

United Nations
Nations UniesInternational Criminal Tribunal
for the former Yugoslavia
Tribunal Pénal International
pour l'ex-Yougoslavie

“OPERATION STORM” (IT-06-90)

GOTOVINA & MARKAČ

The Prosecutor v. Ante Gotovina, Ivan Cermak & Mladen Markac**ANTE GOTOVINA***Found not guilty*

Commander of the Split Military District of the Croatian Army (HV) from 9 October 1992 to March 1996; overall operational commander of the southern portion of the Krajina region during the military offensive known as "Operation Storm".

- Acquitted

IVAN ČERMAK*Found not guilty*

Assistant Minister of Defence in the Croatian Government from 1991-1993; from 5 August 1995, Commander of the Knin Garrison, which encompassed the municipalities of Civljane, Ervenik, Kijevo, Kistanje, Knin, Nadvoda and Orlić; held the rank of Colonel General.

- Acquitted

MLADEN MARKAČ*Found not guilty*

Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia from 18 February 1994, which gave him overall authority and responsibility for the operation and functioning of the Special Police; Assistant Minister of Interior; following Operation Storm, held the rank of Colonel General.

- Acquitted

ANTE GOTOVINA

Born	12 October 1955 on the island of Pašman, Zadar municipality, Republic of Croatia
Indictment	Initial: 8 June 2001, made public on 26 July 2001; amended: 24 February 2004, made public on 8 March 2004; joinder: 14 July 2006; reduced: 21 February 2007; amended joinder: 12 March 2008
Arrested	7 December 2005, in Spain
Transferred to ICTY	10 December 2005
Initial and further appearances	12 December 2005, pleaded not guilty to all charges; 5 December 2006, pleaded not guilty
Trial Chamber Judgement	15 April 2011, sentenced to 24 years' imprisonment
Appeals Chamber Judgement	16 November 2012, acquitted

IVAN ČERMAK	
Born	19 December 1949 in the municipality of Zagreb, Croatia
Indictment	Initial: 24 February 2004, made public on 8 March 2004; amended: 14 December 2005; joinder: 14 July 2006; reduced: 21 February 2007; amended joinder: 12 March 2008
Surrendered	11 March 2004
Transferred to ICTY	11 March 2004
Initial and further appearances	12 March 2004, pleaded not guilty to all charges; 5 December 2006 (by video link), pleaded not guilty
Trial Chamber Judgement	15 April 2011, acquitted

MLADEN MARKAČ	
Born	8 May 1955 in Đurđevac, Croatia
Indictment	Initial: 24 February 2004, made public on 8 March 2004; amended: 14 December 2005; joinder: 14 July 2006; reduced: 21 February 2007; amended joinder: 12 March 2008
Surrendered	11 March 2004
Transferred to ICTY	11 March 2004
Initial and further appearances	12 March 2004, pleaded not guilty to all charges; 5 December 2006 (by video link), pleaded not guilty
Trial Chamber Judgement	15 April 2011, sentenced to 18 years' imprisonment
Appeals Chamber Judgement	16 November 2012, acquitted

STATISTICS

Trial days	303
Witnesses called by Prosecution	81
Prosecution exhibits	2687
Witnesses called by Defence	Gotovina: 25 Čermak: 19 Markač: 13
Defence exhibits	Gotovina: 1024 Čermak: 717 Markač: 391
Witnesses called by Trial Chamber	7
Chamber exhibits	5

TRIAL	
Commenced	11 March 2008
Closing arguments	30 August - 1 September 2010
Trial Chamber I	Judge Alphons Orié (presiding), Judge Uldis Ķinis, Judge Elisabeth Gwaunza
Counsel for the Prosecution	Alan Tieger, Stefan Waespi
Counsel for the Defence	Luka Mišetić, Gregory Kehoe and Payam Akhavan for Ante Gotovina Steven Kay and Gillian Higgins for Ivan Čermak Goran Mikuličić and Tomislav Kuzmanović for Mladen Markač
Judgement	15 April 2011

APPEALS	
Appeals Chamber	Judge Theodor Meron (presiding), Judge Mehmet Güney, Judge Fausto Pocar, Judge Patrick Robinson and Judge Carmel Agius
Counsel for the Prosecution	Helen Brady, Douglas Stringer
Counsel for the Defence	Luka Mišetić, Gregory Kehoe, Payam Akhavan and Guénaél Mettraux for Ante Gotovina; Goran Mikuličić, Tomislav Kuzmanović, Kai Ambos and John Jones for Mladen Markač
Judgement	16 November 2012

INDICTMENT AND CHARGES

The initial indictment against Ante Gotovina was confirmed on 8 June 2001. An indictment against Ivan Čermak and Mladen Markač was confirmed on 24 February 2004. On 14 July 2006, the Trial Chamber granted the Prosecution's consolidated motion to amend the indictment and for joinder. All three accused appealed the decision. On 25 October 2006, the Appeals Chamber affirmed the Trial Chamber's decision, making the joinder indictment the operative indictment in the case.

During a Status Conference on 9 February 2007, and followed by a written order on 21 February, the presiding judge ordered the Prosecution to reduce the indictment pursuant to Rule 73*bis*. Subsequently, the Prosecution filed the reduced joinder indictment on 6 March 2007.

On 17 May 2007, the Prosecution filed a motion to amend the indictment in order to provide additional specification in the pleading of the acts of persecution as well as to amend the pleading of Joint Criminal Enterprise (JCE). On 14 February 2008, the Trial Chamber granted the motion, and on 12 March 2008 the Prosecution filed a corrected version of an amended joinder indictment. Prior to the filing on the same day, Judge Orić orally confirmed the amended joinder indictment as the operative indictment in this case.

The amended joinder indictment alleges that, on 4 August 1995, Croatia launched a military offensive known as Operation Storm (or "Oluja"), with the objective of re-taking the Krajina region of the country. On 7 August, the Croatian Government announced that the operation had been successfully completed. Follow-up actions continued until about 15 November 1995.

According to the indictment, Gotovina, Commander of the Split Operative Zone (which in 1993 was renamed the Split Military District) of the Croatian Army (HV), from 9 October 1992 to March 1996, was overall operational commander of the southern portion of the Krajina region during Operation Storm. On 30 May 1994, he was promoted to the rank of Major General. By early August 1995, he had been promoted to the rank of Colonel General. As such, Gotovina possessed effective control over all units, elements and members of the HV that comprised or were attached to the Split Military District and such other forces as were subordinated to his command and operated and/or were present in the southern portion of the Krajina region during Operation Storm.

The indictment further alleges that Ivan Čermak was appointed as Knin Garrison Commander on 5 August 1995, and continued as such until approximately 15 November 1995. At the same time, he was also acting as a representative of the Croatian Government in dealing with members of the international community and media concerning Operation Storm in areas that extended beyond the boundaries of the Garrison command. Čermak, in his combined capacities, participated in various structures of power and responsibility, and possessed effective control over members of Croatian Army units or elements who comprised, were attached to, or operated in the Knin Garrison, and also over civilian police who operated in the Garrison area and areas adjacent to it. The Croatian Army units comprising or operating in the Garrison and adjacent areas included the 4th and 7th HV Brigades, the 1st Croatian Guards Brigade, the 113th Infantry Brigade, 142nd Infantry Brigade, 144th Infantry Brigade, 126th Home Guard Regiment (HGR), the 6th HGR, the 7th HGR, the 134th HGR, and a combined military police company (consisting of units from the 72nd and 73rd Military Police battalions). Members of the Zadar-Knin and Kotar-Knin Police Administrations (including various stations and posts) also operated in the same area as the Garrison.

As Garrison Commander, Čermak was responsible, *inter alia*, for maintaining order; disciplining and supervising the conduct of military personnel; organising duty services in the garrison; and establishing cooperation and coordination between or among the Knin Garrison and area police forces, for the purposes of establishing and maintaining law and order.

According to the indictment, Mladen Markač was appointed Assistant Minister of the Interior on 18 February 1994, and as such also became the Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia, giving him overall authority and responsibility for the operation and functioning of the Special Police. As Commander of the Special Police, Markač possessed effective control over all members of the Special Police who were involved in Operation Storm. He also possessed effective control over all members of the HV rocket and artillery units attached to his forces or subordinated to his command during Operation Storm and the continuing related operations. Following Operation Storm, Markač held the rank of Colonel General.

Gotovina, Čermak, Markač are charged on the basis of individual criminal responsibility (Article 7(1) and 7(3) of the Statute of the Tribunal) with:

- **Persecutions on political, racial and religious grounds, deportation and inhumane acts (forcible transfer)** (crimes against humanity, Article 5),
- **Plunder of public or private property and wanton destruction of cities, towns or villages, or devastation not justified by military necessity** (violations of the laws or customs of war, Article 3).
- **Murder** (violations of the laws or customs of war, crimes against humanity, Articles 3 and 5)
- **Inhumane acts** (crimes against humanity, Article 5)
- **Cruel treatment** (violations of the laws or customs of war, Article 3)

PRE-TRIAL

On 12 March 2004, Čermak and Markač filed separate motions for provisional release. The Trial Chamber denied the motions on 29 April 2004. Čermak and Markač then separately filed their second motions for provisional release on 23 July 2004. The Trial Chamber denied the motions on 14 September 2004.

On 20 September 2004, the two accused filed a joint motion for leave to appeal the Trial Chamber's decision. On 29 September 2004, the Prosecutor filed a response in which the "Prosecutor joined in the accused's motion for leave to appeal the Trial Chamber's decision denying their second motions for provisional release." After the Bench of the Appeals Chamber granted the motion for leave to appeal the impugned decision on 13 October 2004, the accused filed interlocutory appeals against the Trial Chamber's decision on the second motion for provisional release on 22 and 26 October 2004, respectively.

On 2 December 2004, the Appeals Chamber granted the provisional release of Čermak and Markač.

On 5 December 2006, the accused made further appearances to enter pleas to the new counts in the joinder indictment. Gotovina, Čermak and Markač all pleaded not guilty.

On 26 January 2007, the Trial Chamber suspended the provisional release of the accused and ordered them to be present at a Status Conference in order to discuss Čermak's compliance with his provisional release conditions. After the Conference, Markač was provisionally released again on 10 February 2007 and Čermak's provisional release was reinstated as of 16 February 2007.

On 10 October 2007, the Trial Chamber suspended the provisional release of Čermak and Markač and ordered the two accused to be present at the Status Conference on 26 October 2007. On 27 October 2007, both accused were provisionally released again.

On 28 December 2007, the provisional release of Markač was terminated due to his violation of the conditions of his release, and he returned to the Detention Unit on 30 December 2007.

On 6 February 2008, the Trial Chamber terminated the provisional release of Čermak, who was ordered to return to the Detention Unit on 5 March, six days before the start of the trial.

THE TRIAL

The trial commenced on 11 March 2008.

On 5 March 2009, the Prosecution completed its case-in-chief. On 25 May 2009, a witness re-called by the Prosecution was examined.

The Defence case commenced on 28 May 2009 and was officially rested on 27 January 2010.

In the period from 24 February until 22 April 2010, seven witnesses called by the Trial Chamber testified.

On 2 and 3 June 2010, the Prosecution presented new evidence in its reopened case. Subsequently, on 10 June 2010, the Defence of Ivan Čermak called two witnesses in its reopened case.

The closing arguments were held from 30 August until 1 September 2010.

RULE 98*bis* DECISION

After the conclusion of the presentation of Prosecution evidence, the Trial Chamber can rule on whether there is a case to answer. If the Chamber believes that the Prosecution has not presented sufficient evidence to prove certain charges, it can dismiss those charges and enter a judgement of acquittal before the beginning of the presentation of Defence evidence.

On 3 April 2009, the Trial Chamber issued an oral decision pursuant to Rule 98*bis* and dismissed the motions for acquittal filed by the Defence of Gotovina, Čermak and Markač.

TRIAL CHAMBER JUDGEMENT

On the basis of the evidence before it, and in accordance with an agreement between two of the Defence parties and the Prosecution, the Chamber found that an international armed conflict existed throughout the indictment period and area.

The Chamber found that Croatian military forces and the Special Police committed acts of murder, cruel treatment, inhumane acts, destruction, plunder, persecution, and deportation as charged in the indictment. Considering the large number of crimes committed against the Serb population of the Krajina region in a relatively short period of time, the Chamber further found that there was a widespread and systematic attack directed against this Serb civilian population.

The Prosecution charged all three accused as participants in a joint criminal enterprise, the objective of which was the permanent removal of the Serb population from the Krajina region. In assessing whether there was indeed a joint criminal enterprise, the Chamber carefully considered the discussions held at a meeting that took place on the island of Brijuni on 31 July 1995, a few days before the launching of Operation Storm. At this meeting Croatian president Franjo Tuđman met with high-ranking military officials to discuss the military operation. The Chamber found that the participants at this meeting also discussed the importance of the Krajina Serbs leaving as a result of the imminent attack. Responding to a statement by President Tuđman to this effect, Gotovina stated: "*A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving.*"

The Chamber carefully reviewed the statements of high-ranking Croatian officials at the Brijuni gathering, other meetings, and in public. The Chamber considered these statements in the context of its findings on the deportation, unlawful attacks on civilians and civilian objects, and the imposition of discriminatory measures, all of which were committed against Krajina Serbs. The Chamber found that certain members of the Croatian political and military leadership shared the common objective of the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved deportation, forcible transfer, and persecution through the imposition of restrictive and discriminatory measures, unlawful attacks against civilians and civilian objects, deportation, and forcible transfer. The joint criminal enterprise came into existence no later than the end of July 1995 and continued throughout the indictment period.

The Chamber found that Tuđman, who was the main political and military leader in Croatia before, during, and after the indictment period, was a key member of the joint criminal enterprise. Tuđman intended to repopulate the Krajina with Croats and ensured that his ideas in this respect were

transformed into policy and action through his powerful position as national president and supreme commander of the armed forces. The Chamber further found that other members of the joint criminal enterprise included Gojko Šušak, who was the Minister of Defence and a close associate of Tudman's, and Zvonimir Červenko, the Chief of the Croatian army Main Staff. The members of the joint criminal enterprise also included others in the Croatian political and military leadership who participated in presidential meetings and were close associates of Tudman's.

At the Brijuni meeting, Tudman and high-ranking military officials discussed how the military forces should be used to ensure that not only the Serb Krajina army, but also the Serb civilian population, would leave the Krajina. The Chamber found that high-ranking Croatian military officials, including Tudman, Šušak, and Červenko used the Croatian military forces and the Special Police to commit the crimes within the objective of the joint criminal enterprise. The Croatian military forces included the Croatian army and military police, as well as Bosnian Croatian army units which had been subordinated to Croatian army commanders.

The Chamber found that Ante Gotovina participated in the Brijuni meeting and contributed to the planning and preparation of Operation Storm. Moreover, Gotovina failed to make a serious effort to prevent and follow up on crimes reported to have been committed by his subordinates against Krajina Serbs. Gotovina's failures had an impact on the general attitude towards crimes in the Split Military District. Based on these considerations, the Chamber found that Gotovina's conduct amounted to a significant contribution to the joint criminal enterprise. The Chamber further found that Gotovina's order to unlawfully attack civilians and civilian objects amounted, in and of itself, to a significant contribution to the joint criminal enterprise. Based on Gotovina's acts and conduct and his participation in, and statements at, the Brijuni meeting, the Chamber found that Gotovina had the state of mind that the crimes forming part of the objective should be carried out. The Chamber therefore established that Gotovina was a member of the joint criminal enterprise, and thus intended that his actions should contribute to this enterprise. The Chamber further found that other charged crimes, although not part of the common purpose, were natural and foreseeable consequences of the execution of the joint criminal enterprise, and foreseeable also for Gotovina.

The Chamber found that Mladen Markač participated in the Brijuni meeting, contributing to the planning and preparing of Operation Storm. It also found that he ordered the Special Police's shelling of Gračac on 4 and 5 August 1995, which constituted an unlawful attack on civilians and civilian objects, and brought about the forcible displacement of persons. The order to shell Gračac amounted, in and of itself, to a significant contribution to the joint criminal enterprise. Based on his acts in relation to the preparation of Operation Storm, as well as his acts and omissions with regard to crimes committed by members of the Special Police, the Chamber concluded that Markač had the state of mind that the crimes forming part of the joint criminal enterprise's objective should be carried out. The Chamber therefore found that Markač was a member of the joint criminal enterprise, and that through his acts and omissions he intended to contribute to it. The Chamber further found that other crimes charged, although not part of the common purpose, were natural and foreseeable consequences of the execution of the joint criminal enterprise, and foreseeable also for Markač.

In relation to Čermak, the Chamber found that his activities included dealing with members of the international community, cleaning up Knin, improving hygienic conditions, providing a public soup kitchen, making the hospital operational, reconnecting water and electricity to the town, reactivating public services, improving transportation conditions, restoring factories and other businesses, and de-mining Knin and its surroundings. The evidence did not establish that Čermak knew or intended that his activities contribute to any goal of populating the Krajina with Croats rather than Serbs. As for Čermak's conduct with regard to crimes committed on the ground, the Chamber found that he denied and concealed the crimes committed in Grubori on 25 August 1995. It further found that Čermak, in general, provided misleading assurances to the international community that actions to stop the crimes against Serbs were being or would be taken. However, apart from this, the Chamber found that the Prosecution did not prove its allegations that Čermak permitted, minimised, denied or concealed crimes against Serbs, nor that he provided false, incomplete or misleading information or false assurances to the international community. The Chamber concluded that the evidence did not establish that Čermak was a member of the joint criminal enterprise, or that he had made any intentional and significant contribution to it. The Chamber also found that Čermak was not liable under any other mode of liability charged against him.

On 15 April 2011, the Chamber rendered its judgement convicting the accused as follows:

Ante Gotovina and Mladen Markač, as members of a joint criminal enterprise, on the basis of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal), were found guilty of:

- Persecution, deportation, murder and inhumane acts (crimes against humanity, Article 5)
- Plunder of public and private property, wanton destruction, murder and cruel treatment (violation of the laws or customs of war, Article 3)

Sentence: 24 years of imprisonment for Gotovina and 18 years for Markač.

Ivan Čermak was acquitted of all charges.

APPEALS PROCEEDINGS

On 16 May 2011, Gotovina's Defence filed its notice of appeal. Markač's Defence filed a public redacted version of its notice on 18 May 2011.

On 2 August 2011, Gotovina's Defence filed its appeal brief. On 12 October 2011, Markač's Defence filed a final redacted version of its brief.

The appeal hearing took place on 14 May 2012.

APPEALS CHAMBER JUDGEMENT

Gotovina, in his first and third grounds of appeal, and Markač, in his first and second grounds of appeal, in part, submitted that the artillery attacks on Knin, Benkovac, Obrovac, and Gračac, or the 'Four Towns', were not unlawful and that without a finding that the artillery attacks were unlawful, the Trial Chamber's conclusion that a JCE existed could be sustained.

The Appeals Chamber recalled that the Trial Chamber concluded that the appellants were members of a JCE whose common purpose was to permanently remove Serb civilians from the Krajina by force or threat of force. The Appeals Chamber found that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, considered that the touchstone of the Trial Chamber's analysis concerning the existence of a JCE was its conclusion that unlawful artillery attacks targeted civilians and civilian objects in the Four Towns, and that these unlawful attacks caused the deportation of large numbers of civilians from the Krajina region.

The Appeals Chamber found that the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful was heavily premised on its analysis of individual impact sites within the Four Towns ('Impact Analysis'). This Impact Analysis was in turn based on the Trial Chamber's finding a 200 metre range of error for artillery projectiles fired at the Four Towns ('200 Metre Standard'). Based on this range of error, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack. In identifying legitimate targets, the Trial Chamber took into account, in part, its finding that the HV could not identify targets of opportunity, such as moving police or military vehicles, in the Four Towns.

The Appeals Chamber unanimously held that the Trial Chamber erred in deriving the 200 Metre Standard. The Trial Judgement contained no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error, and it was devoid of any specific reasoning as to how the Trial Chamber derived this margin of error. The Trial Chamber considered evidence from expert witnesses who testified as to factors, such as wind speed and air temperature, that could cause variations in the accuracy of the weapons used by the HV against the Four Towns, and the Trial Chamber explicitly noted that it had not received sufficient evidence to make findings about these factors with respect to each of the Four Towns. In its Impact Analysis, however, the Trial Chamber applied the 200 Metre Standard uniformly to all impact sites in each of the Four Towns. In these circumstances, the Appeals Chamber was

unanimous in finding that the Trial Chamber erred in adopting a margin of error that was not linked to the evidence it received. In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, found that no reasonable trial chamber could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks. Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, granted Gotovina's first ground of appeal, in part, and Markač's second ground of appeal, in part, and reversed the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful.

In these circumstances, having reversed the Trial Chamber's finding that artillery attacks on the Four Towns were unlawful, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considered that no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a joint criminal enterprise ('JCE') with the common purpose of permanently removing the Serb population from the Krajina by force or threat of force. In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, granted Gotovina's first and third grounds of appeal and Markač's first and second grounds of appeal, in part, and reversed the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina by force or threat of force. It was therefore unnecessary to address the appellants' remaining contentions regarding the JCE's existence. All of the appellants' convictions were therefore reversed.

In this context, the Appeals Chamber, Judge Agius dissenting, could identify no remaining Trial Chamber findings that would constitute the *actus reus* supporting a conviction pursuant to an alternate mode of liability. Accordingly, the Appeals Chamber, Judge Agius dissenting, did not enter convictions against Gotovina and Markač on the basis of alternate modes of liability.

On 16 November 2012, the Appeals Chamber reversed, by majority, Judges Agius and Pocar dissenting, Gotovina's and Markač's convictions for crimes against humanity and violations of the laws or customs of war and entered verdicts of acquittal.

Judge Theodor Meron appended a separate opinion. Judge Carmel Agius appended a dissenting opinion. Judge Patrick Robinson appended a separate opinion. Judge Fausto Pocar appended a dissenting opinion.