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MARGIN OF ERROR: POTENTIAL PITFALLS OF THE RULING IN *THE PROSECUTOR v. ANTE GOTOVINA*

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I. Introduction[1]

On April 15, 2011, the International Criminal Tribunal for the Former Yugoslavia (ICTY)[2] sentenced Croatian General Ante Gotovina to twenty-four years in prison[3] on charges stemming from his actions

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[1] The author gratefully acknowledges the assistance of many colleagues in the development of this article. I particularly thank Professor Laurie Blank, Director of the International Humanitarian Law Clinic at Emory University School of Law for hosting a meeting of experts on this subject where the seeds of this article were planted and many of its concepts discussed. *See generally* Int'l Humanitarian Law Clinic at Emory Sch. of Law, Operational Law Experts Roundtable on the Gotovina Judgment, Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law, No. 12-186 (Jan. 28, 2012) (on file with the International Humanitarian Law Clinic at Emory School of Law).

[2] The International Criminal Tribunal (Former Yugoslavia) (ICTY) was established by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), after the Security Council determined that "ethnic cleansing" and other widespread violations of humanitarian law occurred within the former Yugoslavia. By the time Operation Storm began in August 1995, Croatian leaders knew that the ICTY, UN observers and the entire world were watching daily developments in the Balkan wars. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1986 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (appeal pending). All ICTY documents cited in this article are available at the ICTY website, http://icr.icty.org/default.aspx (link requires registration).

[3] General Gotovina has been confined in The Hague since December 2005. *See* COMMUNICATIONS SERV. OF THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET, "OPERATION STORM" (IT-06-90), GOTOVINA & MARKAC (2012), *available at* http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf. As this article goes to publication, the case is pending in the ICTY

during Operation Storm, the 1995 Croatian military campaign to reclaim territory from the self-proclaimed Republic of Serbian Krajina (RSK).[4] While General Gotovina was formally charged with participating in a joint criminal enterprise to drive ethnic Serbs out of the Krajina region, the case against him was based largely on allegations that he ordered unlawful artillery and rocket attacks on four towns during conventional combat operations against RSK Serbian forces.[5] Because very few judicial opinions apply the law of war to tactical artillery operations, the Trial Chamber's judgment raises issues of significant legal and operational importance and will command the attention of scholars, courts, and military professionals worldwide. This article critically examines the court's reasoning and concludes that in the interests of justice, the coherent development of international humanitarian law, and the protection of innocent civilians in future wars, the Gotovina judgment should be set aside.[6]

Combat for the control of cities is as old as warfare itself, and the bombardment of cities is a grim reality of war. Cities offer a belligerent

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Appeals Chamber. Official court records and filings of parties relating to this case are accessible at http://icr.icty.org/default.aspx.

[4] *Gotovina*, Case No. IT-06-90-T, Judgment (appeal pending).

[5] This article focuses on the operational and legal validity of the court's findings relating to unlawful use of tactical artillery. While the judgment now under appeal raises other issues, the allegations relating to Gotovina's role in the artillery attacks are central to all aspects of the case against him. *See* Part II.D. *infra.*

[6] Trial chamber decisions are not binding precedent and have no formal authority to change the law, but as one learned treatise aptly observed regarding the weight of decisions of international tribunals: "A coherent body of jurisprudence will naturally have important consequences for the law." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998). *See also* William J. Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the ICTY*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENIUM 77, 77-78 (Michael N. Schmitt & Leslie C. Green, eds., 1998).

> Judicial decisions are a subsidiary means for the determination of rules of international law, not a source of law equivalent to treaties, custom or general principles of law. Further, there is no rule of precedent in international law as such. The decisions and practice of the ICTY, if they are to have a positive impact on the development of the law of armed conflict, must persuade external decision makers such as foreign ministry officials, officials in international organizations, other judges, military officers and academic critics of their relevance and utility.

Id.

cover from enemy fire, logistical support, and a host of facilities with military significance, such as communications nodes, transportation hubs, national defense headquarters, and political capitols.[7] At the same time, urban battles bring war's violence into deadly proximity with civilian populations and produce some of the most horrific cases of human suffering and loss of innocent life in the annals of warfare. It is no surprise, then, that cities are often focal points in military campaigns, and the names of cities echo throughout history as reminders of the tragic legacy of urban warfare—Troy, Jericho, Solferino, Gettysburg, Stalingrad, Hue, and Fallujah.[8] Cities not only lie at the crossroads of military history; they also mark a moral and legal frontier between savagery and restraint, between total war and the amelioration of suffering. The quest for rational legal constraints on the attack and defense of urban areas has therefore tested international commitment to humanitarian law and driven the evolution of core legal principles in the law of armed conflict. No other operational scenario places greater demands on the moral and legal commitments of an army or the vitality of humanitarian law. The development of modern weapons, the changing face of war, and the evolution of international humanitarian law have intensified efforts in the modern era to formulate legal standards that balance humanitarian concerns and the military necessity of fighting in and for control of cities.

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[7] *See* United States v. Ohlendorf (Einsatzgruppen Trial), 4 Trials of War Crimes Before the Nuremburg Military Tribunals Under Control Council Law No. 10, Nuremberg, Oct. 1946-Nov. 1949, at 466–67 (1948).

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action.

Id.

[8] After the 1859 Battle of Solferino, Swiss doctor Henri Dunant published a book describing the horrible suffering of civilian residents and wounded soldiers left on the battlefield that led to the establishment of the International Committee of the Red Cross. HENRI DUNANT, A MEMORY OF SOLFERINO (Eng. ed. 1939) (1862). *See* Adam Roberts, *Land Warfare: From Hague to Nuremburg*, *in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 132 (Michael Howard et al. eds., 1994) ("One of the most destructive aspects of hostilities, whether ancient or modern, is siege warfare . . . The most terrible siege of the Second World War was that of Leningrad, whose heroism in the face of disaster engraves its name permanently in the history of war. . . .").

This article reviews the ICTY judgment against General Gotovina, which found that Croatian artillery and rocket attacks on four Serb-held towns during Operation Storm violated the law of war, and focuses especially on the court's inordinate reliance on a novel, accuracy-based standard. The Trial Chamber found that legitimate military targets existed in each of the four Serb-held towns at issue, and that some of the shelling was lawfully directed at those military targets.[9] The court presumed, however, that any projectile that landed over 200 meters from a known military target was the product either of indiscriminate fire or deliberate targeting of "civilian areas"[10] (hereinafter, this presumption will be called "the 200 meter rule"). The court found that "too many projectiles impacted in areas too far away from identified artillery targets . . . for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV [Croatian] artillery fire."[11] This finding serves as the linchpin for the court's conclusion that Gotovina ordered unlawful attacks on Serb-held towns.

Viewed in light of international legal standards and operational realities, the "200 meter rule" is subject to serious legal and technical challenge. Neither the evidence in the record of trial nor field artillery doctrine and practice supports the court's 200 meter standard. None of the military experts who testified at trial were asked to comment on a 200 meter standard or asked what an appropriate standard might be. Neither the prosecution nor the defense appears to have anticipated the court's invention of, or reliance upon, this rigid accuracy standard. In fact, the court itself does not clearly explain the origin or basis of its 200 meter rule. Artillery experts, both prosecution and defense, reviewed the standard during appellate motions and unanimously agreed that this standard of accuracy is operationally and technically impossible to achieve, even under ideal conditions.

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[9] This article works within the evidentiary and factual parameters set by the court in its published judgment. The court noted,

> The Trial Chamber used specific terminology in its factual findings. For example, it used the term 'the Trial Chamber finds' for incidents where the factual basis was sufficient to further consider the incident against applicable law. If an incident was not further considered, the Trial Chamber used terms like "the evidence indicates" or "the evidence suggests."

Gotovina, Case No. IT-06-90-T, Judgment, ¶ 63.

[10] *Id.* ¶ 1898.

[11] *Id.* ¶ 1906.

The 200 meter rule is not only operationally unrealistic, but also inconsistent with the existing legal framework. Targeting law focuses on intent at the time the decision to attack was made, not on a post hoc analysis of the accuracy of fires. A technically valid accuracy guideline could serve legitimately as one factor supporting an inference of intent, but elevating an accuracy guideline to a dispositive rule would, in effect, impose a new strict liability offense for artillery and rocket fire in populated areas. Gotovina could not have known that his indirect fires would be judged after the fact by this impossibly stringent standard of accuracy. The 200 meter rule's variance from existing law and lack of legal or operational precedent raises serious and fundamental legal concerns. Finally, and most importantly, the 200 meter rule upsets the law's careful balance between military necessity and humanitarian restraint by creating incentives for both attackers and defenders to choose means and methods of warfare that inevitably will increase the dangers of war for noncombatants in towns and cities. These operational and legal concerns independently, and certainly in combination, raise sufficient grounds for overturning the *Gotovina* judgment. By reversing the trial judgment, the Appeals Chamber would promote consistency in, adherence to, and faith in the international humanitarian laws that govern warfare in populated areas.

II. Background and Charging of General Gotovina

A. Operation Storm

After the dissolution of the Former Yugoslavia in 1990, Serbs in the Krajina region of Croatia, encouraged and assisted by Slobodan Milosevic, declared their independence and proclaimed the Republic of Serbian Krajina (RSK).[12] Supported by the Serbian Army, the Krajina Serbs pursued a campaign of "ethnic cleansing" that resulted in the expulsion of most ethnic Croats from the region by 1993.[13] Upon winning its own independence in 1992, Croatia vowed to restore the Krajina to Croatian control and began planning for such an operation as early as 1993. After the failure of UN-brokered peace talks in the spring

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[12] *Id.* ¶ 1693 (reviewing the central role and dominant political, economic and military influence of Milosevic in RSK affairs and finding that "Serbia/FRY had overall control of the SVK [Krajina Serb forces]").

[13] *Id.* ¶ 1686. *See also* R. CRAIG NATION, WAR IN THE BALKANS 1991–2002, at 109–10 (2003).

of 1995, both sides prepared for imminent armed conflict in the Krajina. The Croatian military campaign for control of the Krajina region was called "Operation Storm."

Operation Storm was the largest conventional military ground operation in Europe since WWII.[14] Croatian forces anticipated stiff resistance from about 39,000 Krajina Serb forces backed by up to 100,000 well-equipped Serbian Army (JNA) troops deployed in Bosnia. Serbian intervention could have led to a protracted conflict and a devastating Croatian defeat.[15] General Gotovina, a senior military leader throughout the war, commanded approximately 35,000 troops in the southern sector of operations (i.e., the Split Military District).[16] Combat operations began in the early morning hours of August 4, 1995, with Croatian artillery and rocket attacks on targets throughout the region, followed by the swift advance of Croatian forces on multiple axes toward Knin, the capital and generally accepted strategic center of gravity of the Krajina Serb government.[17] The strategic military objective of the operation was to eliminate Serbian forces and regain control of the

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[14] *Id*. at 189–90. There was no allegation that Croatia's resort to war was itself unlawful. "[T]he case was not about . . . Croatia's choice to resort to Operation Storm. This case was about whether Serb civilians in the Krajina were the targets of crimes, and whether the Accused should be held criminally liable for these crimes." *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 13.

[15] According to U.S. envoy Richard Holbrooke, both U.S. and British intelligence services predicted that Milosevic would intervene and the Serb Army (JNA) would defeat any Croatian attack on Krajina. U.S. Defense Secretary Perry and Chairman of the Joint Chiefs, General Shalikashvili, pointedly warned Croatian defense Minister Susak in February 1995 that combined Serbian and Krajina Serb forces would defeat Croatian forces if they invaded Krajina. *See* RICHARD HOLBROOKE, TO END A WAR 90, 102 (1998) (calling Operation Storm a "dramatic gamble").

[16] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 75.

[17] *See id.* ¶ 1169:

> Under NATO doctrine, neutralization and or destruction of the enemy's centre of gravity can lead to the destruction of the enemy. . . According to Konings [Prosecution expert], the centre of gravity for the RSK was Knin, so taking control of Knin was important for the HV [Croatian Army] to succeed.

The term "center of gravity" is defined as "[t]he source of power that provides moral or physical strength, freedom of action, or will to act." U.S. DEP'T OF DEF., JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2012), *available at* http://www.dtic.mil/doctrine/dod_dictionary/ [hereinafter DOD DICTIONARY]. At least nine hundred of at least 1205 rounds at issue in this case were fired at targets in Knin.

region. Serbian military intervention never materialized, and General Gotovina's forces broke through Krajina Serb defenses and seized control of Knin by the end of August 5, the second day of operations. Operation Storm was a military success and also a strategic turning point which contributed ultimately to the signing of the Dayton Peace Accords in December 1995.[18]

B. Croatian Artillery in Operation Storm

The prosecution attempted to portray Operation Storm as an ethnic cleansing campaign, which relied on unlawful artillery attacks to drive Serb civilians out of the Krajina region.[19] The defense attempted to show the strategic and tactical planning involved in a relatively standard military campaign to regain territory and decrease the Serbian threat to Croatia. Marko Rajcic, General Gotovina's Chief of Artillery, was responsible for planning, coordination, and control of all indirect fire assets employed by Gotovina in Operation Storm.[20] Rajcic testified that planning for operations in Krajina began several years prior to the conflict, and that he began drafting lists of military targets in the Krajina region in 1993. Based on intelligence and surveillance operations, including aerial photography from unmanned drones, Rajcic identified military targets, determined their coordinates, and began fire support planning in earnest. Throughout 1994 and the spring of 1995, Rajcic continued to update and refine target lists and conducted a large live-fire artillery exercise to prepare his forces for the anticipated conflict.[21]

On June 26, 1995, the Croatian Army Chief of Staff issued a planning directive for Operation Storm, which ordered artillery and rocket forces in Gotovina's sector to focus on neutralizing enemy Main

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[18] The Croat Army reported lingering skirmishes for up to fourteen days after Croatia announced successful end to hostilities. *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1697. At the strategic level, Operation Storm altered the balance of power in the region and is considered a major contributing factor to resumed peace talks which led to the Dayton Peace Accords in Dec. 1995. *See* HOLBROOKE, *supra* note 15, at 100–03.

[19] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution's Public Redacted Final Trial Brief , ¶¶ 55, 61, 64 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2010) [hereinafter Prosecution Trial Brief].

[20] The court relied extensively on Rajcic's testimony for background on Operation Storm artillery planning; without otherwise questioning his credibility, it rejected his interpretation of Gotovina's orders to "place the towns of Knin, Benkovac, Gracac and Obravac under fire." *See* Part IV.B.7, *infra*.

[21] *See Gotovina*, Case No. IT-06-90-T, Judgment ¶¶ 1177–78.

Staff and Corps command posts in Knin and brigade command posts, troop concentrations, armor, and artillery in the areas of Knin and Benkovac, including fuel and ammunition supply centers.[22] On July 31, a few days before the offensive, Gotovina and Rajcic attended a meeting with Croatian President Tudjman and other top leaders on the Island of Brioni.[23] The transcript of this meeting was offered by both the prosecution and the defense to buttress their respective characterizations of Operation Storm. The prosecution alleged that the "plan to permanently and forcibly remove the Krajina Serbs crystallized" at Brioni,[24] and the court apparently agreed with that reading of the meeting transcript.[25] The court also found, however, that "the primary focus of the meeting was on whether, how, and when a military operation against the SVK [Serbian Army of Krajina] should be launched."[26] The meeting transcript shows that Croatian leaders were equally focused on the military risks and the international perceptions of the operation. President Tudjman reportedly told his military commanders that the main task was "to inflict such powerful blows in several directions that the Serbian forces will no longer be able to recover, but will have to capitulate."[27] He also stated that conducting the operation "professionally" would protect Croatian forces from politically motivated criticism of the operation.[28]

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[22] Prior to Operation Storm, Croatian military leaders believed that Knin was the critical command and control center of the Serbs and that it would be strongly defended. *See id.* ¶ 1220 ("Statements of the RSK and SVK leadership led the HV [Croatian Army] to believe that the SVK [Krajina Serb militia] intended to resist and defend Knin to the last man.").

[23] According to the indictment, Croatian President Franjo Tudjman was a central figure in the joint criminal enterprise. Having died in 1999 of natural causes, he was not charged in the case. Prosecutor v. Gotovina, Case No. IT-06-90-T, Amended Joinder Indictment, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 12, 2008) [hereinafter Indictment].

[24] Prosecution Trial Brief, *supra* note 19, ¶ 4; *cf.* Prosecutor v. Gotovina, Case No. IT-06-90-A, Prosecution Response to Ante Gotovina's Appeal Brief, ¶ 169 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011).

[25] The court relied heavily on the transcript of the Brioni meeting and found that it accurately reflected the discussions there. *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1989. The court deemed Brioni the birthplace of a joint criminal enterprise under President Tudjman's leadership, yet it is undisputed that military plans for the operation had been under development for years. Much was also said at the meeting about the conduct of military operations, as such, and the use of artillery support. *See, e.g.*, *id.* ¶ 1977.

[26] *Id.* ¶ 1990.

[27] *Id.* ¶ 1972 (finding that "striking blows" and making Serbs "disappear" referred to Serb forces, not civilians).

[28] *Id.* At Brioni, Tudjman asked Gotovina if Knin could be attacked without collateral damage to the UN observer camp located there, to which Gotovina responded that "Croatian forces could fire with great precision without hitting them." *Id.* ¶ 1977.

Additionally, according to the meeting transcript, Tudjman pointedly urged commanders to conserve ammunition and suggested air assault tactics as a means to avoid unintended collateral damage to United Nations Confidence Restoration Operation [UNCRO] barracks in Knin.[29]

After the Brioni meeting, final fire support planning consisted mainly of updating existing plans based on the most current intelligence.[30] On August 1, Gotovina assembled his subordinate commanders for a final operational planning meeting. Consistent with Gotovina's previous conduct and Croatian Army regulations,[31] Rajcic testified that Gotovina ordered all commanders to focus solely on defeating enemy forces, to follow the Geneva Conventions, and to restrict artillery fire to high-payoff military targets in order to conserve limited ammunition resources.[32] He quoted Gotovina as emphasizing that "the artillery needed to be as precise as possible and could only target military objectives that provided the highest military advantages."[33] Gotovina tasked all artillery-rocket groups[34] to support the main effort through powerful strikes against enemy front line units, command nodes, and indirect fire assets in depth. While tactical direct support artillery focused on enemy forces at the front lines, operational artillery assets under Rajcic's direct control[35] were to concentrate fires on strategic and operational targets in Knin, Benkovac, Obravac, and Gracac. Rajcic also testified that the Operation Storm plan relied heavily on synchronized

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[29] *Id.* ¶¶ 1980–82. Mate Granic, Croatian Deputy Prime Minister and Minister of Foreign Affairs, told investigators that Croatian authorities wanted to avoid "unnecessary civilian casualties at all costs," that he believed compliance with the law of war was critical, and that Croatia had been warned by various governments to conduct a lawful military operation. *Id*. ¶ 1986.
[30] *Id.* ¶ 1180.
[31] *Id.* ¶ 71 ("Commanders were responsible for military discipline and compliance with the international law of war." Further, "military personnel were not obliged to carry out criminal orders.").
[32] *Id*. ¶ 1182 (Gotovina "emphasized that the operation was aimed only at enemy soldiers and . . . also warned those present to instruct their subordinates that enemy prisoners of war and civilians should receive proper treatment and protection.").
[33] *Id.* ¶ 1181.
[34] *Id.* ¶ 79. Croatian artillery was organized into five groups. When firing at strategic targets and targets in operational depth, such as those in Knin, they were under Gotovina's command and control through Rajcic. This included artillery groups TS-1 through TS 4. TS-5 was OPCON to (i.e., operationally controlled by) Special Police (SP) commander Markac. Direct support missions for tactical front line units fell to unit commanders to select targets. About 75% of the artillery support was tactical DS missions and 25% dedicated to operational depth. *Id.*
[35] *Id.* ¶ 6 (noting that Markac controlled rocket and artillery forces OPCON to his SP units).

artillery support to shock, surprise, disorient, and disrupt enemy command, control, and communications.[36]

Rajcic also testified that Gotovina specifically told him that "with regard to using artillery in the civilian-populated areas of Knin, Benkovac, Obrovac and Gracac, maximum precision and proportionality should be respected."[37] Rajcic testified about the detailed military necessity and proportionality review he performed in response to these orders. Rajcic stated that, based on this analysis, he deleted any military targets firing at which risked inflicting excessive collateral damage compared to the target's military value.[38] He also matched weapons to targets based on considerations of proportionality and ordered protective measures, such as time-of-day restrictions, in order to minimize the risk to civilians near urban targets.[39] Finally, Rajcic deployed forward observers and aerial drones in the final days before the operation in order to update artillery maps and target lists.[40]

Meeting minutes introduced at trial described a meeting between Gotovina and other high-ranking Croat leaders and Minister of Defense Susak on August 2, 1995. Susak ordered all commanders to prevent offenses against the civilian population and to protect the United Nations Protection Force (UNPROFOR) in order to protect Croatia's political image and eliminate any basis for criminal allegations stemming from Operation Storm.[41] In summary, the record shows that Croatian leaders were acutely aware of their legal obligation to protect civilians throughout the area of operations and also of international scrutiny by NATO governments, the ICTY, and UN observers present throughout the prospective battlefield.[42]

It was in this context that General Gotovina on August 2 ordered Rajcic to "place the towns of Knin, Obravac, Gracic and Benkovac under fire."[43] The meaning and effect of this order was one of the principal

[36] *Id.* ¶ 1185.
[37] *Id.* ¶ 1183.
[38] *Id.* ¶¶ 1182–84; *see also id.* ¶ 1435 (witness corroborating this guidance to subordinate artillery units).
[39] *See id.* ¶¶ 1245, 1184.
[40] *Id.* ¶ 1182.
[41] *Id.* ¶ 1987.
[42] *Id.* ¶ 2003 (U.S. Ambassador Peter Galbraith warned Tudjman on August 1, 1995, that "there would be bad consequences if Croatia targeted UN personnel and did not protect civilians").
[43] *Id.* ¶¶ 1172 and 1178.

issues in the case. Artillery commander Rajcic testified that he and his subordinate artillery and rocket units understood this as an order to strike previously identified military targets, consistent with the target lists and Gotovina's explicit guidance regarding military objectives, distinction, and proportionality.[44] The prosecution contended, however, that this was an unlawful order to attack civilian areas to cause a forcible evacuation of the civilian Serbian population.[45]

During offensive operations on August 4 and 5, 1995, General Gotovina's forces shelled pre-planned operational targets in Knin, Benkovac, Obrovac, and Gracac and also executed tactical fire missions in response to calls for fire from various maneuver units.[46] Rajcic's testimony indicates that he monitored intelligence updates throughout the battle to confirm the military value of pre-planned targets in Knin.[47] Trial evidence confirmed the presence of Serb forces, command and control, and logistical assets in each town.[48] Also, Serb indirect fires occurred in these areas, which seem to make it impossible to attribute all shelling effects to Croatian artillery alone.[49]

C. Effects of Croatian Artillery Fire

Evidence presented at trial, seventeen years after Operation Storm, regarding the actual effects of Croatian artillery and rocket fire on 4 and 5 August, 1995, was extensive but glaringly incomplete in key respects. Not all Croat artillery logs, reports, and maps were entered into evidence, leaving many key factual questions unanswered.[50] Lacking any

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[44] *Id*. ¶ 1188. *See* Part IV.B.*7.*, *infra* (discussing the court's findings as to the meaning of the order).
[45] *See* Prosecution Trial Brief, *supra* note 19, ¶ 124.
[46] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1255. Both sides at trial agreed that there were tactical calls for fire. *See* Prosecution Trial Brief, *supra* note 19, ¶ 143.
[47] *See, e.g.*, *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1260 (citing Rajcic's testimony that radio intercepts confirmed active Serb command and control centers in Knin before any shelling of those targets on the morning of 5 August).
[48] *See* Part IV.B.1, *infra*.
[49] *See, e.g.*, *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1396 (discussing the origin of a mortar attack in Knin on August 5, the court found it was "unable to conclusively determine which forces fired the mortar").
[50] *See id.* ¶ 1783. Even where the record supported findings regarding the shelling, the defendant has pointed out significant shortcomings in the court's sifting of the evidence. In the Appellant Reply Brief, Gotovina offers a compelling demonstration of the court's failure to take into account all of the impact evidence in the record.

comprehensive survey of battle damage, the court was forced to rely on the faded memories of combatants and observers, and an incomplete documentary record.[51] The court found that at least 1205 rounds were fired in the vicinity of Knin, Benkovac, Obrovac and Gracac, and used the testimony of various witnesses to estimate the impact points of 154 of those shells. It found that only 74 of these landed outside a 200 meter radius, and only 9 of those 74 outside a 400 meter radius, from legitimate targets known to the court. Thus, the court's findings of wrongful intent were based on a sample of less than 13% of the rounds fired—how much less, the court could not say.

Suffice it to say, to found a criminal conviction–proof beyond a reasonable doubt–based primarily on what appears to be an extrapolation from the scanty evidence before the court is concerning. There was no evidence that the sample of 154 shells considered (selected simply by whatever the witnesses could remember) was representative of the whole. One issue with this determination by the court that will strike a sour chord with criminal lawyers is the legally impermissible burden-shifting aspect of the court's extrapolation into the unknown. And even if one believes that shifting the burden of going forward to the defense regarding impact analysis is legally defensible, how exactly would a combat commander, enmeshed in battle and all that goes with that, go about producing that evidence? This is one reason why the Law of Armed Conflict focuses the culpability determination on the commander's intent, not what happened in the exigencies of combat. And on this point, the conflicting evidence cannot be said to reach the criminal law standard of proof beyond a reasonable doubt–or even a less probative standard.

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[51] The court also properly noted that "the chaotic picture of events on the ground" based upon eyewitness impressions rendered the court "necessarily cautious in drawing conclusions with regard to specific incidents based on any general impressions." The court considered all evidence but reviewed and discussed "best available evidence." *Id.* ¶ 1176.

D. The Indictment

The indictment alleged that General Gotovina participated in a joint criminal enterprise with other Croatian political and military leaders, the alleged objective of which was the persecution and forced deportation (i.e., "ethnic cleansing") of ethnic Serbs from the Krajina region.[52] Gotovina and two other defendants were charged with crimes against humanity under Article 5 of the ICTY statute and violations of the laws and customs of war under Article 3[53] for their individual contributions to the alleged criminal enterprise.[54] Although the defendants were accused of various other crimes against the Serb population of Krajina, the heart of the case against Gotovina was unlawful shelling, and that shelling was specifically found to be "an important element in the execution" of the alleged criminal enterprise.[55] Stated differently, Gotovina's conviction turns on the lawfulness vel non of the artillery fires against targets in the Krajina towns and cities.[56] Although unlawful shelling is not charged as a separate offense, allegations of unlawful shelling appear throughout the

[52] Indictment, *supra* note 23, ¶ 12.
[53] Statute of the International Criminal Tribunal (Former Yugoslavia), May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute]. Substantive crimes under the ICTY Statute include grave breaches of the Geneva Conventions of 1949 (art. 2), violations of the laws or customs of war (art. 3), genocide (art. 4), and crimes against humanity (art. 5).
[54] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 2374. Counts 4 (plunder), 5 (wanton destruction), 6 & 7 (murder) were attributed to Gotovina solely as foreseeable consequences of the "joint criminal enterprise." There was no allegation that he ordered or aided and abetted such crimes. The court found that following regular military operations, Croatian forces "committed a large number of murders, inhumane acts, cruel treatment, and acts of destruction and plunder against Krajina Serb civilians throughout August and September 1995." *Id.* ¶ 2307. The findings on unlawful shelling and their implications for targeting law are the focus of this article. However, it should be noted that unlawful shelling is central to the case against Gotovina. *See id.* ¶¶ 2324, 2363, 2370. In particular, the court used the alleged "unlawful attacks" as evidence that Gotovina "knew that there was a widespread and systematic attack against a civilian population," *id. ¶* 2370, without which knowledge he could not be found guilty of any crime against humanity under Article 5 of the ICTY statute. *Id. ¶* 1701 (establishing such knowledge as an element of Article 5). Without a finding of unlawful shelling, the case against Gotovina is greatly and perhaps fatally weakened.
[55] *Id.* ¶¶ 2324 and 2370; *see also* Prosecution Trial Brief, *supra* note 19, ¶¶ 121–22, 134.
[56] This follows from the logic of Joint Criminal Enterprise (JCE) liability. *See* Indictment, *supra* note 23, ¶ 38. If Gotovina contributed to the JCE by unlawful shelling and his liability for the other crimes committed was based on the premise that they were foreseeable consequences of the JCE, then a finding that he did not contribute to the JCE breaks the connection to the other crimes and would require a complete reassessment of his liability, if any, for any other crime committed by Croatian soldiers.

indictment[57] and were central to the prosecution's theory of ethnic cleansing.[58]

III. Relevant Law of War Standards

On the spectrum of conflict, Operation Storm was high intensity conventional combat governed by the international laws and customs of war.[59] Accordingly, it must be sharply distinguished from the various Balkans peacekeeping and peace enforcement operations, which were governed by peacetime rules of engagement (ROE),[60] and from notorious

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[57] The general allegations assert that "Croatian forces shelled civilian areas." *Id.* ¶ 28. In the formal statement of charges, shelling is mentioned explicitly in count 1 (persecutions) as "other inhumane acts, including the shelling of civilians" and as "unlawful attacks on civilians and civilian areas." Counts 2 and 3 (deportation and forcible transfer) refer more obliquely to "the threat and/or commission of violent and intimidating acts." Counts 8 (inhumane acts) and 9 (cruel treatment) refer to "firing upon (including aerial attack)" Serb civilians in Operation Storm. "[E]xtensive shelling of civilian areas" is also listed as one form of inhumane acts and cruel treatment in the indictment. *Id.* ¶ 34. Thus, unlawful shelling is alleged in the Indictment as one of the alleged crimes against humanity in Counts 1, 2, 3, and 8 as a Law of Armed Conflict (LOAC) violation in Count 9.

[58] The Prosecutor alleged that the JCE relied on "a strategy to use artillery to force out the Krajina Serbs." *See* Prosecution Trial Brief, *supra* note 19, ¶¶ 55, 61, 64. Although the indictment is vague about shelling in Counts 2 and 3, the court treated shelling as one of the principal means of forcing Serb civilians out of Krajina. *See Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1742–46. "The Trial Chamber finds that the artillery attack instilled great fear in those present" and "this fear was the primary and direct cause of their departure." *Id.* ¶¶ 1743–44. The court also found that Croatian forces specifically intended to cause deportation by shelling. *Id.* ¶ 1746. The court explicitly and primarily treated unlawful shelling as part of the crime of persecution. *See id.* ¶¶ 1810, 1840, 1856, 1892–1945.

[59] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1686–98 (finding this was an international armed conflict subject to the laws and customs of war). *See also* Prosecution Trial Brief, *supra* note 19, ¶ 469 ("[I]ntensity of the conflict was sufficiently high to distinguish [it] from 'banditry, unorganized and short-lived insurrections, or terrorist activities.'").

[60] "ROE are directives issued by competent military authority to delineate the circumstances and limitations under which . . . forces will initiate and/or continue combat engagement with other forces encountered." DoD DICTIONARY, *supra* note 17. In other words, ROE provide the framework for controlling use of force consistent with the mission, policy and law. Peacekeeping ROE ordinarily are based on self-defense and hence are far more restrictive than the law of war. "ROE provide restraints on a commander's action consistent with both domestic and international law and may, under certain circumstances, impose greater restrictions on action than those required by law." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 74 (2004) [hereinafter OPLAW HANDBOOK].

atrocities perpetrated by military forces against defenseless civilian populations in Bosnia-Herzegovina.[61] To understand and evaluate the court's judgment, it is therefore essential to review the law of armed conflict (LOAC) pertaining to attacking targets in and near populated areas in conventional combat operations.

In general, the LOAC is intended to formalize customary and mutually agreed constraints on the use of force in war, for the purpose of protecting noncombatants and minimizing unnecessary suffering.[62] This aspiration for limited and regulated warfare grew out of the customary practices of civilized nations and is conceptually rooted in operational reality.[63] Having evolved from the customary practices of armies in the field, the law of war reflects the logic of military science and is consistent with the means and methods of warfare practiced by civilized nations.[64] Thus, LOAC standards are generally consistent with operational art and current technological capabilities and limitations.[65] This consistency between the law and the practice of civilized nations is inherent in the definition of customary international law and the contractual nature of conventional law.[66] This close correspondence

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[61] *See* JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 67–69 (2003) (reviewing the history of Bosnian Serb shelling of civilians in Sarajevo and Srebrenica).

[62] PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 342-43 (7th ed. 2004).

[63] This is a key factor in ensuring compliance with the law of war. *See* Louise Doswald-Beck, *Humanitarian Law in Future Wars*, *in* THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENIUM 39, 40–41 (Michael N. Schmitt & Leslie C. Green, eds., 1998).

[64] The organic relationship between operational art and the law of war is thoroughly discussed and well documented in Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEX. INT'L L. J. 337, 358–59 (2012).

[65] COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 2195 (Yves Sandoz et al. eds. 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/RC_commentary-1977.html [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS]. ("In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect, humanitarian interests and military interests coincide.").

[66] "A rule of customary international law is one which is created and sustained by the constant and uniform practice of states and other subjects of international law in or impinging upon their international legal relations in the belief that they are under a legal obligation to do so." Comm. on Formation of Customary (Gen.) Int'l Law, Int'l Law Ass'n, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, 69 INT'L L. ASS'N REP. CONF. 712, 719 (2000), *available at* http://www.ila-hq.org/pdf/CustomaryLaw.pdf. *See also* BROWNLIE, *supra* note 6, at 4-6.

between law and practice promotes respect for and compliance with the law in combat operations. It also explains why LOAC principles are embedded in the military doctrine, training, and practices of modern armies.[67] The law of war, like military doctrine itself, seeks to direct and limit combat operations to military purposes and objectives.[68] The law of war accepts the necessity of war in defined circumstances and seeks to minimize the inevitable suffering of war, including collateral casualties and property damage to noncombatants.[69] It is generally accepted that adherence to these standards will promote humane treatment of prisoners and civilians, restoration of peace, and future compliance with the law of armed conflict.[70]

Codification of the customary laws governing tactical shelling began with Hague Convention IV of 1907 and its regulations of the means and methods of warfare.[71] Those regulations remain in effect today, but the most explicit statement of customary international law on the use of artillery and other conventional indirect fire weapons against targets in populated areas is found in Protocol I to the Geneva Conventions (1977) (Protocol I).[72] Not all major powers have ratified this 1978 convention, but all the specific provisions discussed here are generally accepted as authoritative statements of customary international law, binding on all nations.[73] It is these specific standards that the Trial Chamber invoked in

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[67] *See generally* Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L., No. 3, at 728–29 (May 2009) (citing specific examples of how law of war principles are embedded in U.S. military doctrine).

[68] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2206. "The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements"; *see also id.* ¶ 2219. "[The rule of proportionality] is aimed at establishing an equitable balance between humanitarian requirements and the sad necessities of war." *Id.*

[69] *Id.* ¶ 1935. "There is no doubt that armed conflicts entail dangers to the civilian population, but these should be reduced to a minimum." *Id.*

[70] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 2 (18 July 1956) [hereinafter FM 27-10] (Purposes of the Law of War).

[71] *See* Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 25, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[73] *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419, 420–21 (1987).

its judgment condemning Gotovina's use of artillery and rockets in Operation Storm.[74]

The relevant standards of battlefield conduct in Protocol I allow commanders reasonable latitude in the exercise of good faith judgment under the myriad circumstances and difficult conditions of combat.[75] This results in legal standards that are often intentionally and patently imprecise.[76] The International Committee of the Red Cross (ICRC) commentaries on Protocol I cite the "heavy burden of responsibility on military commanders, particularly as the various provisions are relatively imprecise and are open to a fairly broad margin of judgment."[77] This perspective is crucial when these legal standards are applied in a judicial setting to decisions made in the heat of battle and the "fog of war"[78] many years after combat action occurs. While prosecution of war crimes is unquestionably essential to effective enforcement and deterrence, international humanitarian law adopts a posture of deference to the operational perspective of the combatants, who must apply its standards in the difficult circumstances of battle. Judicial decisions in this area of practice, to be credible, must be solidly based on current legal standards and give appropriate respect to the good faith judgment of combat commanders.

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[74] *See, e.g.*, Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1827 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011) (citing military necessity as a consideration in determining whether persecution in violation of Article 5 took place); *id.* ¶ 1910 & n.935 (citing concepts of distinction and proportionality to determine whether shells were lawfully fired).

[75] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2187 (in discussing article 57, noting that "the various provisions are relatively imprecise and are open to a fairly broad margin of judgment").

[76] *Id.* (noting that some parties characterized the targeting laws of Protocol I as "dangerously imprecise").

[77] *Id.*

[78] The term "fog of war" alludes to the endemic uncertainties of the battlefield and is commonly attributed to CARL VON CLAUSEWITZ, ON WAR, bk. 2, ch. 2, § 24 (Col. J.J. Graham trans. 1873), *available at* http://www.clausewitz.com/readings/OnWar1873/BK2ch02.html ("[T]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight . . . like the effect of a fog or moonshine. . . .").

A. Targeting Law

The law of targeting[79] is governed by three foundational principles, which are the starting point for legal analysis of combat actions.[80] The *principle of military necessity* justifies those measures, not forbidden by international law, which are indispensable for securing the complete submission of the enemy as soon as possible.[81] Military necessity requires that, before striking any target, a commander must make a reasonable determination that the target is a valid military objective.[82] The *principle of distinction* follows logically and yields the foundational rule of targeting in Protocol I, Article 48: "Parties to the conflict shall at all times *distinguish* between the civilian population and combatants and between civilian objects and military objectives and accordingly *shall direct their operations only against military objectives*."[83]

Protection of civilians and civilian property from the dangers of military action is one of the principal goals of the law of war.[84] Intentional attacks on civilians are absolutely prohibited under Protocol I, Article 51(2).[85] Likewise, indiscriminate attacks are prohibited by

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[79] Targeting is how a military commander brings combat power to bear against enemy military objectives to set the conditions for achieving tactical, operational, and strategic success. Targeting is a complex process, beginning with analysis of the mission and task for subordinate units. The targeting process starts with an assessment of enemy targets, including a determination that each target is a lawful object of attack under the law of armed conflict (LOAC). The process then defines desired effects on each target, matches combat capabilities to each target, executes the attack, and assesses effects. Targeting is a cyclical process of analysis, execution, and assessment until the military objective is achieved. Corn & Corn, *supra* note 64, at 349–50.

[80] A fourth principle, prevention of unnecessary suffering, prohibits use of weapons and tactics that are calculated to inflict unnecessary suffering. *See* OPLAW HANDBOOK, *supra* note 60, at 13–14.

[81] *See* FM 27-10, *supra* note 70, ¶ 2 (Purposes of the Law of War).

[82] Defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Protocol I, *supra* note 72, art. 52(2).

[83] *Id.* art. 48 (emphasis added).

[84] *Id.* art. 51(1). "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." *Id.* This applies equally to civilian property that is not being used for military purpose. *Id.* art. 52(1) & (2) ("Civilian objects shall not be the object of attack or reprisals. . . . Attacks shall be limited strictly to military objectives. . . .").

[85] *See id.* art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.").

Articles 51(4) and 51(5)(a).[86] The law also recognizes the fundamental reality that military targets often lie close to civilian populations, so that attacks on military targets will sometimes cause incidental casualties and property damage.[87] The enemy's emplacement of military objectives close to civilians or civilian objects does not render them immune from attack. Rather, the *Principle of Proportionality* requires commanders to make a conscious, good-faith determination that anticipated collateral effects are reasonably proportional to the military goals of the attack.[88] This principle is codified in Protocol I, Article 51(5)(b), which states that an attack is disproportionate, and therefore unlawful, only if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[89] Thus, the law does not prohibit or condemn collateral damage and casualties *per se*, but only where such effects are "*excessive*"

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[86] *See id.* art. 51(4) ("Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective . . . and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian property without distinction."). Article 51(5) specifies two distinct types of indiscriminate attacks:

> Among others, the following types of attacks are to be considered indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. art. 51(5).

[87] *See* United States v. Ohlendorf (Einsatzgruppen Trial), 4 Trials of War Crimes Before the Nuremburg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946-Nov. 1949, at 466–67 (1948).

> A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action.

Id.

[88] *See* FM 27-10, *supra* note 70, ¶ 41.

[89] *See* Protocol I, *supra* note 72, art. 51(5)(b). The proportionality formula is also reiterated in Article 57(2)(iii).

when weighed against the military purpose of the combat action. The phrases "may be expected" and "anticipated" indicate that proportionality judgments are to be based on information available at the time the targeting decision is made and not on the actual effects of the attack viewed in hindsight.

Where collateral harm to civilians and civilian objects is anticipated, commanders are required to make deliberate, good faith proportionality judgments based on information reasonably available before the attack.[90] In the author's experience, there is no more difficult position than that of combat commanders making targeting decisions. Their judgments call for complex evaluations of risk and consequences that are not susceptible to precise mathematical analysis. The term "excessive" in the definition of proportionality is a prime example of the relative and fact-dependent nature of these judgments. The standard of proportionality is intentionally and necessarily vague. It must be understood in light of the additional obligations and precautions of an attacking force in Article 57 of Protocol I, including the obligations to minimize incidental loss of civilian life, to choose means and methods which pose the least danger to civilians, and to give advance warning of an attack "unless circumstances do not permit."[91]

Although the focus of this article is on the conviction of General Gotovina during his command of attacking forces, it is worth noting that the obligation to protect civilians from the effects of combat applies equally to attacking and defending forces. Both bear legal responsibility for the safety and protection of civilians. All parties to a conflict are

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[90] Precautions in the attack include the obligation to "do everything feasible to verify that the objectives attacked are neither civilian nor civilian objects. . . " *Id.* art. 57(2)(a)(i). *See also* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 1952.

> The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent . . . .

See also id. ¶ 2195 ("Thus the identification of the objective, particularly when it is located at a great distance, should be carried out with great care . . . .") and ¶ 2199 (recognizing the differing ISR capabilities of belligerents).

[91] Protocol I, *supra* note 72, art. 57(2).

prohibited from using civilians and civilian objects "to shield military objectives from attacks or to shield, favor or impede military operations."[92] All parties to the conflict are therefore obligated to "avoid locating military objectives within or near densely populated areas."[93] Additionally, a party that has control over a civilian area shall "endeavor to remove the civilian population, individual civilians and civilian objects from the vicinity of military objectives" and shall also take other precautions to protect them from harm.[94] Thus, a heavy legal obligation and responsibility to protect civilians rests on a defending force that chooses to occupy a town. Even when a defending force deliberately places military objectives in populated areas, the attacking force remains bound by legal targeting standards. The presence of civilians, however, does not render a military objective immune from attack, and to this author's knowledge no court or authoritative treatise has ever held that artillery cannot be used against lawful military targets situated in populated areas.

The ICRC commentaries note that "[i]n the early stages of the discussions on the codification of the law of bombardments, the possibility had been entertained of expressly providing the standard of precision required for bombardments on towns and cities. . . ."[95] However, the high contracting parties chose not to impose a rigid rule, such as the 200 meter rule or any other fixed measurement, relying instead on the general duties to distinguish military targets from civilians and to minimize civilian casualties by all feasible and tactically prudent means. That standard accommodates a wide range of technical and operational capabilities and places the commander's subjective knowledge, intent, and good faith at the center of the legal analysis. These rules are equally applicable to all means and methods of war, from laser-guided munitions to slingshots and grenades. The law does not require any particular standard of accuracy, but it does require combatants to do their best within their technical, tactical, and intelligence limitations. Advanced technology has not eliminated (and cannot, for the foreseeable future, eliminate) civilian casualties from warfare; that is why the principles of military necessity, distinction, and

[92] *Id.* art. 51(7).
[93] *Id.* art. 58(b).
[94] *Id.* art. 58(a) & (c). In light of the legal obligation of the defending party to remove civilians from the target area, when possible, and the Serbs failure to do so in this case, it is ironic that Gotovina was charged and convicted for causing the flight of civilian refugees by shelling the very areas the Serbs chose to defend.
[95] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2185.

proportionality remain relevant and essential even in the age of precision guided munitions.[96]

B. Criminal Prosecution of Shelling Offenses

From the Hague Conventions of 1907 to Geneva Protocols of 1977, LOAC treaties were written and conceived primarily as state obligations during international armed conflict. The translation of these battlefield regulations into formal criminal charges in cases before the ICTY requires the rigorous definition of the elements of each offense. Rules drafted with the regulation of battlefield action in mind must be filtered through the special requirements of criminal law in the context of an individual war crimes prosecution.[97] Defining the elements of war crimes based on custom and law of war treaties presents special challenges to courts, which must grapple with texts that were not drafted as criminal statutes and do not meet the more rigorous modern legislative standards of criminal law. Vagueness in language, deference to the field commander's good faith judgment, and a lack of clearly delineated elements pose significant challenges to courts responsible for defining the elements of proof for offenses arising under the law of war.[98] The

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[96] *See generally* Scott Peterson, *Smarter Bombs Still Hit Civilians*, CHRISTIAN SCI. MONITOR, http://www.csmonitor.com/2002/1022/p01s01-wosc.html (Oct. 22, 2002) (citing examples and statistics showing that "smart bomb" attacks have inflicted civilian casualties at ever-increasing rates).

[97] Prosecutor v. Delalic, Case No. IT-96-1-T, Judgment, ¶ 405 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (noting that the principles of legality must be applied differently in war crimes cases due to "the nature of international law; the absence of international legislative policies and standards; the ad hoc processes of technical drafting," etc.), *available at* 1998 WL 34310017.

[98] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶ 2187, highlights this problem when referring to disagreements among parties to the Protocols about precautions in the attack under Article 57:

> The differences of opinion were mainly related to the very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and are open to fairly broad margin of judgment. ..Those who favored a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach. As we will see below, several delegations considered that this condition was not met and that the article was dangerously imprecise.

Id.

ICTY has played a key role in developing definitions for war crimes.[99] It is the Trial Chamber's duty to determine the elements of each offense by referring to treaties, customs, prior decisions of the ICTY Appeals Chamber, and general principles of law.[100]

Gotovina was not charged separately for unlawful shelling. Of the eight counts in the indictment against him, only count 1 (persecution, charged as a crime against humanity under the ICTY statute) specifically mentions shelling.[101] Yet allegations of unlawful shelling are implicit in the other charges of crimes against humanity (i.e., counts 2, 3, and 8).[102] Unlawful shelling is both central to the *Gotovina* indictment and the primary basis of Gotovina's conviction.

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[99] Other sources of offense definition are found, for example, in domestic legislation, judicial precedent, learned treatises, and the ICC Statute, App. 4 (Elements of Crimes). *See, e.g.*, War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); *see also* INT'L CRIMINAL COURT (ICC), REPORT OF THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT. ADDENDUM. PART II, FINALIZED DRAFT TEXT OF THE ELEMENTS OF CRIMES (Nov. 2, 2000), *available at* http://untreaty.un.org./cod/icc/prepcomm/jun2000/5thdocs.htm.

[100] *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶ 71 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (ruling that the determination of the legal elements of crimes is "the responsibility of the Trial Chamber"), *available at* 2006 WL 4549662.

[101] "Ante Gotovina, Invan Cermak and Mladen Markac are responsible for acts of persecution against the Krajina Serbs including: deportation and forcible transfer; destruction and burning of Serb homes and businesses; plunder and looting of public or private Serb property; murder; other inhumane acts, *including the shelling of civilians* and cruel treatment; unlawful attacks on civilians and civilian objects; imposition of restrictive and discriminatory measures, including the imposition of discriminatory laws; discriminatory expropriation of property; unlawful detentions; disappearances." Indictment, *supra* note 23, at ¶ 48 (emphasis added).

[102] The indictment for counts 2 and 3 (deportation and forcible transfer under Articles 5 and 3 of the statute) does not mention shelling *per se*, but states that the three accused "acting individually and/or through their participation in the joint criminal enterprise planned, instigated, ordered, committed, and/or aided and abetted the planning, preparation and/or execution of the forcible transfer and/or deportation of members of the Krajina Serb population from the southern portion of the Krajina region to the SFRY, Bosnia and Herzegovina and/or other parts of Croatia, by the threat and/or commission of violent and intimidating acts (including the plunder and destruction of property). . . ."

1. Actus Reus

Count 1 of the indictment charges Gotovina with persecution as a crime against humanity in violation of Article 5 of the ICTY statute. The court found the following elements were needed to sustain a conviction under Article 5:

> (i) there was an attack;
> (ii) the attack was widespread or systematic;
> (iii) the attack was directed against a civilian population;
> (iv) the acts of the perpetrator were part of the attack;
> (v) the perpetrator knew that there was, at the time of his or her acts, a widespread or systematic attack directed against a civilian population and that his or her acts were part of that attack.[103]

The court used its 200 meter rule to determine that the prosecution had met the third element, and shown that Gotovina was targeting entire towns and the civilian population rather than military targets located in those towns.[104]

2. Mens Rea

As shown above, the court explicitly acknowledged the need for guilty knowledge to support a conviction under Article 5. Furthermore, the crime of persecution, the subject of count 1 (which explicitly relies on the shelling) requires "an act or omission which . . . is carried out with the intention to discriminate on political, racial, or religious grounds."[105] On this point, the court noted that persecution requires a *specific intent* to discriminate.[106] Yet with respect to the shelling, the *Gotovina* court

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[103] Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1701 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 15, 2011).
[104] *Id.* ¶¶ 1911 (Knin), 1923 (Benkovac), 1935 (Gracac), 1943 (Obrovac).
[105] *Id.* ¶ 1801.
[106] *Id.* ¶ 2590. It has been persuasively argued that not only persecution, but all crimes against humanity under article 5, are and ought to be treated as specific intent crimes – specifically, that the element of attacks directed at a civilian population ought to be read as requiring specific intent to target civilians. Sienho Yee, *The* Erdemovic *Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263, 299-300 (1997) (arguing that the defense of duress should apply in crimes against humanity because it negates specific intent). However, for crimes against humanity, the ICTY requires only the specific intent

relied heavily on its inference that Gotovina targeted towns as a whole—an inference that, as shown below, wrongly relies on the 200 meter rule—plus the fact that the towns were predominantly Serbian in ethnicity.[107]

While it is certainly possible to prove specific intent with circumstantial evidence, in this case the circumstantial evidence was far too weak to show specific intent. Without the 200 meter rule this finding collapses. When an indiscriminate attack is alleged, the results of the attack alone are not enough to show intent or even knowledge; guilt or innocence depend on the commander's prospective assessment of the target area and anticipated collateral effects. This rule, sometimes called the "Rendulic rule,"[108] has profound implications for the *Gotovina* case. The explicit language of Protocol I supports this crucial rule: an attack is unlawful if it "*may be expected to cause* incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which *would be* excessive in relation to the concrete and direct military advantage *anticipated*."[109] Several of the states that adopted or acceded to Protocol I explicitly did so on the understanding that this rule applies.[110] Even if the commander's judgment is conclusively shown to

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for the underlying act, plus objective knowledge that the act was performed in the context of a widespread or systematic attack on a population. Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 212 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), *available at* 2001 WL 34712270.

[107] *See Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1912 (Knin), 1924 (Benkovac), 1936 (Gracac), 1944 (Obrovac). In each case, the court found "discrimination in fact" by noting the ethnic composition of the towns, and found intent to discriminate by observing "the language of the HV's artillery orders and the deliberate shelling of areas devoid of military targets." But the "deliberate shelling" in question was established primarily by the 200 meter rule.

[108] United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, Oct. 1946–Nov. 1949, at 759, 1296 (1951), *available at* http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html. General Rendulic was charged with unlawful destruction of civilian facilities during the Nazi retreat from Finland at the end of WWII. He was acquitted of that crime on grounds that his decision to attack the civilian facilities was based on his honest, but mistaken belief that the Soviet army was in hot pursuit. "But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal." *Id. See* Corn & Corn, *supra* note 64, at 375.

[109] Protocol I, *supra* note 72, art. 51(5)(b).

[110] DOCUMENTS ON THE LAW OF WAR, 462–68 (Adam Roberts & Richard Guelff, eds., 2d ed. 1989). The countries that expressly invoked some version of the Rendulic rule were

have been erroneous in hindsight, based on battle damage assessment, such error alone is never sufficient for a finding of guilt.[111] The law does not require the commander always to be right; instead it requires a good faith judgment based on information available in the heat of battle. Civilian casualties, property destruction, and impact locations viewed in hindsight are not enough to prove a commander guilty of indiscriminate attacks. The results of an attack are but one factor from which intent *at the time of attack* may be inferred.[112]

Austria, Belgium, Italy, New Zealand, Switzerland, and the United Kingdom. *Id.* These statements have been described as "the codification of the Rendulic rule." Commander Charles A. Allen, Reporter, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L LAW PROC. 39, 47 n.5 (remarks of Francoise J. Hampson, Department of Law and Human Rights Center, University of Essex). Several other states made similar statements upon ratification of Protocol I. *See Practice Relating to Rule 15. The Principle of Precaution in Attack, Section D. Information Required for Deciding upon Precautions in Attack*, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15_sectiond (last visited Aug. 10, 2012) (under "other national practice," the website cites such statements from Australia, Canada, Germany, Ireland, and Spain, in addition to those noted above). The United States and the Netherlands also made similar statements at the 1974-1977 Diplomatic Conference on Humanitarian Law. *Id.*

[111] One noteworthy and tragic example of this principle was the U.S. precision air strike on the Al Firdus bunker in Baghdad during the First Gulf War on February 13, 1991, which resulted in the deaths of several hundred civilians. Intelligence sources indicated that Iraqi high command was using the bunker and surveillance confirmed that the site was protected by camouflage, military access guards and barbed wire. Based on these facts, Coalition authorities targeted the bunker, unaware that it was being used as a civilian bomb shelter at night. An inquiry into the tragedy determined that the bunker was a legitimate target and that Coalition commanders had acted properly based on the information available at the time the bunker was slated for attack. CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 702 (U.S. Dep't of Defense, 1992); *see also* Major Ariane L. DeSaussure, *The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview*, 37 AIR FORCE L. REV. 41, 64–65 (1994).

[112] The ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) existence of fierce fighting; (6) number of incidents compared to the size of the area; (7) distance between victims and source of fire; (8) presence of military targets in the vicinity; (9) status and appearance of victims. *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 132–33 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on Appeals Chamber shelling cases). *See also* Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution's Response to Ante Gotovina's Appeal Brief ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011) (citing Appeals Chamber rulings *Milosevic*, *Strugar*, and *Galic*).

IV. The Trial Chamber Judgment

A. Findings of Guilt

The court found General Gotovina guilty on counts 1 (persecution), 2 (forced deportation), 8 (inhumane acts), and 9 (cruel treatment), based partly on his tactical artillery and rocket attacks against the Serb-held towns of Knin, Benkovac, Gracac, and Obravac during combat operations on 4 and 5 August 1995.[113] Despite the voluminous length of the opinion (1400 pages) and its detailed review of the evidence relating to Croatian artillery attacks, the court's rationale on unlawful shelling is relatively simple.[114] Announcing its judgment in open court at The Hague on April 15, 2011, the court summarized its rationale for finding unlawful artillery attacks as follows:

> The Chamber carefully compared the evidence on the locations of impacts in these towns with the locations of possible military targets. Based on this comparison, and the relevant artillery orders and reports . . . the Chamber found that the Croatian forces treated the towns themselves as targets for artillery fire. . . [which]

[113] *See* Part II.D., *supra*. Gotovina was acquitted on count 3 (forcible transfer) for technical reasons unrelated to shelling. The crimes charged in counts 4 (plunder), 5 (wanton destruction), 6 & 7 (murder) were attributed to Gotovina as foreseeable consequences of the JCE. *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 2372–75. In reaching this judgment, the trial court stated that "unlawful [artillery] attacks against civilians and civilian objects [ordered by Gotovina] . . . signaled his attitude towards crimes and towards Serbs to his subordinates." *Id.* ¶ 2373. The finding of unlawful shelling was the linchpin of the judgment against Gotovina and important to the conclusion that Gotovina participated in the JCE. *See id.* ¶ 2370 (finding that the "unlawful attacks formed an important element in the execution of the JCE" and assessing his actions "in light of [his] order to unlawfully attack civilians and civilian objects"). Whether a conviction could be sustained on other grounds appears doubtful, but is beyond the scope of this article.

[114] The parties' appellate briefs vigorously disputed the court's actual rationale for unlawful shelling. They disagreed about the meaning of the 200 meter rule, its importance to the verdict and the actual grounds of decision. *See Gotovina*, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 19 (arguing that the 200 meter rule was the sole basis for the court's finding of unlawful shelling); *cf. Gotovina*, Case No. IT-06-90-T, Prosecution Response to Ante Gotovina's Appeal Brief, ¶ 63 (arguing that Gotovina "distorts the role and relevance" of the 200 meter rule and that the court's ruling is based on "far more" than the 200 meter rule).

> constituted an indiscriminate attack on these towns and an unlawful attack on civilians and civilian objects.[115]

As explained below, the 200 meter rule was central to the court's comparison of impact locations and military target locations, and to construing as illegal Gotovina's order to "put the towns of Knin, Obrovac, Gracac and Benkovac under fire." Thus the central and decisive role of the 200 meter rule in the court's reasoning is patent.[116] Without the 200 meter rule, the court's finding of unlawful artillery attacks on the four towns in issue would have a greatly weakened evidentiary basis and that, in turn, would seem to undermine the finding that Gotovina violated international law by ordering unlawful shelling.

In the judgment itself, the court stated, "Croatian forces did not limit themselves to shelling areas containing military targets, but also deliberately targeted civilian areas"[117] and "treated the towns themselves as targets for artillery fire."[118] Therefore, the court concluded, the shelling "constituted an indiscriminate attack . . . and thus an unlawful attack on civilians and civilian objects."[119] Thus, the court apparently embraced a hybrid theory of both deliberate and indiscriminate targeting in violation of Protocol I, Articles 51(2) and (5)(a).[120] The court's

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[115] INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, JUDGMENT SUMMARY FOR GOTOVINA, *ET AL.* (2011), *available at* www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf.

[116] On appeal, the prosecution conceded that the 200 meter standard was overly narrow, but characterized it as a "rule of thumb" and "only one factor" in the court's analysis. Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution Response to Gotovina's Second Motion to Admit New Evidence Under Rule 115, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012). However, in the author's view, no detached reading of the judgment can mistake the indispensible importance of the 200 meter rule in the court's reasoning. Absent the 200 meter rule, the court has no strong basis to infer any indiscriminate or deliberate attacks on civilians and civilian objects.

[117] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1911 and 1936. The court's use of the term "civilian area" in several passages is not defined, but seems to describe areas in the towns devoid of military targets. Under the law of war "civilians" and "civilian objects" are legally defined and significant elements, which the prosecutor is obligated to prove. Protocol I, *supra* note 72, arts. 50 and 52.

[118] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1743 ("[T]he Trial Chamber found that [Croatian forces] deliberately targeted civilian areas in these towns and treated the towns themselves as targets for artillery fire and that the shelling of these towns constituted an unlawful attack on civilians and civilian objects.").

[119] *Id.* ¶ 1911.

[120] The prosecution also interprets the judgment this way: "The Prosecution argued and proved at trial that the shelling attack on the four towns was unlawful, in the sense of a direct *and* indiscriminate attack on civilians and civilian objects." Prosecutor v. Gotovina,

assertion that Gotovina "deliberately targeted civilian areas" denotes intentional attacks on civilians and civilian objects, a violation of Article 51(2). Elsewhere, the court seemed to articulate a theory of indiscriminate shelling on the towns as a whole, which would constitute indiscriminate shelling in violation of Article 51(5)(a).[121]

B. Specific Findings Relating to Croatian Shelling

The 200 meter rule and its central place in the court's ruling have been alluded to already, and thus it is necessary to examine this unprecedented rule in some detail. The meaning and function of the 200 meter rule is best understood in light of the court's interconnected chain of findings.[122] Stated in its simplest terms, the court found that applying the 200 meter rule to the known military targets and a small sample of artillery impact points led to the inference that Gotovina ordered indiscriminate or intentional shelling of civilians and civilian objects in the four towns. The court rejected alternative interpretations of the pattern of impact points, such as mobile targets of opportunity, as not established by the evidence.

Case No. IT-06-90-T, Prosecution's Response to Gotovina's Supplemental Brief, ¶¶ 2, 12 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2012) (emphasis added).

[121] In addition to findings of intentional and indiscriminate attacks on civilians and civilian objects in the towns, the court found that on at least two occasions Croatian shelling of Serbian leader Milan Martic's residence in Knin (plus another Croatian shelling of a place where he was believed to be) created an excessive risk of civilian casualties and hence violated Protocol I, Article 51(5)(b). The court found that Martic's residence was a lawful target and that Croatian artillery engaged the target believing Martic was present at that location. The court found that Martic's residence was the object of intentional attack on those three occasions based on Croatian artillery logs and reports–and not based on the 200 meter rule. (The court found this attack to be disproportionate, and to demonstrate disregard for civilian casualties, but not an intentional attack on civilians or civilian objects per se.)

[122] The court used specific terms to highlight its key findings: it used the term "the Trial Chamber finds" for incidents where the factual basis was sufficient to further consider the incident against applicable law. If an incident was not further considered, the Trial Chamber used terms like "the evidence indicates" or "the evidence suggests." *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 63.

1. Finding #1: There were lawful military objectives in the towns shelled by Gotovina's forces.

The court carefully considered the pre-planned target list for Knin developed by Gotovina's chief of artillery prior to Operation Storm.[123] The court found the targets there identified by Rajcic and approved by Gotovina to be lawful military targets.[124] The court did not have the target lists for Bencovak, Graca, and Obravac, but nonetheless found legitimate military targets in all three towns.[125] Had there been no military objectives in the towns, then the shelling would have been patently illegal.[126] The finding of legitimate military objectives in the towns meant that the shelling was not *per se* unlawful and required a more careful analysis of Gotovina's intent in shelling the towns. The court applied the 200 meter rule to these military targets and found that "artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that target."[127] The greater distance at which the other projectiles fell was central to the court's finding that they were deliberately or indiscriminately fired at civilian targets.[128]

2. Finding #2: At least some of the Croatian shelling was lawful.

The court found that some of the rounds fired in all four towns were fired at legitimate targets, but others were unlawful attacks on civilian areas or indiscriminate attacks on the towns as a whole. The court made this dual finding explicit: "[T]he Trial Chamber finds that on 4 and 5 August 1995, at the orders of Gotovina and Rajcic, the HV fired artillery projectiles *deliberately targeting previously identified military targets*

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[123] *Id.* ¶ 1177.
[124] The court found at least ten lawful targets on the artillery target lists for Knin that were shelled on August 4 and 5: Krajina Serb Headquarters, the Northern Barracks, the Senjak barracks, Martic's residence, the police station, a railway station, a post office, an intersection, an open field north of a school, and a factory. *Id.* ¶¶ 1899–1902.
[125] For the fact that the court did not have the target lists, see *id.* ¶ 1915 (Brakovac), ¶ 1926 (Gracac), and ¶ 1938 (Obrovac). For the court's finding of lawful targets, partly based on the testimony of Rajcic, see *id.* ¶¶ 1917–19 (Benkovac), ¶ 1929 (Gracac), ¶ 1939 (Obrovac).
[126] *See* Hague IV, *supra* note 71, Annex, art. 25. "The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited."
[127] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1898.
[128] *Id.* ¶¶ 1906–07, 1920, 1932, 1940.

and also targeting areas devoid of such military targets."[129] The finding of both lawful and unlawful attacks results in part from the 200 meter rule, which infers the intent of an attack from where the rounds landed in relation to known military targets.

3. Finding #3: The means (weapons) and methods (tactics) of Croatian shelling were not per se indiscriminate.

Croatian forces employed unobserved general support fires[130] from 130 mm tube artillery and multiple rocket launchers to strike pre-planned operational targets in the towns at issues. The court found these fires to be a lawful means and method of war and that harassing fire employed in Knin, Benkovac, Gracac, and Obrovac was a legitimate means of disrupting enemy military activity.[131] The court rejected the prosecutor's contention that rocket attacks in populated areas were *per se* indiscriminate.[132] Even though BM-21 rocket batteries are generally less accurate than artillery and mortar systems, they may be lawfully used against targets in populated areas in some circumstances.[133] As discussed above, under the law of war, the location of military objectives in towns does not render those targets immune from attack, but only requires the attacking force to choose means and methods of attack that will minimize collateral harm to civilians and to make a good faith judgment that anticipates collateral effects will not be excessive in relation to the military advantage gained by the attack.[134] The court found that the means and methods chosen by Gotovina to attack military targets in the towns were not unlawful.

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[129] *Id.* ¶ 1911 (finding for Knin) (emphasis added). The court repeats this finding for each of the other three towns in issue. *Id.* ¶¶ 1923 (Benkovac), 1935 (Gracac), and 1943 (Obrovac).
[130] General Support (or "GS") artillery fire is generally long range, unobserved fire in support of tactical or operational objectives. *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence under Rule 115, exh. 20 (Scales Report), at 4 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 2011).
[131] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1897.
[132] *See* Prosecution Trial Brief, *supra* note 19, ¶ 492.
[133] *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1897.
[134] *See* Part III.A, *supra*.

4. Finding #4: Shells that landed more than 200 meters from a known military objective were deemed unlawful (deliberate or indiscriminate) attacks on "civilian areas."

This "200 meter rule," which is central to the ruling, makes its first appearance in paragraph 1898 of the judgment.[135] In introducing the rule, the court considered the testimony of prosecution artillery expert, Lieutenant Colonel Harry Konings, Royal Netherlands Army, as to variations in range and deflection[136] typical of 155 mm NATO cannon fire, which he described as "similar" to the 130 mm Soviet guns actually used by the Croats.[137] The court also considered the testimony of Rajcic on the same variations for 130 mm fire.[138] These witnesses gave likely errors of 55 to 75 meters (range) and 5-15 meters (deflection) for the weapons in question.

The court also cited the testimony of Lieutenant General Andrew Leslie, Canadian Armed Forces, Chief of Staff for the UN mission in Croatia, who had been in Knin during the shelling and whom the court described as "a military officer with extensive experience in artillery."[139] General Leslie testified that rounds landing within a 400 meter radius of a target with the first shot would be "acceptable," but the court discounted this suggested standard because the witness was "not called as an artillery expert" and did not testify in detail about the basis for this estimate.[140]

After noting various factors that might degrade accuracy of artillery fire, the court commented that "the variations in the locations of impacts

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[135] *Gotovina*, Case No. IT-06-90-T, Judgment ¶ 1898. "Evaluating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that artillery target." (This text is found in the section covering legal findings on count 1 (persecution).)
[136] "Range and deflection" refer to the location of where an artillery round falls in relation to a target and the imaginary line between the gun and its target. "For the distribution of artillery or rockets about their aimpoint, the pattern is typically elliptical and the probable errors will be described in both range, parallel to the gun-target line, and deflection, perpendicular to the gun-target line." Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exh. 21 (report of William A. Shoffner), at 3 (Nov. 4, 2011) [hereinafter Shoffner Report].
[137] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶¶ 1164, 1898.
[138] *Id.* ¶ 1898.
[139] *Id.* ¶ 1167.
[140] *Id.* ¶ 1898.

of the artillery weaponry employed by the HV [Croatian army] is difficult to delimit precisely, as it depends on a number of factors *on which the Chamber has not received detailed evidence*."[141] Despite this seemingly crucial concession, the court decreed a 200 meter standard of accuracy, with no further reference to evidence or authority and no explanation of the methodology used to derive that standard. The court simply stated that, "[e]valuating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meters of an identified artillery target were deliberately fired at that artillery target."[142]

With regard to impact locations outside of the 200 meter radius from legitimate artillery targets, the court found that they did not land so far from the targets "incidentally as a result of errors or inaccuracies in the HV's artillery fire," but instead were deliberately aimed there.[143] The court further found that most of these rounds landed in "civilian areas," because there was no evidence of Serb military or police presence and no evidence "indicating that firing at these areas would offer a definite military advantage."[144]

5. Finding #5: "Too many" rounds landed more than 200 meters from legitimate military targets to be the product of inaccurate fire.

The court estimated that at least 1205 rounds were fired at the towns in question on 4 and 5 August 1995.[145] The court found that only some of

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[141] *Id*. (emphasis added).
[142] *Id.*
[143] *Id.* ¶¶ 1906 (hospital and cemetery, 400–700 meters from the nearest identified target in Knin), 1920 (factories and various parts of Benkovac, 250–700 meters from the nearest identified targets), 1932–33 (parts of Gracac 300–800 meters from the nearest identified targets), and 1940 (health clinic and factory located 200–400 meters from the nearest targets in Obrovac); *but see id.* ¶¶ 1919 (considering a firemen's hall 500 meters from the nearest identified target and a gas station 150 meters from the hall; the court found that the HV deliberately targeted the hall, but concluded that they could have considered the hall a legitimate target, and therefore treated it as such), 1931 (concluding that an intersection not identified by Rajcic as a target might still be a legitimate target).
[144] *Id.* ¶¶ (Knin), 1921 (Benkovac), 1933 (Gracac), 1941 (Obrovac).
[145] *See id.* ¶¶ 1909, 1916 and 1928, and 1939 (stating that "not less than" 900 shells fell on Knin, 150 on Benkovac, and 150 on Gracac, and listing five locations in Obrovac at which "one or more" shells were fired).

the shell impact locations could be determined based on eyewitness testimony.[146] Nonetheless, the court concluded

> that too many projectiles impacted in areas which were too far away from identified artillery targets...for the artillery projectiles to have impacted in these areas incidentally as a result of errors or inaccuracies in the HV's artillery fire. Thus, the Trial Chamber finds that the HV deliberately fired artillery projectiles targeting these areas in Knin.[147]

It bears noting that "too many" is an imprecise and elastic standard, compared to the definitive edge of the court's precise 200 meter rule of accuracy.[148]

6. Finding #6: Impacts beyond 200 meters were not attributable to targets of opportunity.

The ICTY Statute incorporates the bedrock principle that a defendant is innocent until proven guilty.[149] The judgment acknowledged that the burden of proof as to the elements of the offense "remains with the

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[146] *Id.* ¶¶ 1909, 1922, 1934, 1942. In each of these sections, the court noted that it could determine impact locations for only "some" of the projectiles fired, but found that, of these, "a considerable proportion" were fired at civilian objects or areas. According to the defense appellate brief, the court was able to determine the location 154 of approximately 1205 projectiles fired, and determined that 74 of these 154 fell outside the 200 meter limit, with only 9 of those 74 falling more than 400 meters from acceptable targets. Prosecutor v. Gotovina, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 3 and Annex A (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011) [hereinafter Gotovina Appellant's Brief].

[147] *Gotovina*, Case No. IT-06-980-T, Judgment ¶ 1906.

[148] The court also acknowledged the limited sample of impact points it was able to determine. "The Trial Chamber considers that the number of civilian objects or areas in Knin deliberately fired at by the HV [Croatian Army] may appear limited….Of the locations of impact which the Trial Chamber was able to establish, a *considerable portion* are civilian objects or areas." *Id.* ¶ 1909 (emphasis added).

[149] *See* ICTY Statute, *supra* note 53, art. 21(3) (Rights of the Accused) ("The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute."). *See also* RULES OF PROCEDURE AND EVIDENCE OF THE ICTY R. 87(A), Rev. 46, Oct. 20, 2011, http://www.icty.org/sid/ [hereinafter ICTY Rules] ("A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt.").

Prosecution throughout the trial,"[150] and that the accused "must be acquitted if there is any reasonable explanation of the evidence other than the guilt of the accused."[151] One possible exculpatory explanation for the pattern of artillery impact points would be inaccuracy, but the court rejected that explanation based on its 200 meter rule. The court also considered "targets of opportunity" as one additional alternative explanation which it had a legal duty to address.

Rajcic testified that "commanders of artillery groups . . . directed and corrected artillery fire during operation Storm," and had twenty-two artillery observation points near Knin to make this possible. Nonetheless, the court dismissed this exculpatory possibility on two grounds. First, the court noted that, despite Rajcic's testimony about calls for fire, Croatian artillery reports and operational log books make no mention of forward observers in Knin.[152] Therefore, the court concluded that "the evidence does not establish whether the HV had artillery observers"[153] who could have called for fire, and stated that "[i]f they did not, at least on August 4, the HV would have been unable to spot, report on, and then direct fire at SVK or police units or vehicles, which would have presented so called opportunistic targets (i.e. not previously identified), also referred to as tactical (as opposed to operational) targets."[154] But in using such reasoning, the court impermissibly placed the burden of proof on the defense, and resolved a major factual ambiguity in favor of the prosecution. This further strains the usefulness of the 200 meter rule, because to apply the rule the court must assume it has an exhaustive list of locations of legitimate targets. Otherwise, to apply the rule leaves open the question: 200 meters from what?

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[150] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 14 (citing Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004)). The ICTY Rules place the burden of production on the defense only as to "special defenses," ICTY RULES, *supra* note 149, art. 67(B)(i)(a) and (b) ("[t]he defense shall notify the Prosecutor of its intent to offer (a) the defense of alibi . . . (b) any special defense . . . and any other evidence upon which the accused intends to rely to establish the special defense.").

[151] Prosecutor v. Delalic, Case no. IT-96-21-A, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (discussing cases based on circumstantial evidence). "It is not sufficient that it is a reasonable conclusion from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion that is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."

[152] *Id.* ¶ 1907.

[153] *Gotovina*, Case No. IT-06-90-T, Judgment, ¶ 1907.

[154] *Id.*

Second, even if forward observers had been deployed, the court stated that "the limited SVK and police presence in Knin indicates that there would, in any event, have been few opportunistic targets in Knin on 4 and 5 August."[155] The court further examined the evidence of this presence and noted that the limited evidence of SKV and police presence did not place them in the areas where the suspect artillery fire hit. However, the evidence *was* limited—as it had to be by its nature (most of the witnesses took cover during periods of intense shelling)—and even a few targets of opportunity could draw a great many rounds to places not considered legitimate targets by the court. On the basis of only these two observations—the lack of proof about forward observers on August 4 and the low probability of mobile targets in the areas hit—the court rejected the possibility that the impacts further than 200 meters from identified military targets resulted from firing at targets of opportunity.

In considering the shelling evidence at Gracac, the court took this kind of reasoning even further. The court acknowledged that "[t]he evidence does not clearly establish the location of the Gracac command post [a legitimate military target] within Gracac town," and that neither the prosecution nor the defense had produced evidence on the location of this target.[156] Nonetheless, the court noted shelling near two houses that were 450 meters from *each other*—and concluded on that basis alone that the shells must not have been aimed at the command post, wherever it was (the 200 meter rule, at its strictest, is evident in this finding).[157] The court also noted evidence that the Croatian army did use both Special Police (SP) and unit commanders as forward spotters for artillery in Gracac, but decided the rounds could not have been fired at targets of opportunity—because there was no evidence the forward spotters had a view of Gracac at 5 a.m. (when the rounds were fired), because there was no evidence that SVK or police were moving through the area at 5 a.m., and because the court would not "expect" such movement given the minimal SVK presence in Gracac.[158] Again, the court had to make broad assumptions, treat the absence of evidence as evidence of absence, and resolve ambiguities in favor of the prosecution to be able to apply its 200 meter standard.

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[155] *Id.* ¶ 1908.
[156] *Id.* ¶ 1933.
[157] *See id.*
[158] *Id.*

7. Finding #7: Gotovina's order to "place the towns under fire" was deemed an unlawful order to attack civilians.

It is undisputed that Gotovina issued orders two days before the battle began to "put the towns of Knin, Obravac, Gracac and Benkovac under fire."[159] Rajcic testified that Gotovina's order, in context, implied attacks only against the lawful targets on the pre-planned target list.[160] The prosecution's artillery expert, however, testified that when giving orders to shell targets in urban areas, "detailed specification of military targets is an absolute pre-condition, otherwise the vague nature of the order may be interpreted as ordering, or at least permitting commanders to fire randomly into the named cities."[161] Unable to resolve the order's ambiguity and interpret its intended meaning based solely on the wording of the order, the court turned to the pattern of artillery impact locations and the 200 meter rule as a means of inferring the meaning and intent of the order and assessing Rajcic's credibility on that issue.

The court found that Rajcic's testimony about the interpretation of the order was not credible, primarily because it concluded that the pattern of artillery impacts was not consistent with Rajcic's explanation.[162] The analysis of impact based on the 200 meter rule was the principal ground cited by the court for choosing between the possible interpretations of the order.[163]

V. Critique of the 200 Meter Rule

The ICTY mandate requires judges to interpret and apply the law of war in complex individual criminal cases, often many years (here, fifteen) after the events at issue. In effect, judges must combine two complex systems of law, each with very different processes and legal

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[159] *Id.* ¶ 1185.
[160] *Id.* ¶ 1188.
[161] *Id.* ¶ 1172. The defense artillery expert, Professor Geoffrey Corn, agreed that the order was ambiguous, and might be interpreted either as requiring indiscriminate shelling of the towns or as requiring fire on predetermined military objectives. *Id.* ¶ 1173.
[162] *Id.* ¶ 1906. The court also noted that Croat artillery reported firing at least 24 shells "at Knin or at the general area of Knin . . . without further specifying a target." *Id.* ¶ 1895 However, the court also noted that the artillery reports in its possession "provide[d] only a partial and at times coded account of the targets fired at in Knin," and concluded that these reports alone could not establish indiscriminate firing. *Id.* Thus, the 200 meter rule was critical to the court's ultimate findings of guilt.
[163] *See id.* ¶¶ 1911, 1923, 1935, 1943.

traditions: international regulation of the battlefield and judicial punishment of criminals. The latter tradition carries with it core legal values and principles that exert a conservative bias on how LOAC rules should be interpreted in order to protect the interests of justice and basic rights of defendants.[164]

The ICTY stands at the intersection of these two traditions and, with admirable skill and erudition, has played a historically pivotal and positive role in the development of adjudicative standards for the international enforcement of LOAC. Indeed, some of the most important developments in the law of war in recent decades are found in the judgments of the ICTY and the International Criminal Tribunal for Rwanda. Occasionally, this process produces well-intended judgments that require correction through the process of appellate review. Such correction is needed here, where the Trial Chamber relied on an operationally invalid standard of accuracy that also transgresses fundamental and universally recognized principles of criminal law.

A. Expert Assessment of the 200 Meter Rule

The court's invention of and reliance on the 200 meter standard was anticipated neither by the prosecution nor the defense when the Trial Chamber Judgment was published in April 2011.[165] This finding was neither litigated by the parties nor raised by the prosecution at trial. On appeal both the defense and prosecution obtained opinions from artillery experts and submitted their written opinions to the Appeals Chamber as additional evidence under Rule 115 of the ICTY Rules of Procedure and Evidence.[166] Instead of the "battle of the experts" that is the norm in such

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[164] *See* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 402–13 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (holding that basic principles of criminal law, such as the prohibition of ex post facto laws and the Rule of Lenity, apply when the ICTY interprets its statute).

[165] *See* Gotovina Appellant's Brief, *supra* note 146, ¶¶ 11–13 (asserting that Gotovina had no notice of the 200 meter rule and neither prosecution nor defense experts were asked to opine on the standard at trial); Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Redacted Public Version of Prosecution Response to Ante Gotovina's Appeal Brief, ¶¶ 83–87 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 12, 2011) (arguing that Gotovina had notice of "margin of error" issues at trial but not denying that the 200 meter standard *per se* was not discussed at any time during trial).

[166] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Public Redacted Version of Appellant Ante Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2012); and

situations, prosecution and defense artillery masters found themselves in agreement on one key point: the court's 200 meter standard is both technically unsound and operationally unrealistic, even under ideal conditions. The experts also generally concurred in the technical and operational variables likely to affect the accuracy of artillery and rocket fires. The unanimous opinions of the experts even led the prosecution to concede that the 200 meter rule was untenable.[167]

1. Defense Artillery Experts

On appeal, the defense has offered expert opinions on the 200 meter rule as evidence under Rule 115.[168] These opinions are authored by arguably some of the foremost artillery experts in NATO.[169] Together these experts represent well over 235 years of combined fire support and military operational experience in combat, academic, and training environments. Their military and scholarly contributions to artillery theory are respected around the world. They include General Granville-

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Prosecutor v. Gotovina, Case No. IT-06-90-T, Prosecution Response to Gotovina's Second Motion to Admit Additional Evidence Pursuant to Rule 115; Prosecutor v. Gotovina, Case No. IT-06-90-T, Supplemental Response to Gotovina's First Rule 115 Motion (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012) [hereinafter Pros. Rule 115 Response]. Motions to admit additional evidence were denied by the Appeals Chamber on grounds that they could have been presented at trial and were, therefore, not admissible under Rule 115. Prosecutor v. Gotovina, Case No. IT-06-90-T, Decision on Ante Gotovina's and Mladen Markac's Motions for the Admission of Additional Evidence on Appeal ¶¶ 16–17 (Int'l Crim. Trib. for the Former Yugoslavia June 21, 2012). These reports, however, remain part of the appellate record and are accessible to public review at http://icr.icty.org/default.aspx.

[167] "The Prosecution agrees that the 200-metre margin of error is overly narrow." *Gotovina,* Case No. IT-06-909-T, Response to Gotovina's First Rule 115 Motion, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012).

[168] *See* ICTY RULES, *supra* note 149, R. 115 (providing that "[a] party may apply by motion to present additional evidence [beyond the record of trial] before the Appeals Chamber").

[169] In addition to the four opinions offered in Gotovina's First and Second Rule 115 motions, two additional artillery experts were consulted by the defense and produced written opinions. One is from a former Chief of Staff of the German Training and Doctrine Command. Comments and Conclusions by GenMaj (ret.) Rolf Th. Ocken, German Army, on the Subject "Croatian Army use of Artillery in KNIN, CROATIA on 4-5 August 1995," (Nov. 19, 2011) (*infra* app. A) [hereinafter Ocken Report]. The other is from Lieutenant General (ret.) Percurt Green, former Deputy Supreme Commander of the Swedish Armed Forces. Report, Subject: Croatian Army use of Artillery and Rockets, Knin Croatia, 4-5 August 1995 (Apr. 2012) (*infra* app. B) [hereinafter Green Report].

Chapman, a Master Gunner of the British Army and Commander in Chief of British forces deployed to Iraq and Afghanistan; General Griffith, former U.S. Army Vice Chief of Staff; Lieutenant General Wilson A. Shoffner (Ret.), a former Commandant of the U.S. Army Artillery Center and School; and Major General Robert Scales (Ret.), a respected veteran, scholar, and author of several works on artillery art and science.[170]

These respected experts were asked to focus exclusively on whether the 200 meter standard was either technically or tactically rational or attainable under the circumstances set forth in the court's judgment. They were asked to review the court's findings as to the basis and application of the 200 meter rule in the context of the shelling of Knin, which was the most detailed and important part of the court's shelling analysis.[171] They were given access only to the court's judgment (not the complete record of trial) and for purposes of their analysis accepted the court's findings as to the lawfulness of the military targets engaged by Croatian artillery. They were not asked to express opinions about whether Croatian shelling in Operation Storm complied with the law of war.

The defense experts unanimously found that the court did not adequately consider the full range of factors that influence accuracy in the planning and execution of artillery fire.[172] General Scales provided a detailed discussion of the many factors that influence dispersion of canon and rocket fire in an operational setting. He concluded that "the Trial Chamber did not adequately consider the full impact of these execution variables in assessing the effects of HV [Croatian] artillery."[173] Among several critical factors overlooked by the Trial Chamber, one example was the lack of an accurate meteorological message prior to firing. General Scales characterized this as "[t]he most telling technical

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[170] The relevant qualifications of each expert are summarized in their respective reports, cited below.
[171] Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exh. 20 (Scales Report), at 1 (Int'l Crim. Trib. for the Former Yugoslavia Nov 4, 2011) [hereinafter Scales Report].
[172] *See* Shoffner Report, *supra* note 136, at 2, 4; Ocken Report, *infra* app. A; Green Report, *infra* app. B.
[173] Scales Report, *supra* note 171, at 6. Those factors analyzed by General Scales which would have a significant effect on accuracy, included range, meteorological conditions, target location, battery location azimuth of fire, ammunition lot and quality, platform stability, condition of material, opportunity to "register" targets, training and experience of the cannon crews. *Id*. at 7–10.

shortcoming of HV artillery operations at Knin,"[174] which is "the single greatest source of deviation from firing tables and thus the largest source of error at the target." He also noted that the "map spotting" technique used by Croatian gunners could have reduced target accuracy by 100 meters or more, and that the likely inexperience of the Croatian gunners could have added more to this inaccuracy.[175]

Even if a firing battery could achieve perfect execution of fire missions, which General Scales points out is "a factual impossibility" (a point this author's experience certainly supports), the routine occurrence of "outliers" might fully explain the few rounds found by the court beyond 400 meters from military targets. According to Scales, "[a]bout one round in every hundred for advanced systems and one in 50 for older systems . . . occasionally impact outside the normal radius."[176] As General Scales further explains, these aberrant results are usually caused by "flaws in the manufacture of ammunition." If the 154 shots examined by the court were a representative sample of all the shots fired—and whether they were is unknown and unknowable—this problem alone would explain 3 of the 9 shots found to lie over 400 meters from their targets. If the sample was not representative, it might explain them all.

In summary, taking all of the normal execution variables into account and applying the mathematical formulas on which artillery fire is based, all experts emphatically agreed that the 200 meter rule was a technically, mathematically, and operationally impossible standard of accuracy under the conditions of Operation Storm. Master Gunner of the British Army, retired four-star General Sir Granville-Chapman, stated: "There is, in my opinion, absolutely no justification for concluding that rounds falling outside the 200 metre box were indicative of a deliberate attempt to fire on separate (and possibly inappropriate) targets."[177]

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[174] *Id.* at 10.

[175] *Id.* at 6. *See also* Ocken Report, *infra* app. A, at 2 n.5 (noting that inaccurate meteorological data generally accounts for "50-70% of the total errors"). This discussion is not cited to definitively assert that the lack of accurate meteorological data caused errant rounds, but rather simply to highlight some of the technical processes and expertise required to deliver accurate artillery fire and thereby underscore the danger of dictating an artillery combat standard of accuracy by judicial fiat. As the U.S. Supreme Court has noted on several occasions, even the best and most well-intentioned judges are generally ill equipped in terms of training and experience to render definitive opinions on military combat operations. *See* Parker v. Levy, 417 U.S. 733, 748 (1974) and cases cited therein.

[176] Scales Report, *supra* note 171, at 8.

[177] Prosecutor v. Gotovina, Case No. IT-06-90-T, Notice of Filing Public Redacted Version of Appellant Ante Gotovina's Second Motion to Admit Additional Evidence

General Shoffner, the former Chief of Artillery for the U.S. Army, called the 200 meter rule "totally unrealistic"[178] and "simply wrong," and concluded, "There is no scientific, mathematical or practical justification for such a conclusion."[179]

It is worth noting that even with their extensive experience, these combat veterans and artillery experts declined to assert a single, bright-line standard of accuracy that would be appropriate in all circumstances. However, General Scales stated that 400 meters would be far a more realistic standard for HV artillery in Operation Storm, and all identified a variety of factors that would bear on analysis of the issue.[180] General Scales and General Shoffner provided the detailed mathematical and technical formulas for determining the expected dispersion patterns of the artillery systems used under the conditions faced by HV forces in the Krajina. General Scales found that "firing errors far greater than 200 meters" would be expected and that "the compounding of errors traditional in such missions, in fact, would offer a radial error of at least 400 meters."[181] General Granville-Chapman thought the evidence showed especial care taken by the Croat gunners. Noting that "a high proportion of the rounds fell within 200 meters," General Granville-Chapman concluded that "in many ways such accuracy is remarkable,

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Pursuant to Rule 115, annex E (Granville-Chapman Report), at 1–2 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2012) [hereinafter Granville-Chapman Report] (observing that even British artillery in Afghanistan "typically delivers only 90% of its rounds within a 250 meter box at its operational range").

[178] Applying standard mathematical formulas to normal dispersion patterns of artillery fire under conditions faced by Croation forces, General Shoffner showed that "as much as half the rounds fired could be expected to be greater than 200 meters from the aim point." Shoffner Report, *supra* note 136, at 2.

[179] *Id.* at 2. Swedish General Green said, "the 200 meter standard adopted by the court is completely inconsistent with both technical and practical aspects of artillery employment," and called the rule "the most astonishing statement from the portions of the Trial Chamber judgment I reviewed." Green Report, *infra* app. B. *See also* Shoffner Report, *supra* note 136, at 3 ("Nor does the 200 meter standard reflect the science of indirect fire weapons or the established practice by artillerists around the world for predicting the probable impact of indirect fired weapons."); Ocken Report, *infra* app. A, at 2 ("I can state unequivocally that a circle of 200m around a target could never serve as a realistic or proper standard for a sound assessment of cannon and rocket fire over a distance from 8 to 27 kilometers.").

[180] *See* Scales Report, *supra* note 171, at 5-9. In this he agreed with Lt. Gen. Leslie, who testified at trial that for rounds to land within 400 meters of their targets would be "acceptable" with the weapons in question under the circumstances. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1167 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[181] Scales Report, *supra* note 171, at 1.

given the age of equipment, the state of training of the crews, and the unsophisticated means…of attending to variables such as weather conditions. . . ."[182]

2. Prosecution Artillery Experts

In response to the defense motion to admit expert opinions of allied artillery experts, the prosecution offered the opinions of three senior career British officers with solid artillery credentials.[183] Among their distinctions, General Applegate was a Master-General of the Ordnance and commander of the European Rapid Reaction Force artillery group, which in 1995 fired more than 1,499 rounds in 56 fire missions in support of the intervention to lift the siege of Sarajevo.[184] General Brown was a former Director of Royal Artillery; and General Ashmore is a currently serving British general with extensive field artillery experience in Iraq.

The opinions of the British generals are described as "rebuttal reports,"[185] and they are critical of some Croatian artillery practices; however, all three prosecution experts joined the defense experts in unanimously rejecting the 200 meter rule as a completely invalid standard for judging the accuracy of Croatian artillery fire in Operation

[182] Granville-Chapman Report, *supra* note 177, at 2. General Green found the high degree of accuracy "quite surprising." Green Report, *infra* app. B. *See also* Prosecutor v. Gotovina, Case No. IT-06-90-T, Motion to Admit Additional Evidence, exhibit 22 (Griffith Report), at 2 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 4, 2011) [hereinafter Griffith Report] (finding that, given the lack of any proven civilian casualties and the dispersion of rounds, "General Gotovina's use of indirect fires was done in a responsible manner . . . by any reasonable standard"); Shoffner found "nothing that would lead me to conclude that these firings were not within accepted norms for dispersion and accuracy given the methods and weapons used." Shoffner Report, *supra* note 136, at 4. The experts also commented on the relatively low volume of fire given the operational circumstances faced by Croatian forces. Based on many years of combat experience in various wars, General Griffith said "the volume of artillery fire" over the two-day period in issue and given the number of lawful targets engaged "was not excessive." Griffith Report, *supra*, at 4; Shoffner Report, *supra* note 136, at 2 ("not considered excessive"); Granville-Chapman Report, *supra* note 180, at 1 ("[T]he number of rounds fired looks modest and entirely consistent with seeking to neutralize the opposition in an urban setting, rather than wholesale destruction.").

[183] Pros. Rule 115 Response, *supra* note 166.

[184] Prosecutor v. Gotovina, Case No. IT-06-90-T, Supplemental Response to Gotovina's First Rule 115 Motion, annex I (Applegate Report), at 21 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 27, 2012) [hereinafter Applegate Report].

[185] *See* Pros. Rule 115 Response, *supra* note 166, ¶ 38.

Storm. Having reviewed the defense expert reports, General Applegate states: “I concur with their arguments concerning the specific ruling that the 200m zone of error . . . is inappropriate and fails to take into account the characteristics of the weapons system, and that 400m is a more appropriate rule of thumb.”[186] Similarly, after listing various control measures he would have recommended to Rajcic and Gotovina, General Ashmore conceded, “However, I would highlight that I agree . . . that the Trial Chamber’s conclusion as to a reasonable radius of error (200m) was far too restrictive and a 400m radius is a more accurate and realistic standard to use.”[187]

Compelled by operational reality to abandon the court’s 200 meter standard, the prosecution used its expert reports to criticize Croatian artillery operations on various other grounds, upon which the court itself did not rely.[188] General Ashmore argued that the Croatian fire control measures were not sufficiently strict to limit collateral casualties and damage to civilian property. He stressed the importance of observed fire, current intelligence, prompt battle damage assessments, clear ROE, withholding of authority to target fire in towns to the brigade level or higher, and use of fire support coordination measures such as "no fire" or "restricted fire" areas.[189] Ashmore noted routine use of such measures in his experience, leading him to conclude that “given the apparent failure of the HV [Croatian forces] to consider and address these factors . . . I would consider those Fires to have been, in the main, inappropriate indiscriminate and reckless.”[190] General Applegate similarly concluded: “based upon my own experience of engaging targets in Sarajevo with artillery fire . . . I find that the HV, at the very least, failed to exercise due care in the application of artillery fire. . . .”[191]

As noted in Part I above, Rajcic testified that some of the planning factors advocated by the prosecution experts were actually incorporated into the deliberate fire support planning for Operation Storm.[192] Others,

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[186] Applegate Report, *supra* note 184, at 20.
[187] Pros. Rule 115 Response, *supra* note 166, Annex III (Ashmore Report), at 4 [hereinafter Ashmore Report]. *See also id.*, Annex II (Brown Report), at 2 (referring to the 200 meter rule as an “erroneous conclusion”).
[188] *See id.* ¶ 55.
[189] Ashmore Report, *supra* note 187, at 2.
[190] *Id.* at 5.
[191] Applegate Report, *supra* note 184, at 20 (noting his experience in peacekeeping operations).
[192] *See* Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶¶ 1245, 1182, 1184 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

such as ongoing battle damage assessment (BDA), were not feasible in the circumstances of a two-day blitz into enemy territory, given Croatia's limited aerial surveillance capabilities. Regardless, such measures in themselves are not required by the law of war. While the court in *Gotovina* did take some testimony on the usefulness of forward observers in avoiding civilian casualties, it did not base its findings of unlawful shelling on such considerations, but instead rested its ruling on the 200 meter rule, which all of the prosecution and defense experts found to be invalid.

In the author’s opinion, while Croatian forces might have considered additional restrictive measures—and perhaps British forces would have—neither the law of war nor the mission parameters required or necessitated their use. Artillery control measures in peacekeeping operations, such as General Applegate's experience in Sarajevo, are typically far more restrictive than those required by the law of war in conventional combat operations, such as Operation Storm. Although British-style fire control measures are excellent in this author’s experience,[193] the LOAC does not require every combatant to meet their standards.

3. An Operationally Invalid Standard

A hallmark of international humanitarian law is its consistency with the actual practice of warfare by civilized nations.[194] This consistency promotes respect for and compliance with the law of war. Legal standards that make compliance impossible will inevitably be ignored and ultimately undermine respect for the law among military personnel.[195] The specific LOAC rules governing the means and methods of warfare, including the law of targeting, place reasonable constraints on the manner in which forces use their combat power in the chaotic maul of warfare. Legal standards that are inconsistent with the operational realities of modern war, the limitations of technology, and the customary

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[193] The British First Armored Division was attached to the U.S. Army VII Corps during Desert Storm and performed magnificently. *See* FRED FRANKS & TOM CLANCY, INTO THE STORM 592 (1997).
[194] *See generally* Corn & Corn, *supra* note 64 (insightful analysis of how operational art corresponds to the law of war).
[195] Doswald-Beck, *supra* note 63, at 45 (noting that “belief in the appropriateness of humanitarian rules is the single most important factor for effective implementation of the law”).

practice of civilized nations will not be considered practical or workable by armies in the field. Unless nations expressly undertake, in advance, to supersede customary military practices through treaties and conventions, the law should therefore be interpreted consistent with contemporary operational art and technology.[196]

A determination that a legal standard is operationally and technically invalid is a sufficient reason to invalidate the rule. The law of war does not ask the impossible of battlefield commanders; nor does it unfairly disadvantage armies that lack the technological capabilities of the most advanced nations. It requires only that commanders act in good faith to do all within their capabilities and limitations to minimize civilian casualties while accomplishing their missions. General Gotovina was bound to operate within the technical constraints of his combat capabilities. Croatian forces did not have the most modern indirect fire weapons, and certainly did not have precision-guided munitions. Even beyond the modest capabilities of Gotovina's indirect fire capabilities, no army on earth could meet a 200 meter standard, or any other hard and fast standard that failed to account for the myriad vagaries associated with artillery in combat that result statistically in errant rounds. The court's desire to create a more precise standard of judgment is understandable. However, the danger exists that this rule—which is temptingly simple—will be read in the future as a universal standard of accuracy. If the complex judgments of battlefield commanders could be measured against a simple mathematical standard, the task of criminal adjudication would be greatly simplified. But the law of war historically, consistently, and necessarily has declined to provide a bright-line standard.[197]

B. The 200 Meter Rule in Light of Fundamental Legal Principles

While the operational and technical invalidity of the 200 meter rule is sufficient to invalidate the findings of unlawful shelling, the court's heavy reliance on a post-hoc accuracy standard raises additional, independent legal concerns.

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[196] This occurred, for example, with the 1925 Geneva Protocol and with the 1980 Conventional Weapons Treaty. An analogous situation occurs when new emissions standards are promulgated by regulation or statute, forcing automobile manufacturers to upgrade existing automobile technology.
[197] *See infra* note 208.

1. Legal Insufficiency of an Accuracy-Based Standard

The first strictly legal concern raised by the use of the 200 meter rule is its tendency to distort application of the law of war to allegations of unlawful shelling. The Rendulic rule requires proof of criminal intent at the time the attack was ordered.[198] The 200 meter rule diverts the court's attention from this key element through inordinate reliance on the location of artillery impacts and other post-hoc target effects evidence. While target effects evidence may be one relevant factor from which the intent of an attack may be inferred,[199] it cannot be dispositive standing alone. Thus, the law, properly applied, may exonerate a commander who mistakenly inflicts the most dreadful civilian casualties based on a reasonable, but mistaken, belief that he was attacking a purely military target.[200] On the other hand, the law may condemn a commander who launches an attack knowing it will likely cause civilian casualties that are excessive in relation to the anticipated military advantage gained, even if no casualties result.[201]

2. Strict Liability and the Principle of Legality

Nullum crimen sine lege and *nulla poena sine lege* are fundamental principles of criminal law that have been fully embraced by ICTY jurisprudence. Known together as the principle of legality, these fundamental rules prohibits "the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission."[202] "Associated with these principles are the

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[198] *See* Part III.B.*2*, *supra.*

[199] As noted above, the ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) existence of fierce fighting; (6) number of incidents compared to the size of the area; (7) distance between victims and source of fire; (8) presence of military targets in the vicinity; and (9) status and appearance of victims. *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 132–133 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on Appeals Chamber shelling cases), *available at* 2006 WL 4549662.

[200] *See supra* note 111 (discussing the al Firdus bunker incident in Desert Storm).

[201] Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 105 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

[202] Prosecutor v. Delalic, Case No. IT-96-1-T, ¶¶ 313, 402 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), *available at* 1998 WL 34310017. These principles translate as "no crime without a law, no punishment without a law." For an analysis of the principle of legality in ICTY jurisprudence, see generally M.C. BASSIOUNI & P.

requirement of specificity and the prohibition of ambiguity in criminal legislation," and the prohibition of retroactive or *ex post facto* laws.[203] As expressed in the International Covenant on Civil and Political Rights, "No one shall be held guilty of any criminal offense for any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. . . ."[204] This principle is not explicit in the ICTY Statute (as it is in the statute of the International Criminal Court[205]), but the court has unequivocally embraced it as a fundamental and indispensible attribute of justice. The principle of legality is implicated whenever a court explicitly or implicitly creates a new offense, expands criminal liability under an existing offense, or increases the penalty prescribed by law. Arguably, the 200 meter rule creates a new strict liability standard for shelling in urban settings or, at a minimum, expands existing criminal liability for shelling well beyond any previous standard.[206]

Although ICTY opinions contribute to the development and clarification of humanitarian law standards, the tribunal is not empowered to make law or to expand the substantive standards of criminal liability under the law of war.[207] Creating a more stringent standard of substantive law exceeds the permissible role of any international tribunal, yet that is what occurred here. The court's unattainable 200 meter standard of accuracy not only departed from

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MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 265–91 (1996).

[203] *Delalic*, Case No. IT-96-1-T, Judgment ¶ 402.

[204] International Convenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

[205] *See* Rome Statute of the International Criminal Court, art. 22, July 17, 1998, 2187 U.N.T.S. 90 (1998) [hereinafter ICC Statute]. "*Nullum crimen sine lege.* A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

[206] In addition to concerns related to the principle of legality, the court's invention and application of the 200 meter rule after the trial had ended, without any discussion of the rule during trial, raises substantial fair notice concerns under Article 21(4)(a) of the ICTY Statute. Gotovina has asserted fair notice as grounds for appeal. Prosecutor v. Gotovina, Case No. IT-06-90-T, Appellant's Brief of Ante Gotovina, ¶ 11–13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011).

[207] *See Delaic*, Case No. IT-96-1-T, Judgment ¶ 417 (pointing out that the UN Security Council, which created the ICTY, "not being a legislative body, cannot create offenses. It therefore vests in the Tribunal the exercise of jurisdiction of offences *already recognized* in international humanitarian law" (emphasis added)). *See also* CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 35–42 (2008) (reviewing sources of international law and discussing the role of the ICTY in the process of developing and clarifying law of war).

current battlefield reality, but also implicitly created a new strict liability offense for indirect fire against legitimate military targets embedded in urban settings. Prior to the court's ruling, no court, military manual, learned treatise, or commentary on Protocol I had ever asserted or held that 200 meters was a legal standard of accuracy that would be enforced by criminal sanctions. Indeed, the ICRC commentaries recognized that the high contracting parties had explicitly considered, but not adopted, such a rigid mathematical standard.[208] The court's desire to fashion a simple, precise, and black-and-white standard, while understandable, impermissibly amended the law of war and applied it to Croatian shelling fifteen years after Operation Storm. As a practical matter, such an *ex post facto* determination undermines respect for the law and may promote noncompliance.

For good reason, the law of war has never reduced the rules of indiscriminate fire and proportionality to mathematical formulas. The circumstances of combat and the factors affecting accuracy and data available to the commander at the time a targeting decision is made are infinitely variable. The law requires a commander to make a good faith judgment, oftentimes under extreme pressures of time and danger. When viewed in hindsight, such decisions warrant a healthy degree of deference. In adjudicating allegations of criminal conduct, courts must operate within the framework of the law as it exists. Here, the error of creating a post hoc standard is compounded by the arbitrary and unrealistic content of the standard itself. By creating the 200 meter standard and using it, in effect, as a substantive standard of criminal liability, the court traveled far beyond the framework of existing law.

C. Legal Incentives Which Can Endanger Noncombatants

Military legal advisors closely follow developments in the Law of Armed Conflict, including decisions of courts such as the ICTY. This decision, however it is resolved on appeal, is likely to significantly influence military practice in the field. No matter how the *Gotovina* appeal is decided, the trial judgment will serve as a cautionary tale for

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[208] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 65, ¶¶ 2185 ("In the early stages of the discussions on the codification of the law of bombardments, the possibility had been entertained of expressly providing the standard of precision required for bombardments on towns and cities. . . ."), 2187 (noting that the rule as adopted is "imprecise").

commanders who employ indirect fires in populated areas. Great care in wording orders, documenting legal review and precautionary measures, taking fire control measures, and documenting battle damage must be paramount in the planning and execution of indirect fires.

However, if the judgment is allowed to stand, it could have unintended consequences and create perverse incentives that would increase the danger of urban combat for civilians and combatants alike.

From the perspective of the attacking force, any impossible standard of precision, including the standard imposed by the *Gotovina* court, would expose conscientious commanders to serious legal jeopardy. This led British General Granville-Chapman to call the *Gotovina* judgment "extraordinarily unsafe in terms of the precedent it sets for the use of indirect fire."[209]

From the defending force's perspective, as General Percurt Green of the Swedish Armed Forces, and a renowned artillery expert, warned: "Should this standard gain traction in international law, it will make it virtually impossible for commanders to employ artillery against vital enemy targets in populated areas, thereby creating an incentive for the enemy to co-mingle their most valuable assets in the midst of civilians."[210] By subjecting the attacking force commander to a strict liability standard, such as the 200 meter rule, the judgment dramatically enhances the "human shield" effect of locating critical military assets in populated areas.[211] Defenders seeking an asymmetrical advantage to offset an attacker's superior strength will exploit the attacker's reluctance to incur the risk criminal prosecution by shelling lawful targets in a town—and in so doing will increase the risk of harm to civilians.[212] This

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[209] Granville-Chapman Report, *supra* note 177, at 2.
[210] Green Report, *infra* app. B.
[211] *See generally* Richard Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity,* VAND. J. TRANSNAT'L L. 42, 690 (2009) (discussing how Protocol I's targeting rules favor the defender and "provides a powerful incentive for insurgents and terrorist organizations to rely on their enemies' observance of the law of war").
[212] *Id.* at 690.

> It creates a "win-win-win" situation for such groups: either their adversaries avoid striking them altogether out of fear of causing civilian casualties (win); or they attack them, cause civilian casualties, and suffer international condemnation (win); or they forego air power and artillery and attack using ground troops, there

in turn upends the purpose and norms of international humanitarian law. According to German General Rolf Ocken, "[A] standard of this nature would induce enemies to keep, or actually move civilians closer to military targets based near urban areas, thereby actually endangering them, in hopes of exploiting an unrealistic standard that simply does not comport with standards applicable everywhere to sound and proper use of artillery and indirect fire."[213]

VI. Conclusion

The court, in undertaking its important task in this case, clearly attempted to err, if at all, in favor of protecting innocent civilians. For this effort they should be applauded. However, as many of us have learned the hard way, sometimes the most important law of all is the law of unintended consequences. In this case, by basing their well-intentioned verdict on an operational requirement that is neither based on current legal norms nor operationally achievable, the court's decision will likely have exactly the opposite effect of that intended. If the legal rules protecting civilians become unrealistic, they will be either disregarded or abused, and civilians will be placed in greater danger than they already are when cities are attacked.

General Gotovina's conviction is based on a rule that is wholly unsupported by any custom or convention, any precedent in international jurisprudence, or any basis in operational art or military capabilities. This rule should be scrapped.

The law of armed conflict seeks to strike a careful balance between military necessity and humanitarian concern for the protection of civilians. Neither the 200 meter standard nor any other simple numerical standard, when adopted as a basis for striking that balance, gives proper deference to or appreciation of the exceptionally difficult and complex task facing the combat commander. While violations of LOAC standards should be prosecuted with uncompromising vigor, the limits of

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> by incurring much greater casualties and the loss of their public's support for the conflict (win).

See also Corn & Corn, *supra* note 64, at 370.

[213] Ocken Report, *infra* app. A, at 3.

the law must be respected and the protection of the rights of defendants deserves the same uncompromising vigor.

Appendix A

Report of Maj. Gen. Rolf Ocken (ret.) (Germany)

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19. November 2011

Comments and Conclusions by GenMaj (ret.) Rolf Th. Ocken, German Army on the Subject "Croatian Army use of Artillery in KNIN, CROATIA on 4-5 August 1995"

1. By way of introduction, I am a retired German Army General Major, having served 38 years on active duty in the Bundeswehr, German Armed Forces. My final position was Chief of Staff of the German Training and Doctrine Command (Heeresamt) in KÖLN, GERMANY. My basic branch was Artillery, and I served 13 years in artillery units and formations, learning and executing specific artillery tasks in various functions:

- as a gunner on the (US) 105 mm field howitzer and as a specialist private in a battery fire direction centre, I learned the basics of being an artillerist: Accuracy and speed are two "musts." The smallest error can lead to huge consequences,
- as a battery officer, later a fire direction officer and finally a forward observer in units with (US) 105 mm howitzers and later (GE) 105 mm howitzers,
- as a commander of a 155 mm M 109 G battery,
- as an S 3 in a 155 mm M 109 G battalion, being responsible for the education and training of the battalion survey team and fire direction centre together with all subordinate battery survey teams and fire direction centres to ensure that the effectiveness of the artillery battalion as a whole is reached and maintained,
- as a specialist in developing artillery safety procedures at the German Artillery School in IDAR OBERSTEIN, GERMANY, and further, on to educate safety teams for artillery regiments in order to minimize recurring accidents during live artillery firing on training areas,.[1]
- as a commander of an M 109 G battalion, and
- as commander of a mechanized armoured infantry brigade, an M 109 battalion was one of my subordinate formations.

As the Chief of Staff of the German Training and Doctrine Command artillery development in the context of combined forces was one of my primary tasks. Efficiency, and, even more important, accuracy, were and are always, a top priority.

Beyond having served in German artillery units, I should add that I served from 1981 to 1984 as a Military Attaché in the Embassy of the Federal Republic of Germany in Belgrade, SFRY, and in this capacity, had the opportunity to visit KNIN and also to observe life firing of a JNA artillery unit.[2] There I learned, and observed, first hand, the doctrine of the "all peoples army"

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[1] German artillery units must exercise their live firing in densely populated areas. Very often it is necessary to use firing positions which are located outside the training areas. As a result we fire across populated areas, even villages, streets, football-fields etc. In cases of errors which lead to a "short round", we sometimes suffer (and we still do!) damages in areas between the firing system and the impact area; if we erroneously produce a "too-far-round", the projectiles hit civilian installations which are located in prolongation of the trajectory, on the other side of the impact area. Most of my experience goes to the Training Area MUNSTER where the population was and is still used to artillery firing accidents – in spite of the most intensive training , very rigid safety regulations and, nowadays, extremely sophisticated equipment. We are now much better, but human and mechanical error still unfortunately, occur.

[2] In the course of Exercise „Jedinstvo" the JNA demonstrated live artillery fire on a training area. While this was a major event for the JNA – all Military Attachés accredited in the SFRY were present – the fire was obviously inaccurate: both in time and in placement.

in which, in the event of mobilization, every man would find his place in a particular unit.[3] I gained an appreciation there for the considerable effort entailed in storing weapons and ammunition, and the reality that adequate assets to do this properly were almost never available.[4] I concluded from this first hand experience that the fighting units in the last Yugoslav civil war were far less well-trained, adequately equipped, and properly maintained, with accurately sorted ammunition than I as an artilleryman would hope for as an ideal.

2. I have been asked to review and report my findings relative to the Trial Chamber's opinion on the subject shelling KNIN or shelling military targets in KNIN on 4. and 5. August 1995.

a. At this outset, my views expressed here are limited to that part of the Trial Chamber's findings, in which the Chamber states that

"the HV's shelling of KNIN on 4 and 5 August 1995 constitutes an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in KNIN"

with the justification that

only those shells which impacted within a 200 m circle around a military target within the city of KNIN were militarily justified, but those shells which impacted outside that 200 m circle around the military target deemed to be an indiscriminate attack against the civilian population.

b. Fire on the targets in KNIN reportedly came from four separate firing units: Two 130 mm cannon units, firing from a distance of 25 and 27 kilometres and two 122 mm multiple rocket units, firing from a distance of 18-20 kilometres.
Theses systems almost never were employed in "Direct Support" missions, but almost always in "General Support" missions, what means: Without observation in order to correct the fire. It is evident that accuracy as to target acquisition, system laying, very exact positioning of the system, availability of weather data, accuracy related to systems and ammunition maintenance and personnel training is of paramount significance and vital to the effectiveness of the systems.
"General Support" missions are executed to engage "area targets". I have never experienced a case – and I can hardly imagine a situation – where a "General Support" mission would be to engage a "point target."
Without computing meters and mils, without knowing details about the availability of meteorological data[5] and the level or degree of crew training and fire direction specialists, I can state unequivocally that a circle of 200 m around a target could never serve as a realistic or proper standard for a sound assessment of cannon and rocket fire over a distance from 18 to 27 kilometres.

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[3] Visiting factories or larger companies the Military Attachés were regularly briefed that every man (and often woman) had his place in the "all peoples army", that his rifle was prepared, and that he knew his military mission. We concluded that the SFRY government wanted to project force and capabilities that exceeded reality.

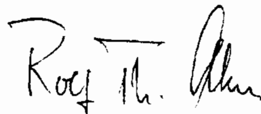
[4] We witnessed and toured firsthand parts of a „hollow mountain" in Bosnia containing in one part a hospital and in another a storage site.

[5] These data generally encompass 50-70% of the total error.

c. In his excellent and extremely thorough analysis, General Scales makes it very clear that a myriad of important sources for potential ballistic errors must be taken into consideration when assessing both the accuracy as well as the inaccuracy of artillery fire.
The 130 mm Soviet origin cannon and the 122 mm Soviet origin rocket launcher are very old systems. Even if "every technical aspect of every mission were perfect, normal dispersion alone would result in some small percentage of rockets and shells landing outside a 200-meter radius."[6] Based upon many years of sobering firsthand experience, I can attest, however, that this starting assumption, real world, i.e., assuming complete perfection, is totally unrealistic. That being the case, we must assume more realistically for some rounds that various causes of imperfection will inevitably lead to a number of shells impacting outside of a 200-meter circle.

d. I would also like to refer to General Shoffner's mathematical analysis. Having the relevant figures of dispersion for 130 mm shells and 122 mm rockets in mind, I am actually surprised that only some 50 projectiles impacted outside the Chamber's circle of 200 meters, and that very few impacted measurably further far away: four projectiles appr. 450 meters from the nearest target, and appr. one projectile 700 meters from the nearest target.

3. In full consonance with General Scales, General Shoffer and General Green of Sweden, I come to the conclusion that the 200-meter-assessment of the Trial Chamber is absolutely inconsistent with both mathematics and all practical experiences with artillery and rocket firing. This assessment leads me to state respectfully that the Trial Chamber could never justly come to the conclusion that "the HV's shelling of KNIN on 4 and 5 August 1995 constitutes an indiscriminate attack on the town and thus an unlawful attack on civilians and civilian objects in KNIN."
I also join General Scales, General Shoffer and General Green in their concern as to the consequences of a 200-meter-circle standard: among many other problems, a standard of this nature would induce enemies to keep, or actually move civilians closer to military targets based near urban areas, thereby actually endangering them, in hopes of exploiting an unrealistic standard that simply does not comport with standards applicable everywhere to sound and proper use of artillery and indirect fire.



Rolf Th. Ocken
General Major, GE Army, (ret.)

[6] See report General Scales, page 10, number 11

Appendix B

Report of Lt. Gen. Percurt Green (ret.) (Sweden)

SUBJECT: Croatian Army use of Artillery and Rockets, Knin Croatia, 4-5 August 1995

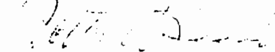
I am a retired Swedish Army Lieutenant General who spent 42 years in active service. My final post was Commanding General, Central Joint Command, prior to which I served as the Commanding General Army Material Command and between 1994-1998 as the Deputy Supreme Commander of the Swedish Armed Forces. My basic branch was artillery where I served a tour as an Artillery Battalion Commander.

I have reviewed carefully the report rendered by Major General (Ret.) Bob Scales, as well as the reports and conclusions submitted by Lieutenant General (Ret.) Wilson A. Shoffner and General (Ret.)Ronald H. Griffith. Furthermore, I have reviewed the document from the International Criminal Tribunal for the Former Yugoslavia, "Gotovina Defence Final Trial Brief" (IT-06-90-T D36469 - D36155, 27 July 2010) in the parts related to the Knin operation (referred to below as (G and the specific para-number)). which I deemed critical to acquire an overall picture of the Operation Storm, and thereby get a better background for understanding the artillery aspects in the operation against the town of Knin. That evidence was provided from the perspective of the defence, but it was useful insofar as overall factual information as to the overall operation. Finally, I also read paragraphs 1890-1916 of the Trial Chamber Opinion, which focuses on Knin, and the August 4-5, 1995 time period.

I limit my observations to the artillery operation in Knin on 4 and 5 August as I am in no position to make any informed judgment as to the possibility of other alleged war crimes that may have been committed by either side. Furthermore, based on the findings of the Trial Chamber, my assessment is based on the assumption that the targets placed under attack in Knin during those dates, (referred to in (G 258)) qualified as lawful objects of attack due to their military significance. Based on this assumption, I agree with General Griffith's statement (Paragraph 2) that the volume of artillery fire was not excessive.
The planning, described in (G 192-196, 205-209) gives a picture of "ordinary planning of an artillery mission."
In (G 201) a reduction of artillery due to inability to sustain a resupply rate necessary is mentioned, which in my view points at a need for concentration on the most important targets at the decisive time in the attack, which explains the surge of fires in the early morning hours of both days. In (G 258) the military objectives, selected for engagement are outlined by RAJCIC (*the Artillery Commander)* in his testimony. In my view the targets fully meet the criteria of a military target. (See also G 264-266)
I fully agree with General Shoffner's findings concerning the dispersion of rounds fired (his Paragraph 2 c). The results are mathematically correct, and, as he attests, the estimates are conservative. Taking in consideration the meteorological conditions, the geographical data for launcher displacement and the target coordinates (by only using "map-spot" tecniques), the dispersion of the differing projectile weights, the condition of the separate weapons and the other factors (outlined in General Scales report, (his Paragraph B), all of which contribute to the dispersion from the aim point, the 200 meters standard used by the court cannot be supportable.
The Trial Chamber concluded that 50 projectiles out of 900 landed outside the 200 meter perimeter of targets it determined qualified as legitimate. As General Griffith also mentions (his Paragraph 3), this small quantity of rounds not attributed to a lawful target is quite surprising, since added to the above mentioned limitations, the firings were conducted at the extreme limits of range with both the 130 mm pieces and 122 mm MLRS, a factor that substantially increases the probability of "short" or "long" rounds. In other words, this firing range has a considerable impact on the dispersion.

After having reviewed the documents mentioned above, I agree fully with the findings and conclusions drawn by the Generals Scales, Shoffner and Griffith in their respective reports. It is important to state thet my comments address only the employment of artillery in Knin on the 4 and 5 August 1995 and I can make no judgment concerning the Operation Storm as a whole.
I also feel compelled to note what I consider to be the most astonishing statement from the portions of the Trial Chamber judgment I reviewed: "—the reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 meter of an identified artillery target were deliberately fired at that target." Based on this conclusion, the Trial Chamber then found that all projectiles impacting outside that radius were the result of deliberate attack against civilian areas in Knin. The reason this is astonishing is because, as Major General Scales' report indicates, the 200 meter standard adopted by the Court is completely inconsistent with both technical and practical aspects of artillery employment, which therefore undermines the ultimate finding that the 50 rounds impacting beyond 200 meters of an accepted lawful target conclusively prove a deliberate attack against civilians. Should this standard gain traction in international law, it will make it virtually impossible for commanders to employ artillery against vital enemy targets in populated areas, thereby creating an incentive for the enemy to co-mingle their most valuable assets in the midst of civilians

Respectfully submitted,



Percurt Green
Lieutenant General, Swedish Armed Forces, Retired