mr. Gotovina will be invited, if he wishes to have  
18       ten minutes personal address, and, as well, Mr. Markac.

19               MR. JONES: Thank you, Your Honour.

20               Your Honour, the Prosecution seems to be under two  
21       misapprehensions, if I may put it that way. The first misapprehension is  
22       that we're defending President Tudjman. He is not our client, Markac is.  
23       We heard about Tudjman's inflammatory speeches on the 26th of August,  
24       1995, three weeks after the alleged artillery attacks, but we have heard  
25       very little about General Markac. And I will return to that in a moment.

1           The second misapprehension seemed to be that their response today  
2           was simply an opportunity to restate their response brief to respond to  
3           our written pleadings.

4           Now, of course, the purpose of their response was to respond to  
5           our oral submissions made today, and they said nothing about my  
6           submissions, nothing about how it all hangs on an unlawful artillery  
7           attack finding. They didn't respond at all. They gave what sounded very  
8           much like a closing speech after a trial, punctuated by the mantra that  
9           we've shown no error. And they gave no answer because there is no  
10          answer. And we're sure that the Appeals Chamber will draw the necessary  
11          inferences from their failure to respond.

12          So we're not going to respond to all the points which are not  
13          responses at all. We simply refer the Appeals Chamber to our appeals  
14          briefs, and especially in regard to crimes in Donji Lapac and at Grubori,  
15          we have a full response in our briefs and we won't repeat it. It is  
16          completely denied, completely and utterly denied that there was any  
17          failure to prevent or punish, and on the contrary, as you've heard today,  
18          Markac tried to prevent crimes and yet the Trial Chamber used it against  
19          him.

20          And I did want to just refer Your Honours to Blaskic  
21          paragraph 602 where the Chamber said this:

22                 "In concluding that the Appellant knew of the crimes that were  
23                 being committed, the Trial Chamber further relied upon orders issued by  
24                 the Appellant directing personnel under his command to treat the  
25                 detainees according to the requirements of humanitarian law. This is a

1 finds with which the Appeals Chamber cannot agree. In relying on those  
2 orders, the Trial Chamber effectively sanctioned the Appellant for  
3 fulfilling his duty as a military officer to prevent and punish  
4 violations of humanitarian law. Evidence of the execution of that duty  
5 cannot be cited as evidence of the Appellant's prior knowledge of and  
6 assent to those violations."

7 And we rely fully on that dictum.

8 Now, the Prosecution rely very heavily on a context approach, a  
9 totality approach, and variations on that theme, sometimes described as  
10 reviewing the evidence as a whole, and so I intend to tackle that head  
11 on.

12 First of all, it is not a totality approach at all. It's a  
13 subset of the totality. In fact, the Prosecution, when it refers to the  
14 totality, it is referring to the incriminating subset of the totality of  
15 evidence minus all exculpatory evidence minus all explanations which are  
16 favourable to the Appellant. That's not a totality approach. It doesn't  
17 look at all the relevant evidence and interpretations, exculpatory and  
18 incriminating, and I will develop that a little.

19 And secondly, the main point of Your Honours' question number 4,  
20 as the table, I hope, which perhaps was initially perplexing, shows is  
21 that if that is wrong, the unlawful artillery attack finding, then there  
22 is no use relying on a totality approach because there is no actus reus.  
23 So looking at Brioni, looking at a totality, will not get the Prosecution  
24 anywhere.

25 Now, I'd like to touch on General Markac's "participation at

1 Brioni" because that was touched on and it is significant. And I would  
2 ask, if possible, if you have Exhibit P461, to look at it, but if not, it  
3 doesn't matter. You can look at it later. There were only six pages, I  
4 believe, where General Markac is -- where he has any comment at Brioni.

5 Now, can it be maintained as a proposition that everyone present  
6 at the Brioni meeting was a member of the JCE? Surely not, because that  
7 is pure guilt by association. Right. So if that proposition is wrong,  
8 then we have to look at what Markac said and did at Brioni which is  
9 incriminating. We've had Tudjman, Tudjman, Tudjman. No. We need to  
10 look at what Markac said and did. And the reference is at page 17 of  
11 that exhibit. And there, in fact, it is just the president saying, What  
12 ask Markac's task here? Who will take Ljubovo? Purely and simply,  
13 wondering what his operational task will be in the operation.

14 And then paragraph 18:

15 Markac: "Mr. President, allow me to add something regarding my  
16 task in this plan on a micro level related to Mr. Norac. We all head out  
17 from Velebit --"

18 In fact there is almost no point in -- I was going to -- there's  
19 no point in me reading it apart from what the president says. The  
20 president says:

21 "When you say you're going to block Gracac off, bear in mind that  
22 there can be a state of panic in Gracac. You have to enter as quickly as  
23 possible and report that you have entered, as well as all of you who will  
24 be involved, because that will have a psychological effect in such  
25 situations. The psychological effect of the fall of a town is greater

1       than if you shell it for two days."

2               That is what Tudjman says to Markac about Gracac. He's saying,  
3       Don't shell it, better to march in there and announce that you have taken  
4       it. That is the complete opposite of the alleged JCE. That's page 18.

5               Page 19. The president says, We should have a pretext for the  
6       military action. And they ask Markac to do that, and he says, We can  
7       accuse them of launching a sabotage attack. Nothing to do with the JCE.  
8       One may not like the idea of having pretexts, but I imagine every army in  
9       the world occasionally uses pretext for attacks. Anyway, nothing to do  
10      with the JCE.

11              19. Sorry, that was page 19.

12              24, is the next intervention. And he simply says that it will  
13      take him four days to get to Gracac because it's 18 kilometres, and  
14      there's an argument about why it should take four days to go  
15      18 kilometres.

16              25, Markac says that in essence he should take down the  
17      communications system. That's all sound military tactics, nothing  
18      JCE-esque at all.

19              31 is the final reference, which simply says -- and again -- it  
20      is hard to know exactly what's being discussed and that's one of the  
21      problems of not having a live witness. And whoever explained this just  
22      says, We should give them an hour, just enough to take cover. So who  
23      knows what that is about. Absolutely nothing incriminating, nothing  
24      JCE-related and that's why they are forced to rely on Tudjman. And as I  
25      said, it is not guilt by association. There's nothing by Markac.

1       Moreover, nothing by anyone at Brioni about let's prevent their return.  
2       Let's use laws to stop them coming back, and that is absolutely -- that's  
3       the other half of the JCE. If there are two halves of this apple, there  
4       is displacing them and not letting them return, and you don't see  
5       anything of that half of the apple at Brioni. And they have absolutely  
6       no answer to that, the Prosecution, as far as Brioni is concerned.

7               Moreover, in relation to that, the Prosecution hasn't answered  
8       the fact that the Chamber found, at 2562 to 2563, that neither Gotovina  
9       nor Markac were involved in -- in adopting discriminatory measures, which  
10       is this second half of the apple.

11               Just to give you a preview of how I intend to proceed at this  
12       stage, I want to deal with some further issues and then I will give the  
13       floor to my learned colleague Mr. Kuzmanovic to reply on Gracac and, if  
14       possible, some extra time for the Gotovina team on evacuation orders  
15       because they've had no time to deal with it.

16               Now, failure to prevent or punish crimes. The Prosecution say,  
17       well, we didn't deal with that at all. Well, no, not in detail because  
18       we, unlike them, were answering your questions. So in fact that shows  
19       the Prosecution should not be addressing it in their response to us  
20       because of the precise reason that we didn't deal with it.

21               But we did deal with it in the context of the question asked, and  
22       if you still have the chart, you'll see that the top-level box to the far  
23       left, Markac substantially contributed to the JCE, including failure to  
24       prevent/punish. We've dealt with it there and we've dealt with it by  
25       showing that that finding depends on finding that he participated in an

1 unlawful attack. You have the paragraph references. And the Chamber did  
2 not identify failure to prevent or punish as an independent, separate  
3 ground for substantial contribution. And the reference for that is  
4 paragraph 2582, and time doesn't allow me to read it so I will simply say  
5 this, that that paragraph starts off by saying, "Considering the above,"  
6 and "the above" refers to paragraph 2580, the first sentences of which  
7 deal with unlawful attack. So again, it's considering unlawful attack in  
8 trying to determine whether he substantially contributed.

9 And then again it refers to the alleged deportation of Krajina  
10 Serbs by virtue of non-artillery crimes and that's also factored in, so  
11 that the finding that there was a substantial contribution does not  
12 identify as an independent contribution failure to prevent or punish  
13 and -- and 2580 to 52582 to make that clear.

14 Moreover, in relation to the alleged failure to prevent and  
15 punish, we want to point out the irrationality of the Chamber on this  
16 point -- not point out but remind it to the Chamber. As we've said in  
17 paragraph 167 of our appeals brief, the Trial Chamber in acquitting  
18 Mr. Cermak said, in essence, well, covering up crimes couldn't make a  
19 contribution to the JCE because the JCE is about forcibly expelling  
20 Serbs.

21 This is what they say at paragraph 2548:

22 "Considering its finding on the objective of the JCE being the  
23 permanent removal of the Serb civilian population from the Krajina by  
24 force or threat of force, the Trial Chamber finds that Cermak's  
25 misleading assurances were not of a magnitude and nature to constitute --

1 contribute to the JCE. With regard to Cermak's denial and concealment of  
2 the crimes committed in Grubori, the Trial Chamber finds, considering the  
3 finding on the JCE objective and the nature of Cermak's acts, that they  
4 did not constitute a significant contribution to the JCE."

5 And this was a case of putting weapons next to civilians to  
6 suggest that, in fact, they were combatants, a much more significant  
7 cover-up, if you like. So the Chamber was fully aware when dealing with  
8 Cermak, when acquitting him, that the JCE was about permanently removing  
9 Serbs, so a cover-up of murders committed weeks later would not have any  
10 link, would not constitute a significant contribution, but failed to  
11 apply exactly the same point to Markac.

12 On the totality -- I have five minutes.

13 The Prosecution defends the Chamber's totality approach when  
14 seeking to salvage its inferences regards Brioni and the JCE, et cetera.  
15 The problem is that to have a totality approach you need a Judgement with  
16 incontrovertible, unambiguous, reliable or strong evidence, which are the  
17 necessary foundations of a totality approach. But claiming to use a  
18 totality approach to assess evidence and make inferences when, in fact,  
19 it systematically disregarded exculpatory evidence, the Chamber ran foul  
20 of the guidance given in this Chamber's previous Judgements. And I refer  
21 to Ntagerura. The Prosecution is -- has cited Ntagerura frequently,  
22 relies on it for its totality approach. But in fact, if one looks at  
23 what the Appeals Chamber said, it's paragraph 174, 175:

24 "Only after the analysis of all the relevant evidence can a  
25 Trial Chamber determine whether the evidence upon which the Prosecution

1 relies should be accepted as establishing the existence of the facts  
2 alleged, notwithstanding the evidence upon which the Defence relies."

3 Then paragraph 175, it says, and I'm going to paraphrase, the  
4 presumption of innocence -- well, I better quote:

5 "... the presumption of innocence requires that each fact on  
6 which an accused's conviction is based must be proved beyond a reasonable  
7 doubt. The Appeals Chamber agrees with the Prosecution's argument that  
8 'if facts which are essential to a finding of guilt are still  
9 doubtful'" - oh, I don't have time - "'... notwithstanding the support of  
10 other facts, this will produce a doubt in the mind of the Trial Chamber  
11 that guilt has been proven beyond a reasonable doubt.' Thus, if one of  
12 the links is not proved beyond a reasonable doubt, the chain will not  
13 support a conviction."

14 So one has the metaphor a chain is only as strong as its weakest  
15 link. The Prosecution likes the cable metaphor. Whether you use a  
16 metaphor of chains or cables, the fact is if a piece of evidence is half  
17 doubtful, half incriminating, half exculpatory, and another piece of  
18 evidence is likewise, half incriminating, half exculpatory, you don't  
19 just add up the two halves which are incriminating and you say, well,  
20 there, we have a strong argument now. The halves -- the doubtful halves  
21 multiply as well. Half times a half is a quarter. It's not one. So  
22 they overlook the fact that the doubts multiply through the evidence as  
23 well, not just the certainties.

24 And that applies to Brioni because it relies on these excerpts,  
25 highly selective excerpts from -- from Gotovina's and Tudjman's

1 statements at Brioni, but ignore the context and ignore all the other  
2 elements there. So if I can just -- it's dealt it in our appeals briefs,  
3 paragraphs 21 to 86, Brioni, we analyse it in detail. But how about all  
4 these facts which are also part of the totality? One, that references to  
5 leaving a corridor for civilians and military forces to evacuate is in  
6 accordance with humanitarian necessity and sound military reasoning. As  
7 counsel for Gotovina said, you can't trap civilians in a war zone. And  
8 we have UN exhibits, D28 -- UN documents which are exhibits, D28 and  
9 D1530, where the UN says -- this is D28:

10 "However, Croatia will allow with full guarantees for security  
11 the departure from those areas of all those who expressed desire to do  
12 so."

13 The UN is calling on Croatia to allow people to leave, and quite  
14 right.

15 And then D1530, and it's at the -- it's a resolution of the  
16 Security Council and demand that the government of the Republic of  
17 Croatia "respect fully the rights of the local Serb population, including  
18 their rights to remain, leave, or return." You have to respect their  
19 right to leave and not hem them in. That the Brioni discussions didn't  
20 need to be either about deporting civilians or protecting them. As we  
21 said in our appeals brief that is a false dichotomy. But there are  
22 plenty of other reasons why you might wish them to go.

23 But the ostensible passage on which they place so much reliance  
24 is a paragraph full of ellipses, things which haven't been recorded, and  
25 subject to many interpretations. Here's one possible interpretation.

1 Tudjman realises the Serbs are not going to stay. He says, well, if they  
2 do say, they can have their civil rights. He realises they're not  
3 actually going to stay so they're ostensible. They're ostensible civil  
4 rights.

5 One simply doesn't know -- the fact is -- if I can perhaps just  
6 develop one analogy and I hope it doesn't come across as inappropriate,  
7 but in hotels these days, one comes across these signs which say,  
8 Consider the environment and don't make us wash your towels too much, and  
9 clearly the hotel business has never shown any great concern for the  
10 environment in the past. I don't see hotel chains giving money to  
11 Greenpeace or showing any other concern about the environment. Clearly  
12 they want to save money on detergent and so they say -- you can imagine a  
13 board meeting of the hotel chain, saying, Well, let's put up signs  
14 saying, Consider the environment, and that way we'll save money and we  
15 won't have to wash so many towels. It doesn't mean that they don't care  
16 about the environment -- it doesn't mean that the environment isn't going  
17 to be protected. It doesn't mean that there will be less towels  
18 wastefully washed. And so, it's the same context because -- if someone  
19 says, Yes, we can say this and in any event this will happen. I mean, in  
20 fact, what it shows, all of this, is that without a witness who actually  
21 says, This is what he meant, this is what everybody understood, which  
22 would be normal in a criminal trial of this magnitude, we're all guessing  
23 at what is meant.

24 Now I don't want to trespass too much on the Chamber's time, so  
25 I'm permitted a brief review whether there's -- what I'll do is I'll just

1 cite the page references of Brioni which I would also ask you to look at.  
2 In relation to Serb shelling of civilian areas in the town of Osijek,  
3 Croatian town, Tudjman, Cervenko, and Gotovina all rejected any  
4 retaliatory strike on non-military objectives. And Tudjman explicitly  
5 dismissed Serb villages as illegitimate targets. Cervenko concurs, and  
6 Gotovina says that there's no target even close to an adequate objective.  
7 Tudjman says, We can hit a battery, nothing but that. Pages 20 to 21.

8 Page 25, Gotovina states that the objective of the operation is  
9 military of territory, making no reference to any other purpose.

10 Page 27, Tudjman says:

11 "From a military viewpoint, the task is just to attack their  
12 batteries."

13 The Gotovina statement that Knin could be destroyed within a few  
14 hours should be seen in the context of the preceding paragraphs which can  
15 only reasonable be read to be referring to military targets not  
16 civilians.

17 And so on.

18 So, none of the above pieces are conclusive, beyond dispute or  
19 incontrovertible, and so the totality approach simply doesn't assist.

20 I think to give my colleagues time, I will stop there.

21 Thank you.

22 JUDGE MERON: Mr. Kuzmanovic.

23 MR. KUZMANOVIC: Thank you, Your Honour. If you don't mind, I  
24 will just stay right here rather than shift around.

25 First an observation and then I want to make three or four

1 specific points on the response argument.

2 First observation is: In relation to substantial contribution,  
3 the only argument put forth was essentially a recitation of the  
4 Trial Judgement. It was not anything that dealt with our brief. It was  
5 not anything with our oral argument.

6 On the substantial contribution issue it was: The Judgement at  
7 these paragraphs says this, and therefore it is right. That's not an  
8 argument.

9 The second thing I wanted to say with regard to the record in one  
10 of the arguments that was made regarding artillery. On page 169 of the  
11 response referring to -- line 12, referring to Prosecution artillery  
12 expert Konings and the margin of error, and also referring to  
13 Witness Rajcic and the margin of error, the Prosecution knows this,  
14 Rajcic only testified to a 70 to 75 metres range of error as internal  
15 margin of error. He did not discuss the additional external factors  
16 which Konings discussed, wind speed, air temperature, density, muzzle  
17 velocity. Those add to the range of error 240 additional metres for  
18 external errors. So Rajcic's margin of error is not 70 to 75 metres  
19 because that is simply internal. You have to add all of the external  
20 factors, as Konings did, to 240 metres, or up to 315 metres if you accept  
21 Rajcic's 70 to 75 metres of internal margin of error. You can't just  
22 factor on that alone. So that is a misleading argument to say that the  
23 margin of error is only 70 to 75 metres.

24 Second, there was a statement that the shelling caused a  
25 disregard for civilian casualties. I noted that on page 173, line 24, in

1 relation to Gracac. My question is: What civilian casualties? There  
2 were no civilian casualties. No dead, no wounded.

3 Third, Konings was an expert for the Prosecution. He found  
4 absolutely no fault with the special police's use of artillery in Gracac.  
5 Transcript 14775 and 76. He was not put the question by the Prosecution  
6 regarding the special police's use of artillery. He had no opinions  
7 critical of the special police's use of artillery in Operation Storm.  
8 Prosecution's own expert.

9 The other thing I wanted to add, on page 171, I think it's  
10 lines 10 and 11, where in the record has it been established the civilian  
11 nature of the targets or the homes, or whatever it is, in Gracac? The  
12 Prosecution certainly didn't establish it, they didn't cite anything to  
13 the record. I went through the six -- six -- six, I believe, impact  
14 areas. They didn't respond to any of those impact areas that I  
15 discussed. Where? There was no expert that discussed any shell impacts  
16 at all in Gracac.

17 Finally, I wanted to point the Trial Chamber's attention to,  
18 again, Josip Turkalj. Now the comment from the Prosecution is -- for the  
19 first time we hear that Turkalj testified the way he did because he  
20 didn't want to incriminate himself, even though he was a Prosecution  
21 witness. Turkalj testified at trial regarding artillery on several  
22 occasions and he was asked: What happened to you, Mr. Turkalj, when the  
23 RSK fired into the Republic of Croatia? What was the reaction of the  
24 civilian population in Croatian-held territory? Did they flee, did they  
25 go into hiding? What did they do?

1                   And he answered:

2                   "When the ARSK artillery fired upon towns or civilian targets,  
3                   everyone sought refuge in shelters wherever they could. People did not  
4                   abandon places where they lived, if that's what you're asking me about.  
5                   They spent most of the time in shelters, and the situation ... prevailed  
6                   for years."

7                   Then the focus turned to Gracac.

8                   Let's talk about the attack on Gracac. When you got to Gracac,  
9                   there was no civilian population. They had evacuated.

10                  That's correct. Yes, there was no civilian population.

11                  "... Mr. Turkalj, based on your experience being on the other  
12                  side of -- in Croatian-held territory receiving an artillery attack, were  
13                  you surprised that, in fact, the entire civilian population had evacuated  
14                  with the ARSK?"

15                  And Judge Orić reformulated the question: When the RSK fired  
16                  into it the Republic of Croatia, what was the reaction of the population?

17                  That was asked of the witness.

18                  And now the comparison is made between the reaction of the  
19                  civilian population as the witness experienced it being on the receiving  
20                  side, and now, on arriving at the side that had received the artillery  
21                  fired by the forces this witness was a part of. And Mr. Kehoe [sic]  
22                  says:

23                  "I will take the liberty to answer Your Honours' and counsel's  
24                  question this way: I was surprised at the fact that there was no  
25                  civilian population there. It was already said that the targets engaged

1 in Gracac were engaged with an exceptionally small number of projectiles  
2 in view of the number of targets in Gracac."

3 JUDGE MERON: Mr. Kuzmanovic, you should conclude in a moment or  
4 two.

5 MR. KUZMANOVIC: I will, Your Honour. This is my last point.  
6 Thank you.

7 "To draw a comparison, I was present in ... the town of Karlovac  
8 where hundreds or even thousands of rounds landed on Karlovac, and the  
9 population never abandoned it. It was always there.

10 "So the movements of the population can never be correlated with  
11 the activities of shelling, or at least I could not when it came to the  
12 shelling of towns that came from our side."

13 That's transcript reference number 13772 and 73, Your Honours.  
14 With that, I will conclude my submissions.

15 Thank you, Your Honour.

16 JUDGE MERON: Thank you very much, Mr. Kuzmanovic.

17 Mr. Gotovina. I'm terribly sorry, I forget the promise I made to  
18 you, that you would be able to respond.

19 Five minutes, counsel of Mr. Gotovina.

20 MR. MISETIC: Thank you very much, Mr. President, and I  
21 appreciate the extra time. With your leave, in the five minutes I would  
22 like to address the second topic, which was the evacuation issue. We  
23 never really addressed the argument presented by Ms. Elliott and with  
24 your leave I'd like to address that.

25 JUDGE MERON: Please do.

1           MR. MISETIC: Thank you. The first point is concerning  
2 Ms. Brady's submissions on General Gotovina's comments at Brioni. We  
3 take exception to what appeared be quotation and then insertion of  
4 language. She correctly cited that General Gotovina said:

5           "If we continue this pressure," and then inserted the words  
6 "meaning the shelling." No such language appears in the Brioni  
7 transcript. In fact that was highly contested at trial as to what that  
8 language meant.

9           Now, we'd like to draw your attention to what the Prosecution  
10 acknowledged in its pre-trial brief as to what the participants meant by  
11 continuing this pressure. First of all, it should be noted that  
12 continuing this pressure could not have referred to shelling because  
13 there was no shelling taking place in the Krajina on the date of the  
14 Brioni meeting. Therefore, continuing something that hadn't taken place  
15 yet wouldn't make any sense. Instead, the Prosecution correctly in its  
16 pre-trial brief explained what the participants were discussing. And  
17 this is via Sanction we're showing this. It says -- this is at  
18 paragraph 28:

19           "Following discussions regarding the operational plan for the  
20 attack, Tudjman observed that the general offensive would create great  
21 panic in Knin ..."

22           And that is what we submit, Your Honours. They're talking about  
23 that the offensive is going to create a general panic, not particularly  
24 using artillery. And as we know, in all places but the four towns, once  
25 the offensive was underway, in fact they did leave for reasons that the

1 Chamber found were not the result of unlawful conduct by the Croatian  
2 Army.

3 Secondly, with respect to General Gotovina's comments about being  
4 able to destroy Knin if the order is given. We note the Prosecution's  
5 opening statement which confirmed that the Prosecution itself did not  
6 contend that there was a mens rea to destroy Knin. Quite the opposite,  
7 according to the Prosecution. This is again on your screens. This is  
8 the Prosecution's comment.

9 "Despite the bombardment, Your Honour --" and this is at trial  
10 transcript 444.

11 "Despite the bombardment, Your Honour, the Court should not get  
12 the wrong impression. This was not Stalingrad or Vukovar, where weeks of  
13 shelling reduced the city to rubble. It was not the most destructive  
14 shelling of the war. But that is precisely the point. The intention was  
15 not to destroy Knin, the city of Zvonimir, into which President Tudjman  
16 intended to resettle Croats but to drive out Serbs."

17 So there is no dispute in this case that there was no intent to  
18 destroy Knin.

19 Turning our attention to the evacuation orders. The proposition  
20 that masses of civilians were evacuating early in the day is simply  
21 fantasy. There is no evidence in the record, contemporaneous evidence,  
22 to support that proposition. You will not find any evidence from the  
23 4th of August, the 5th of August, the 6th of August, any reports,  
24 anything of the like to confirm any mass exodus of civilians prior to the  
25 issuance of Martić's evacuation order. Are there claims that were made

1 in the weeks and the months later by individuals --

2 MR. STRINGER: I apologise, counsel, for the intervention.

3 Mr. President, it was under our understanding that Mr. Misetić's five  
4 minutes was granted in order to respond to Ms. Brady's specific comments  
5 about Brioni and General Gotovina's remarks as made in that meeting. It  
6 wasn't our understanding that the five minutes was granted in order to go  
7 into other areas that didn't fall within that point.

8 MR. MISETIĆ: Mr. President, I asked for leave when I got on my  
9 feet and you granted it, and that's why I proceeded.

10 JUDGE MERON: Please continue, and it is almost up.

11 MR. MISETIĆ: Thank you.

12 Now, we turn to two documents to confirm what the contemporaneous  
13 records confirm. And this is Exhibit P398, beginning at page 1, and this  
14 is the report of -- it's the commander of Sector South, General Forand,  
15 it's a transcript. We're showing it via Sanction. And it says towards  
16 the bottom concerning -- sorry, towards the top -- the bottom of the  
17 first paragraph.

18 He says:

19 "Discussing why the Krajina fell," beginning at line 7, "and this  
20 is a bit surprising when you look at it from the military point of view.  
21 Another aspect that was critical, I think, in their -- why it went so  
22 fast, they decided very early, on the afternoon, on the 4th afternoon to  
23 evacuate the civilians from Knin and all the surrounding towns, and as  
24 soon as that was done, everybody started to flee away, including the  
25 military."

1           General Forand again at trial Exhibit P399. Page 1 -- I'm sorry,  
2 page 2. I'll skip over in the interests of time. On page 1,  
3 General Forand describes being called to a meeting at 1800 hours where  
4 the SVK authorities asked him to assist in the evacuation of the civilian  
5 population.

6           On page 2 from lines 2 to 8:

7           "And I told them that when they had a plan, you know, I would  
8 come back. So they said, We'll come back in an hour and we'll have a  
9 plan. I could not go back in an hour. It was a couple of hours, you  
10 know, before we could go back to that location, and when we arrived  
11 there, we found out that they had evacuated the location. There was  
12 nobody there. And that's when we started to see quite a flow of vehicles  
13 getting out of Knin and going direction north."

14           JUDGE MERON: I think -- I really think that you ought to --

15           MR. MISETIC: Thank you, Mr. President.

16           JUDGE MERON: Your time is up. Thank you so much.

17           MR. STRINGER: Excuse me, Mr. President. I apologise. I just  
18 want to tie up one thing from this morning.

19           As Your Honours may recall, I raised a question about the  
20 demonstrative aids, the maps and the photographs, and whether the circles  
21 on the margin of error corresponded to the legends at the bottom, and I  
22 just want to inform the Chamber that Mr. Misetich and I have been in touch  
23 about that during the course of the day. He assures us that the circles  
24 are the correct size and I take his word for it. It may be that they  
25 don't correspond to the legends. But for the limited purpose of these

1 demonstrative aids, they're not in evidence. They relate to the  
2 400 metres which, in fact, was not even accepted by the Trial Chamber. I  
3 think Your Honours are aware of that and acceptable to us from that --

4 JUDGE MERON: I made it clear that they were -- that we looked at  
5 them without prejudice.

6 Thank you very much.

7 And, Mr. Gotovina, you would like to [Microphone not activated]

8 THE APPELLANT GOTOVINA: [Interpretation] Your Honours, I would  
9 like to address you -- Your Honours, I would like to address you in  
10 English [as interpreted] if I may.

11 Your Honours, throughout my military career, I have endeavoured  
12 to conduct myself honourably and in a dignified manner. As a soldier and  
13 officer, I have always done my best to protect civilians. As an officer,  
14 I am proud of the way Operation Storm was conducted. I am proud of that  
15 operation, not only because we won the battle but also because civilian  
16 casualties and damage to civilian objects were reduced to the bare  
17 minimum.

18 As a human being, I am, of course, extremely sorry for the loss  
19 of civilian lives and the destruction of civilian objects in the  
20 aftermath of the operation. I cannot, however, be held accountable for  
21 what others may have done or failed to do while I was engaged in and  
22 conducting operations in Bosnia.

23 Throughout the war, I was tasked with difficult duties and  
24 responsibilities. To this day, I remain convinced that I fulfilled my  
25 duties to the best of my ability. As a man, I know that with hindsight,

1       it is possible to say that things could have been different. But, as a  
2       commander, I did not have the benefit of hindsight at the time of the  
3       crimes charged.

4               During Operation Storm, we were engaged in a life and death  
5       struggle against another military force to liberate our country whilst  
6       trying to protect the lives of our men and that of civilians. I lay no  
7       claim to perfection and I hope I will not be convicted on that basis.

8               Even though I have made mistakes in my time, such as not  
9       surrendering to the Tribunal, you can be sure that I am the first person  
10      to regret them. You may find fault with my judgement, but you will be  
11      hard-pressed to find any willingness or consent on my part to hurt,  
12      abuse, or deny the rights of any man, be he a civilian or a soldier,  
13      simply because he is a Serb or is of Serb ethnicity.

14              I know and can live with the fact that the way I acted during  
15      Operation Storm was appropriate and my orders bear testimony to that.

16              Your Honours, I'm not asking for any favours, and I'm only asking  
17      for what my lawyers have already requested. I know for a certainty that  
18      my actions were consistent with those of an honest and diligent military  
19      officer who tried to do his best in trying circumstances. If this  
20      Chamber were to examine my actions in light of such a context, I would be  
21      entirely satisfied and would ask for nothing more.

22              Your Honours, thank you very much for your attention.

23              JUDGE MERON: [Interpretation] Thank you, Mr. Gotovina.

24              [In English] Mr. Markac, ten minutes.

25              THE APPELLANT MARKAC: [Interpretation] Your Honours, convinced of

1 the fairness of this Tribunal and my own innocence, nine years ago I  
2 appeared before this Tribunal voluntarily. I was surprised at the  
3 allegations made about the military and police Operation Storm in the  
4 course of these proceedings which are not founded on true facts, and  
5 which in many respects misinterpret the actual events on the ground.

6 Motivated by the attempts to alter the facts of the homeland war,  
7 I wish to say this in all honesty: I am not a member of any joint  
8 criminal enterprise, nor am I a war criminal. Moreover, I first heard of  
9 the existence of a joint criminal enterprise in the course of these  
10 proceedings. Neither the representatives of the international community  
11 who were present in Croatia at the time nor any member of the public in  
12 the country had ever indicated to me that such an enterprise existed, to  
13 begin with.

14 Likewise, nobody from domestic institutions or the international  
15 community, either before, during, or after Operation Storm, has ever  
16 drawn my attention to possible unlawful acts committed by the special  
17 police of the Ministry of Interior of whose professional conduct I am  
18 particularly proud.

19 Consequently, I did not plan, commit, or cover up any crime,  
20 because it goes against my outlook on life. I am an officer of the  
21 police and army who has, alongside his subordinates, responsibly and  
22 professionally carried out the tasks assigned to me by the Chief of the  
23 Main Staff of the armed forces and the minister of the interior of the  
24 Republic of Croatia. My job was to fight terrorism, to defend and  
25 liberate the unlawfully occupied territory, and to restore the legal

1 system of the Republic of Croatia in that territory. As a person and a  
2 humanist, I deeply sympathise with all those who have suffered a personal  
3 loss during these unfortunate events.

4 Your Honour, I am not guilty. I expect that you will thoroughly  
5 examine the material available to you and deliver a fair judgement. I am  
6 grateful for this opportunity to address you.

7 Thank you.

8 JUDGE MERON: Thank you, Mr. Markac.

9 The hearing is now concluded, and the Judgement of the  
10 Appeals Chamber will be delivered in due course.

11 We'd like to thank the parties, court management, interpretation  
12 staff, the court reporter, and other staff for their assistance today.

13 And the Appeals Chamber will rise.

14 --- Whereupon the Appeals Hearing adjourned at  
15 6.40 p.m., sine die.

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