THE *GOTOVINA* ACQUITTAL: A SOUND APPELLATE COURSE CORRECTION

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I. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber announced a landmark ruling in November 2012, which reversed the convictions of two Croatian general officers and set an important international precedent for the use of indirect fires in international armed conflict. Despite some criticism, the appellate acquittal of Generals Gotovina and Čermak was consistent with established tenets of the law of armed conflict and provides valuable guidance for future cases in which the use of indirect fires are at issue.

In 1995, Gotovina and Čermak were senior commanders in *Operation Storm*, conducted to retake certain areas of the self-proclaimed Republic of Serbian Krajina, formerly part of Croatia, from Serbian forces. Colonel General Gotovina was the overall commander of Operation Storm. Čermak was an Assistant Minister of the Interior and a commander of civilian police. A third accused, Mladen Markač, was also an Assistant Minister of the Interior and commander of the Special Police, which during *Operation Storm* included some artillery assets.[1] In

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The author notes his sincere appreciation for the legal research and drafting provided for this article by John P. "Jack" Einwechter, a retired Army officer who served in both Military Intelligence and the Judge Advocate General's Corps in a wide range of legal positions, and as a senior War Crimes Prosecutor for the Office of Military Commissions, Department of Defense. He is a graduate of Cornell University Law School, where he was on the Law Review.

[1] Prosecutor v. Gotovina & Markaĉ, Case No. IT-06-90-T, Trial Judgment, ¶¶ 6, 177 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). As noted by the Appeals Chamber, the trial judgment did not make an explicit finding on the disciplinary authority Markač had over the Special Police, noting for example that as commander he could not court-martial Special Police but had to rely on State Prosecutors to try them. Prosecutor

2001, Gotovina was indicted for grave breaches of the law of armed conflict and in 2004, Čermak and Markač were similarly indicted. In April, 2011, Čermak was acquitted of all charges and released. Markač was convicted of numerous international crimes and sentenced to eighteen years of confinement. Gotovina was convicted of serious charges and was sentenced to twenty-four years confinement. Gotovina and Markač appealed their convictions and sentences.

The central issue of their appeal was the alleged unlawful shelling, by artillery and rocket fire, of four towns, and an associated joint criminal enterprise (JCE) indicated by the shelling. The trial court employed a "200 meter" standard, finding that any artillery fire impacting 200 meters or more beyond a military target was *prima facie* evidence of the unlawful targeting of civilians and civilian objects[2]—a violation of both distinction[3] and military necessity,[4] and arguably indicative of a violation of proportionality.[5]

The 200-meter test is a very high standard of accuracy for an area weapon such as artillery, and it immediately raised concern in the military communities of many states that could be subjected to its application by some future tribunal. The core principles of distinction,

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v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 148 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[2] Discussed and critiqued in Walter B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in* The Prosecutor v. Ante Gotovina, 211 MIL. L. REV. 1, 29–51 (2012).

[3] Defined in 1977 Additional Protocol I, art. 48: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[4] Defined in U.S. Dept. of the Army, Field Manual (FM) 27-10, *The Law of Land Warfare*,"[M]ilitary necessity' . . . defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. . . ." U.S. DEPT. OF ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 3.a (18 July 1956).

[5] AP I, *supra* note 3, art. 57.2(b).

> [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. art. 51.5.(b) (complementing Article 57.2(b)).

military necessity, and proportionality, as well as the 200-meter criterion, would be tested through the appeal.

On November 16, 2012, the Appeals Chamber (AC) of the ICTY[6] reversed the convictions of Gotovina and Markač for war crimes and crimes against humanity in furtherance of the alleged JCE during *Operation Storm*.[7] Both defendants, acquitted of all charges, were released,[8] over the dissents of two of the panel's five judges.[9]

The AC found that the convictions were inextricably based on an invalid 200-meter standard of artillery accuracy, which the five appellate judges unanimously rejected as factually groundless. The "200 meter standard" was "the cornerstone and organizing principle"[10] of the trial chamber's impact analysis, upon which it based its finding that the two accused leaders ordered unlawful artillery and rocket attacks during *Operation Storm*. The AC ruled that, absent the flawed inferences from this 200-meter standard, no reasonable trier of fact could conclude that Gotovina or Markač intended unlawful shelling attacks on civilians or civilian objects. The AC also ruled that without the finding of unlawful artillery attacks, no court could reasonably decide that the alleged JCE had existed. Further, if Gotovina and Markač were not JCE participants, they could not lawfully be charged under extended JCE liability[11] for

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[6] The International Criminal Tribunal for the Former Yugoslavia 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 had occurred within the former Yugoslavia.

[7] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 158.

[8] Unqualified acquittal and release of Defendants by the Appeals Chamber has ample precedent. *See* http://www.icty.org/sid/9984 (listing thirteen ICTY full acquittals since 2000, including nine at the appeals level).

[9] The Appeals Chamber includes seven permanent judges along with *ad litem* judges who hear appeals in five-judge panels. The permanent judges elect the Appeals Chamber's President and Vice President. The panel for the Gotovina and Markač appeal included the Court's most senior members, including the ICTY President, Judge Meron, and former President, Judge Robinson, who were in the majority here, and Vice President Judge Agius and former President, Judge Pocar, both of whom dissented.

[10] *Gotovina & Markač*, Appeal Judgment*,* Case No. IT-06-90-A, Appeal Judgment, ¶ 64.

[11] *See generally* Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005) (tracing the evolution of JCE liability in ICTY jurisprudence, including the extended form of JCE liability, JCE 3). Under JCE 3 liability, "a defendant who intends to participate in a common design may be found guilty of acts outside that design if such acts are a 'natural and foreseeable consequence of the effecting of the common purpose.'" *Id.* at 106 (citing Prosecutor v. Tadić, IT No. 94-1-A, Appeal Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)).

other foreseeable crimes committed in executing a JCE. Finally, the AC evaluated whether the convictions could be sustained on any alternative theory of liability, and found that they could not be. The dissenting Judges in this case agreed with the majority that the 200-meter standard was invalid, but urged that the convictions be sustained based either on other evidence or on an alternative theory of superior responsibility.

Reversal of these high-profile convictions was greeted in the international community by reactions ranging from jubilation to condemnation. Serbian leaders condemned the ruling, while Gotovina and Markač returned to Croatia and a city-wide celebration in Zagreb.[12] Former ICTY Chief Prosecutor Carla Del Ponte, who oversaw the 2004 indictment of the two Croatians, declared, "I am shocked, very surprised and astonished because it is absolutely unbelievable . . . . I cannot accept that. I am really shocked because this is not justice."[13] Other commentators speculated about political motives and predicted that the Appeals Chamber's credibility as an impartial agent of international justice and reconciliation would be undermined.[14] The political controversy surrounding the verdicts, and forecasts of adverse impact on ICTY credibility, invite analysis of this ruling, which is the goal of this article.

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[12] *Hague War Court Acquits Croat Generals Gotovina and Markač*, BBC NEWS, Nov. 16, 2012, http://www.bbc.cp.uk/news/world-europe-20352187.html. Serbia's Deputy Prime Minister said the ICTY has "lost all credibility" and the decision "is proof of selective justice which is worse than any injustice." *Id.*

[13] Tamara Spaic, *Carla Del Ponte: This is Not Justice, This is Denial of a Huge Crime*, BLIC ONLINE, Nov. 20, 2012, http://english.blic.rs/In-Focus/9224. In response to Del Ponte's comments, Gotovina's lawyers filed a complaint with UN Secretary General, requesting an investigation of Del Ponte's comments as violations of professional standards. *See* http://daily.tportal.hr/230034/Gotovina-s-lawyers-request-probe-and-penalties-against-Del-Ponte.html. Current Chief Prosecutor Brammertz had a more measured view of the ruling, expressing "disappointment," promising to consider seeking review of the ruling in the event new evidence emerges. Author? *Hague Prosecutor Disappointed at Croats' Acquittal*, ASSOCIATED PRESS, Nov. 21, 2012.

[14] *See, e.g.*, Elizabeth Pond, *A Dangerous Precedent in the Balkans*, WORLD POL'Y BLOG, Dec. 13, 2012, http://www.worldpolicy.org/blog/2012/12/13/dangerous-precedent-balkans. Some related commentary includes politically charged rhetoric and dire predictions of political fallout and impact on international relations. *See, e.g.*, Julie Biro, *Following the ICTY Verdict, What Does the Future Hold for Those Working Towards Reconciliation in the Balkans?,* HUFFINGTON POST, Nov. 28, 2012, http://www.huffingtonpost.com. Some pronounced the Court's credibility destroyed. Of those inferring political motives or anti-Serb bias, none offer evidence to support their charges. *See, e.g.*, David Harland, *Selective Justice for the Balkans*, N.Y. TIMES.COM, Dec. 7, 2012.

Contrary to some of the politically-charged commentary, the ruling stands as an affirmation of the tribunal's commitment to justice. The ICTY was created to administer justice based on legally sufficient proof of individual culpability. Thus, the UN resolution that created the ICTY established its "sole purpose" as "prosecuting persons [i.e., individuals, not groups] responsible for serious violations of international humanitarian law."[15] The ICTY statute establishes the presumption of innocence for such individuals.[16] The standard is proof beyond reasonable doubt.[17] In the event it finds legal error, if necessary, it will review the factual findings affected by the error and affirm them only if it is itself convinced of them beyond a reasonable doubt.[18] Thus, the duty of the ICTY is to deliver individual justice based on the facts and the evidence, not apportion national or ethnic blame for Balkan atrocities.

The Gotovina-Markač trial judgment rested heavily on a flawed standard of artillery accuracy, which the AC unanimously found to have no support in either the record of trial or the real world of armed conflict. The record also confirmed conspicuous gaps in evidence (e.g., no confirmed fatalities from Croatian artillery fire, and no witness who fled from Krajina due to shelling). Nevertheless, after the trial court's decision, the two defendants were imprisoned for seven years based primarily on allegations of unlawful artillery strikes that the Appeals Chamber would later find erroneous.[19] An impartial reading of the Appeals Chamber's opinion strongly indicates that it represents the

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[15] S.C. Res. 827 ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

[16] Statute of the International Criminal Tribunal (Former Yugoslavia), art. 21.3, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

[17] Prosecutor v. Delalic, Case no. IT-96-21-A, Judgment, ¶ 458 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

[18] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (citing *inter alia*, Prosecutor v. Haradinaj, No. IT-04-84-A, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)). The Appeals Chamber also reviews factual findings absent legal error, but under a more deferential standard, by which factual findings are reversed only if no reasonable person could have come to the same conclusion. Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L. L.J. 136–37 (2002) (citing *inter alia* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)). Prosecutor v. Jelisic, Case No. IT-95-10, Appeal Judgment, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

[19] The Trial Chamber was only able to determine impact locations for 154 of the 1205 rounds it estimated were fired at the four towns; and of that small number it found that eighty landed within 200 meters of legitimate targets. Of the seventy-four that did not, only nine landed more than 400 meters from such targets. Huffman, *supra* note 2, at 30–31, 34 n.146.

thoughtful product of good-faith analysis by five highly qualified jurists, who disagreed on particular facts of the case, but whose individual commitments to international justice were clear.[20]

Following a summary of the trial and appeals chamber judgments and dissenting opinions, this article briefly discusses the decision's application of the ICTY standard of appellate review and its impact on the law of targeting, with emphasis on the use of impact analysis in cases dealing with allegations of unlawful shelling.

II. Background and Trial Chamber Judgment

Early on August 4, 1995, Colonel General Gotovina ordered Croatian Army forces to commence military operations against Serbian defenses in the self-proclaimed Republic of Serbian Krajina. Croatian forces launched artillery and rocket strikes on previously identified Serbian military targets and defensive positions, including key command, control, and communications assets placed by Serbian forces in the town of Knin and other populated areas.[21] Croatian forces defeated the Serbian forces within forty-eight hours and established Croatian control of the Krajina region, ending the struggle for Croatian independence and setting the stage for a successful conclusion of the Dayton Peace Accords a few months later, in December 1995.

Allegations of war crimes and ethnic cleansing arose from all sides even before the fighting ended, spawning both national and international investigations. Not until 2004—nine years after *Operation Storm*—did ICTY prosecutors indict Gotovina and Markač, charging crimes against humanity and violations of the laws and customs of war, based on their participation in an alleged JCE of high-ranking Croatian leaders, including the late President Tudjman.[22] According to the indictment, Gotovina and Markač shared the JCE's criminal intent to persecute and forcibly remove ethnic Serbs from the Krajina region. The indictment

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[20] Judge Meron currently is serving a second term as the Appeals Chamber's president, and recently was appointed to a four-year term as the President of the Mechanism for International Criminal Tribunals, created by the UNSC to oversee completion of the work of the ICTY and ICTR. *See* http://www.icty.org/sections/About the ICTY/Chambers.

[21] Huffman, *supra* note 2, at 5–12 (summarizing the planning and execution of military operations in *Operation Storm*).

[22] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-PT, Amended Joinder Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2007).

further charged that they contributed to the JCE by ordering illegal artillery attacks, and failed to prevent or punish crimes committed by Croatian soldiers in their area of operations,[23] and that they aided and abetted these crimes and were liable for them under a theory of command responsibility.[24]

After a three-year trial, Gotovina and Markač were found guilty of participating in a JCE.[25] The Trial Chamber further found that Gotovina and other JCE members persecuted and forcibly removed ethnic Serbs from the Krajina region through illegal artillery attacks and by failing to prevent or punish crimes of Croatian soldiers committed against the area's Serbian population.[26] Convictions for murder, wanton destruction, and plunder were based upon extended JCE liability ("JCE 3") on the theory that subordinates' crimes, while not intended, were foreseeable consequences of the initial JCE.[27] The Trial Chamber declined to make findings regarding either command responsibility or aiding and abetting theories of complicity.[28]

Much of the Trial Chamber's judgment was devoted to a review of evidence about the planning of *Operation Storm*, artillery impact locations, gun positions, firing orders, and other technical and factual issues. The court confirmed that lawful military targets existed in all four towns at issue, including Serbian logistical and command and control assets. Of course, by placing significant military targets in the towns, Serb forces exposed the towns to lawful attack, in potential violation of the concept of distinction, as well as the law of armed conflict.[29] While

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[23] *Id*. ¶¶ 12–20. An earlier indictment was registered against the Defendants in 2001, which made no allegation of unlawful shelling.

[24] *Id.* ¶ 46.

[25] *Id.* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 2370 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (finding "unlawful attacks formed an important element in the execution of the JCE").

[26] *Id.* ¶ 2373.

[27] *Id.* ¶¶ 2372–75.

[28] *Id.* ¶ 2375 ("On the basis of all of the above findings and considerations, the Trial Chamber finds that Gotovina is liable pursuant to the mode of liability of JCE. Consequently, it is not necessary for the Trial Chamber to make findings on the other modes of liability alleged in the indictment.").

[29] Placement of military assets in civilian areas does not render them immune from attack. *See* FM 27-10, *supra*, note 4, ¶ 41. *See also* AP I, *supra* note 3. *See also id.* arts. 51(7), 85(a). The Trial Chamber did confirm the lawfulness of artillery rounds that impacted within the 200 meter radius surrounding lawful military targets, however. Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 1911 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). *Id.*

the Court found intentional attacks on "civilian areas" the primary means of forced deportation, it did not identify any victim of Croatian artillery fire and the record contains no testimony of anyone who fled the region due to Croatian shelling.[30]

After a detailed analysis of the evidence, the Trial Chamber found that approximately 1,205 artillery and rocket rounds were fired on August 4 and 5, 1995, by Croatian forces in or near the four towns at issue,[31] but it could establish the approximate impact locations of only 154 rounds (about 13%). Of these 154 impact locations, 74 rounds (6.1% of 1,205) fell outside 200 meters, while 9 rounds (less than 1%) fell more than 400 meters from military targets.[32] For unexplained reasons, the Court ruled that rounds landing more than 200 meters from a lawful target were presumed to have been intentional or indiscriminate attacks on civilians. Comparing the locations of known impact points with known Serbian military targets, the court applied its 200-meter presumption and concluded that "too many projectiles impacted in areas too far away from identified military targets . . . to have impacted in these areas as a result of errors or in the HV [Croatian] artillery fire."[33] The Court concluded, therefore, that the defendants either intentionally attacked civilian targets or treated entire towns as targets for indiscriminate fire, both violations of the law of armed conflict.[34]

The trial court also found the unlawful shelling to be the *actus reus* of persecution, forcible deportation, wanton destruction, inhumane acts, and mistreatment,[35] and evidence of the JCE's existence and the Defendants' main contribution to the JCE, both of which are elements of

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[30] The Trial Chamber found that there were dead bodies in the general vicinity of HV artillery attacks in Knin, but conspicuously stopped short of finding that these casualties were caused by the shelling. *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 1375, 77, 1388. In the one case where the court found that casualties were caused by a mortar attack, it was unable to determine if the victims were combatants or civilians and whether the source of fire was Croatian or Serb. The court used this same approach to assess collateral damage to civilian houses. *See, e.g. id.* ¶ 1716.

[31] *Id*. ¶¶ 1909, 1916, 1928 and 1939 (finding 900 shells were fired on Knin, 150 on Benkovac, 150 on Gracac and at least 5 on Obrovac).

[32] *Id. Cf.* ¶¶ 1909, 1922, 1934 and 1942.

[33] *Id.* ¶ 1898.

[34] Additional Protocol I, *supra* note 3, art. 51(1), (2) (defining alternative crimes, both embraced by the Trial Judgment. The 200 meter standard was particularly alarming in international humanitarian law circles, and to law of war specialists), *E.g*., Huffman, *supra* note 2 (citing adverse commentary by law of war experts).

[35] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 135.

JCE liability.[36] In short, the 200-meter standard was central to the Trial Chamber's findings and verdict. To buttress its artillery impact analysis, the Trial Chamber also relied on an order by Gotovina to "place the towns under attack"[37] as evidence of his intent to target civilians indiscriminately. The Court's interpretation of the order, however, was also dependent on the faulty 200-meter standard and impact analysis. Gotovina's artillery chief, Marko Rajčić, testified that Gotovina's order was intended and understood to commence lawful attacks on pre-planned military targets in the towns.[38] The Court acknowledged that the order, on its face, could be interpreted in that lawful sense, but rejected that interpretation and Rajcić's testimony, based explicitly on its own faulty impact analysis.

The defendants appealed the convictions and sentences primarily on grounds that the unprecedented 200-meter accuracy standard had no support in the evidence or in expert opinions, and it had not been asserted at trial by any party as a relevant or controlling legal standard.[39] Appellants argued that, absent impact analysis based on the 200-meter standard, their convictions for participating in a JCE based on unlawful shelling could not be sustained.[40] On appeal, the prosecution conceded the invalidity of the 200-meter standard but argued that the Trial Chamber's impact analysis was not essential to its findings of unlawful artillery attacks and urged the Appeals Chamber to uphold the

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[36] *Id.* ¶ 2370. Other proofs of the alleged JCE relied on by the Court are the transcript of a meeting in Brioni, where Gotovina was a minor participant, and the discriminatory policies against Serbs and inflammatory statements by Croatia's president after *Operation Storm* was completed, neither of which was linked to Gotovina.

[37] *Id*. ¶ 70. Gotovina's August 2 order stated, in relevant part: "[F]ocus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centers, artillery firing positions and by *putting the towns of . . . Knin, Benkovac, Obrovac and Gracac under artillery fire*." (italics added).

[38] *Id*. ¶ 1183, 1188. Defense witness Rajcić also testified that Gotovina gave clear and unequivocal orders to avoid civilian casualties and property damage, and to comply strictly with the law of war.

[39] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Gotovina Brief, ¶¶ 11–13 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2011).

[40] The Prosecution did not appeal any aspect of the Judgment, including the Trial Chamber's decision not to enter findings on aiding and abetting or command responsibility. The Appeals Chamber denied defense requests to admit additional evidence, including expert reports demonstrating the invalidity of the 200 meter standard. The Chamber also rejected an amicus brief offering the opinions of eminent artillery and law of war experts explaining why the 200 meter standard was invalid and posed a potentially dangerous precedent for future conflicts. *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 1–2, annex A (Procedural History).

convictions based on other evidence of the defendants' JCE participation. Following oral argument, the Appeals Chamber requested additional briefs on whether the convictions could be sustained based on alternate modes of liability.[41]

III. The Appeals Chamber Judgment

Following eighteen months of appellate litigation, the Appeals Chamber reversed both convictions, rejected alternate modes of liability, and ordered the defendants' immediate release. The Appeals Chamber unanimously rejected the 200-meter standard, finding that it had no support in the trial record.[42] The majority further found the 200-meter standard to be the linchpin of the Trial Chamber's reasoning, and that other trial evidence was insufficient to support either the findings of unlawful shelling or JCE liability.[43] Two dissenting Appeals Chamber judges concluded that the evidence was adequate to sustain the Trial Chamber's key findings and the convictions, even without the 200-meter rule.[44]

A. Ruling of the Court

The Appeals Chamber's logic parallels that of the Trial Chamber Judgment. Because the convictions rested solely on JCE liability, the Appeals Chamber first examined the legal and factual basis for the existence of contributions by Gotovina and Markač to the alleged JCE. The Appeals Chamber observed that existence of a JCE hinged on "several mutually reinforcing findings" of the Trial Chamber, including its impact analysis of Croatian artillery attacks, Gotovina's orders, a high-level meeting of Croatian leaders, and evidence of discriminatory Croatian laws or policies, if any, that prevented Serb refugees from

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[41] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Order for Additional Briefs, ¶¶ 1–2 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2012).

[42] *Id.* ¶ 58 (noting that "the Trial Judgment contains no indication that any evidence . . . suggested a 200 metre margin of error," and "the Trial Chamber made no attempt to justify the 200 Metre Standard").

[43] President, Judge Meron, former President Judge Robinson, and Senior Judge Guney formed the Majority. In ICTY practice, unlike concurring and dissenting opinions, the author of the majority opinion is not indicated.

[44] Current ICTY Vice President Judge Agius, along with former President Judge Pocar, dissented.

returning to Krajina after *Operation Storm*.[45] The Appeals Chamber found that the Trial Chamber's finding that the defendants participated in and contributed to a JCE rested heavily on its finding of unlawful shelling of the four towns at issue.[46] The Appeals Chamber acknowledged that the finding of unlawful shelling was also based on a number of factors, but concluded that without the flawed impact analysis, and the 200-meter test, all other factors combined could not sustain the convictions.

All five appellate judges agreed that the Trial Chamber failed to provide a valid basis for adopting its 200-meter standard.[47] The Court also identified two additional errors fatal to the 200-meter standard and its application to the evidence. First, it observed that, even if a 200-meter standard could apply in some circumstances, the Trial Chamber failed to explain how a single standard of accuracy could apply to the differing circumstances of each attack on four different towns by different batteries at different distances.[48] Second, the Court ruled that the Trial Chamber did not justify its rejection of the possibility that mobile targets, or "targets of opportunity," such as Serb military vehicles in motion, might account for some of the artillery impact points more than 200 meters from stationary military targets in the town of Knin.[49] Because the record contained credible evidence of mobile vehicular targets and Croatian forward observers in the vicinity of Knin,[50] the Appeals Chamber held that the prosecution had the burden of disproving that outlying impacts could be attributed to Croatian engagement of targets of opportunity, and had failed to do this. The Chamber further ruled that "it was unreasonable to conclude that no artillery attacks on Knin were aimed at targets of opportunity."[51] Unless the evidence excludes

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[45] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 24.
[46] *Id.*
[47] *Id.* ¶¶ 61, 64.
[48] *Id.* ¶ 60.
[49] *Id.* ¶¶ 62–63 (faulting the Trial Chamber for failing to "explain how, in these circumstances, it could exclude the possibility that HV [Croatian] artillery attacks were aimed at mobile targets").
[50] *Id.* ¶ 63.
[51] Impact analysis based on an accuracy standard cannot logically proceed until impact points are correlated with the locations of lawful targets. The trial chamber held that "the evidence does not establish whether the HV had artillery observers" who could have called for fire, and therefore assumed that they did not. In so doing, they impermissibly reversed the burden of proof. Huffman, *supra* note 2, at 35; *Gotovina & Markač*, IT-06-90-A, Appeal Judgment, ¶ 63 (citing Prosecutor v. Zigiranyirazo, Case No. IT-01-73-A, Appeal Judgment, ¶¶ 38, 42, 49 n.136 (Int'l Crim. Trib. for the Former Yugoslavia Nov.

engagement of targets of opportunity, impact analysis cannot reliably conclude that any impact point was more than 200 meters from a legitimate static or mobile target.[52]

The Appeals Chamber next considered whether the convictions could be sustained on the basis of two alternative modes of liability alleged in the indictment, but explicitly left undetermined by the Trial Chamber. The indictment charged the defendants with (a) aiding and abetting crimes committed by Croatian soldiers against Serb civilians after the artillery attacks were over, and (b) command responsibility, under ICTY statute Article 7(3), for not preventing or punishing these crimes.[53] The Appeals Chamber held that it was empowered to revise the Trial Chamber's findings and enter findings of guilt based on alternate theories of liability, with or without a prosecution appeal,[54] provided such action would not "substantially compromise the fair trial rights of the accused."[55] The Court held that appellate analysis of alternative modes of liability would require assessment of "the Trial Chamber's findings and other evidence *de novo*."[56] Since the Trial Chamber had based the convictions solely on JCE liability, without findings on alternative theories of liability, the Appeals Chamber ruled that it would consider, but not defer to, the Trial Chamber's findings and analysis.[57]

16, 2009)). "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." Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeal Judgment, ¶ 458 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001).

[52] *Id.* ¶ 458.

[53] *Id.* ¶¶ 117, 120.

[54] *Id.* ¶ 108. Defendants argued that the Appeals Chamber lacked jurisdiction to entertain these alternative theories of culpability because the Prosecution had not appealed the judgment and because entering such convictions on appeal would deprive Defendants of their statutory right of appeal. The Prosecution argued that the Appeals Chamber had legal authority and precedent to enter convictions on these theories, and Defendants would not be prejudiced by its consideration of alternative theories, which had been fully litigated at trial and on appeal. *Id.* ¶¶ 100–02.

[55] *Id.* ¶¶ 107–08. The Appeals Chamber rejected the defense arguments that it was empowered to enter findings on alternate modes of liability if the prosecutor appeals the Trial Chamber's findings on alternate modes. The Trial Chamber here explicitly declined to make findings on alternate theories of aiding and abetting and command responsibility and the prosecutor failed to appeal that aspect of the Trial judgment.

[56] *Id.* ¶ 110.

[57] *Id.*

The Appeals Chamber concluded that the evidence failed to support convictions on either basis.[58] Both theories required a finding that the defendants had failed to take sufficient measures to prevent the crimes of subordinates. The Appeals Chamber reviewed eight specific measures taken by General Gotovina to "prevent and minimize crimes and general disorder" throughout *Operation Storm*[59] and found that his alleged failure to take additional measures, like his orders for shelling, could not serve as the *actus reus* for either alternative theory of guilt.[60] With respect to General Markač, the Appellate Chamber noted that the trial court had failed to find explicitly that he had "effective control" over the Special Police, as would be required for superior liability. In particular, he had lacked the authority to court-martial them for misconduct, since only the State Prosecutors could prosecute them.[61] It also found that the trial court had failed to establish that he himself had made any "substantial contribution" to their crimes, as would be required for aiding and abetting.[62] Absent such findings from the trial court, it refused to engage in "excessive factfinding" of its own to explore these theories against him, lest it prejudice his fair trial rights.[63] Accordingly, it found neither defendant guilty under either alternative theory.[64]

B. Concurring Opinions

The concurring opinions both focused on the alternative theories of liability, and the standards used by the Appeals Chamber in considering them.

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[58] *Id*. ¶¶ 136, 157.
[59] *Id*. ¶ 133. These included approving training to familiarize his soldiers with the requirements of the Geneva Conventions, "limit[ing] movements of Croatian soldiers in occupied areas so as to prevent theft or undisciplined conduct," and ordering commanders to collect and store weapons that he heard were being used to fire on inhabited settlements. The court also noted an increase in prosecutions for disciplinary infractions during *Operation Storm*. *Id.*
[60] *Id.* ¶ 135.
[61] *Id.* ¶ 148 (noting that only State Prosecutors had the power to prosecute Special Police). One of the dissenting judges argued that he still had sufficient control to be held liable, in part because he had access to "parallel disciplinary proceedings" against them. *Id.* ¶¶ 77–80 (Agius, J., dissenting).
[62] *Id.* ¶ 149.
[63] *Id.* ¶ 150.
[64] *Id*. ¶¶ 134, 150.

Judge Meron's opinion agreed that the Appeals Chamber had the power to consider alternative theories of guilt, but cautioned it to be sparing in its consideration of them. He expressed his view that the Appeals Chamber should limit itself, both in drawing additional inferences from the Trial Chamber's findings and in pronouncing convictions different from the ones appealed.[65] He cautioned that these issues require case-by-case analysis and the authority to sustain a conviction on alternative theories is not "a license for wholesale reconstruction or revision of approaches adopted or decisions taken by a trial chamber."[66]

In this case, Judge Meron wrote, the Appeals Chamber should not have analyzed the alternative theories to the extent that it had, because these "were almost entirely absent from core trial and appeal briefing," and because it had reversed "the fundamental conclusions of the Trial Chamber, including the finding that the JCE existed." If the Appeals Chamber had entered convictions under those circumstances, the appellants would have been found guilty of crimes "very different from those they defended against at trial or on appeal," and this would have been unfair to them.[67] Judge Meron was opposed to having such an option on the table.

Appellate Judge Robinson went further. Focusing on the additional theories as applied to Markač, he thought the Appellate Chamber should have adopted a "bright line" test by which it would *never* draw factual inferences from the Trial Chamber's findings, and would enter a conviction on an alternate theory *only* if such a conviction was supported by the specific factual findings of the Trial Chamber. "In my view, when the Appeals Chamber enters a conviction for an alternative mode of liability it must do so on the basis of the findings of the Trial Chamber and those findings alone; the Appeals Chamber is not free to draw inferences from the evidence."[68] Under this approach the Appeals

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[65] *Id.* ¶ 4 (Meron, J., concurring).

[66] *Id.* ¶¶ 5, 7 ("This authority must be wielded sparingly, in appropriate circumstances, and only where its exercise does not impinge on the rights of the appellants.").

[67] *Id.* ¶ 6.

[68] *Id.* ¶ 3 (Robinson, J., concurring). In espousing this view of the role of the Appeals Chamber, Judge Robinson drew not only on ICTY precedent, but on case law from the United Kingdom and Australia. *Id.* ¶¶ 6–9. He wrote that the ICTY, like the United Kingdom and Australia, has "a basis in the common law adversarial system which establishes a distinction between the trial and appellate functions. . .[in which]. . .an appeal is not a re-hearing of the trial, one consequence of which is that those bodies do not indulge in fact finding. . . ." *Id.*

Chamber's "task is confined to ensuring that the Trial Chamber's findings support the conviction for the alternative mode of liability."[69] Applying this standard, Judge Robinson likewise found no basis to convict the defendants on alternative modes of liability. He objected to the fact that the Appeals Chamber had "declined" to draw additional inferences against Markač, instead of pronouncing such inferences off limits.[70]

Judge Robinson also considered whether a new trial would be appropriate. He noted that the ICTY had ordered a new trial in only one case, and on that occasion had not set forth any standards to indicate when such a measure would be permissible.[71] Drawing on case law from the International Criminal Tribunal for Rwanda, and from Australia, he concluded that such an extraordinary action would not be warranted in this case.[72]

C. Dissenting Opinions

The dissenting opinions of Judges Agius and Pocar agreed with the majority that the 200-meter standard was unsupportable, but nonetheless opposed the decision to reverse the convictions. They rejected the majority's view that impact analysis under the 200-meter standard served as the cornerstone of the Trial Chamber's finding of JCE liability. They

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[69] *Id.* ¶ 16 (Robinson, J., concurring).
[70] *See id.* ¶ 3 (Robinson, J., concurring).
[71] *Id.* ¶ 18 (Robinson, J., concurring) (citing Prosecutor v. Haradinaj et al., Case No. IT-04-84-A, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)).
[72] *Id.* ¶¶ 18–19 (Robinson, J., concurring) (citing Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-A, Appeal Judgment, ¶ A.1.(a) (Int'l Crim. Trib. for Rwanda Aug. 29, 2008)); Gilham v. Regina [2012] NSWCCA 131 (Austl.). Judge Robinson identified the overriding consideration to be "whether the interests of justice require a new trial." *Gotovina & Markač*, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring) (*Gilham*, NSWCCA, para. 662). He concluded that retrial was not warranted because:

> (i) it would be unduly oppressive to put the Appellants to the burden of a retrial; (ii) a fair part of the sentences imposed upon convictions has already been served--in Gotovina's case, approximately one-third (7 years), and in Markač's case, approximately one half (8 and ½ years); (iii) a retrial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offense (1995) and the new trial.

Gotovina & Markač, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring).

also argued that the majority failed to identify and properly apply a correct standard of accuracy.

Judge Agius argued that the 200-meter standard was incorrect but not fatal to a conviction, based on the totality of the evidence. "The Majority erroneously regards the 200 Metre Standard as the critical piece underpinning all of the Trial Chamber's findings regarding the unlawfulness of the attacks."[73] He stated that "the Majority has impermissibly tied all of the Trial Chamber's findings to the 200 Metre Standard,"[74] thereby "misinterpret[ing] the Trial Judgment."[75] He thought that overturning this standard left enough facts in place to sustain the convictions.

Judge Agius expressed confusion over whether the majority had overturned the 200-meter standard as a legal error or a factual error. If it was the former, he argued, the correct approach was to identify a legally correct accuracy standard, and then apply that to the impact analysis.[76] If the latter, they should have reviewed the evidence deferentially under a standard of "reasonableness" rather than *de novo*, and affirmed if a reasonable factfinder could have established guilt from the totality of the remaining evidence. Under this standard, Judge Agius would have sustained the finding of unlawful shelling (and thus the JCE convictions) even without the 200-meter standard.[77] Judge Agius, alone among the appellate judges, would also have affirmed the convictions based on an alternative theory of command responsibility.[78]

Judge Pocar's dissent focused on standards of appellate review and how, in his view, the Court had deviated from those established standards.[79] Like Judge Agius, he criticized the majority for not specifying whether the Trial Chamber's 200-meter standard was an error of fact or of law.[80] Casting it as an error of law, he argued that it was the

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[73] *Id.* ¶ 4 (Agius, J., dissenting).
[74] *Id.* (Agius, J., dissenting).
[75] *Id.* ¶ 17 (Agius, J., dissenting).
[76] *Id.* ¶ 14 (Agius, J., dissenting). The majority in fact described the Trial Chamber's *failure to explain the reasoning* behind its 200–meter standard as a legal error, *id.* ¶ 64, and justified *de novo* review on that basis; but in conducting this review made a fact-based critique of the standard. *Id.* ¶¶ 52–60.
[77] *Id.* ¶ 15–16 (Agius, J., dissenting). Judge Agius summarizes the other evidence of unlawful shelling and a JCE in paragraphs 18–23 of his dissent.
[78] *Id.* ¶¶ 70, 79–81.
[79] *Id.* ¶ 5 (Pocar, J., dissenting).
[80] *Id.* ¶ 6 (Pocar, J., dissenting).

Appeals Chamber's duty to articulate the correct standard and apply it to the evidence to determine whether the shelling was or was not lawful.[81] Also like Judge Agius, he reviewed the other evidence cited by the trial court, and stated that the court should not have reversed the convictions unless it "demonstrate[d] that *all* the other remaining findings of the Trial Chamber establishing the unlawfulness of the attacks *cannot stand* in the face of the quashing of the . . . 200 Metre standard."[82]

Judge Pocar sharply criticized the majority's approach to the issue of alternative modes of liability. He wrote that they had mischaracterized what they could have done in this regard as "entering new convictions" on appeal instead of "revising" the trial convictions, arguing that the latter is permissible but the former is not.[83] He stopped short of taking a position on whether the convictions could have been properly "revised" and thus sustained on those grounds.[84]

IV. Analysis of the Appeals Chamber Ruling

The Appeals Chamber's ruling is largely devoted to interpretation of the Trial Judgment and analysis of factual issues of the case, but it also includes guidance for courts, international bodies, and practitioners on issues of substantive and procedural law. Significantly, it also sets parameters for the use of artillery accuracy standards and impact analysis in future cases.

A. The Use of "Impact Analysis" Is Subject to Important Limitations

The Appeals Chamber unanimously ruled that the 200-meter standard was an invalid legal standard. While the Chamber's decision

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[81] *Id.* ¶¶ 10–14 (Pocar, J., dissenting). Judge Pocar went further, declaring the 200-meter standard as a "presumption of legality—which was generous and to the benefit of Gotovina." *Id.* ¶ 10 (Pocar, J., dissenting).

[82] *Id.* ¶¶ 16–17 (Pocar, J., dissenting). Yet Judge Pocar also admitted that the finding of a JCE was supported by "four *mutually reinforcing* groups of factual findings," of which the allegedly unlawful artillery attacks were one, *id.* ¶ 19, thus implicitly recognizing that the Trial Chamber's findings on these other grounds relied in part on the 200-meter rule. That the Trial Chamber itself also implicitly acknowledged this will be shown below.

[83] *Id.* ¶¶ 32–38 (Pocar, J., dissenting). This has apparently been the theme of many of Judge Pocar's dissenting opinions. *Id.* ¶ 37 (Pocar, J., dissenting).

[84] *Id*. ¶¶ 31–38. Like the Trial Chamber, he did not consider alternate modes of liability a basis for the convictions.

does not offer a comprehensive treatment of issues relating to impact analysis, it does yield guidelines for the use of such analysis and accuracy standards for future cases alleging unlawful shelling.

1. Four Minimum Prerequisites for Use of Accuracy Standards in Impact Analysis

The appellate ruling demonstrates that any standard of artillery accuracy adopted for impact analysis first must be clearly established by competent evidence. When an otherwise sharply divided panel finds common ground on a key point, as it did here, that point takes on added significance. In this case, the five appellate judges agreed that the Trial Chamber did not lay an adequate foundation in the record for a controlling 200-meter standard. The Appeals Chamber did not rule that standard patently erroneous in all circumstances, but that in this case it was unsupported by expert testimony, evidence at trial, legal justification, or a discernible methodology.[85] Testimony going to generalized factors that may influence the accuracy of indirect fire, as provided at trial, is insufficient to withstand review. Any accuracy standard requires support by expert testimony, relevant technical data about the weapons systems involved, gun crews' training, atmospheric conditions, tactical circumstances, and other factors affecting the accuracy of indirect fire.[86]

Second, accuracy standards must be tailored to the facts and circumstances of each attack by indirect fire. The Appeals Chamber noted that the lower court's findings indicated that the various attacks at

[85] On appeal, nine eminent artillery experts for both the prosecution and defense agreed that the 200 meter standard was technically and tactically invalid, and a virtually impossible standard to achieve. *See also* Huffman, *supra* note 2, apps. A, B (providing reports of two experts who reach the same conclusion).

[86] *Gotovina & Markač*, Case No. IT-06-90-A, Appellate Motion to Admit Additional Evidence, exhibit 20, at 6, 7–10 (Nov. 2011). Factors analyzed in a report by retired U.S. Army Major General Robert Scales (Scales Report), a career artilleryman, 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. Major General Robert Scales, U.S. Army, addressing the lawfulness of accused's artillery fire and reasonableness of the 200-meter rule in *Gotovina & Markač*, IT-06-90-A, Public Redacted Version of the 21 June 2014 Decision on Ante Gotovina's and Mladen Markač Motions for the Admission of Additional Evidence on Appeal, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 2012).

issue were carried out by different artillery batteries, at different times, from different distances, using different weapon systems and crews.[87] The varying distances from gun positions to targets in the towns were particularly significant, where expert testimony confirmed the effect of range on dispersion patterns of artillery rounds impacting in the target area.[88] Given the differences between the attacks, the Trial Chamber's use of a single standard for all targets, the basis of which was unclear, was unsupportable. Where the evidence confirms differences in accuracy factors, targeting standards must be tailored to the circumstances of each attack.

Third, any method of impact analysis is only as good as the data upon which it is based. The finding of unlawful artillery attacks in this case rested on a small sample of known impact points. The Trial Chamber found that approximately 1,205 total rounds were fired by Croatian forces in or near the four towns at issue, but was able to estimate the approximate impact points of only 154 rounds. Only seventy-four of those exceeded even the flawed 200-meter standard.[89] Because accuracy-based impact analysis depends on the relative locations of impact points and lawful targets, any lack of information regarding either variable undermines the probative value of the impact analysis. Had no lawful military targets existed, then even the small sample of impact locations might have been indicative of intent to shell civilians and civilian objects, but the Trial Chamber found multiple legitimate static military targets in each town, which rendered invalid the Trial Chamber's impact analysis and its resulting finding of unlawful targeting of civilians.

Finally, in battlefield situations in which enemy forces occupy populated areas, prosecutors cannot rely on accuracy-based impact analysis without addressing mobile targets of opportunity—and using the correct burden of proof to do so. Where the evidence indicates the possibility of calls for fire on such targets, courts should not give meaningful weight to an impact analysis unless the prosecution bears its burden of disproving that targets of opportunity could explain impacts outside customarily acceptable distances from lawful targets. Here the

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[87] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 60.
[88] *Id. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 1898 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 5, 20111) (discussing the expert testimony at trial regarding the effect of range on dispersion of rounds at impact).
[89] Huffman, *supra* note 2, at 12.

Appeals Chamber ruled that the trial court erred by assuming Croatian forces did not engage targets of opportunity in Knin.[90] This violated the presumption of innocence by imposing on the defendants the burden of proving the absence of targets of opportunity, which could have explained the few outlying impacts in and around Knin. A similar problem may arise in other cases in which the defendant is not the only force employing indirect fires and the evidence does not clearly establish the source of fire for each known impact point.

2. Dissenting Opinions Illustrate the Pitfalls of Inadequate Impact Analysis

While the two dissenting judges agreed that the 200-meter standard had no factual or legal support, both argued that impact analysis might yet offer support to sustain the convictions. The dissenters appear to have assumed that impact analysis is a necessary predicate to any judgment regarding the legality of indirect fire. Additionally, both judges fault the majority for failing "to formulate its own margin of error or other standard to assess the evidence regarding impact sites and thus the lawfulness of the attacks."[91] By not offering an alternative to the 200-meter standard, the Appeals Chamber, writes dissenting Judge Agius, "effectively raise[s] the margin of error ad infinitum,"[92] rendering it "impossible to classify any attack as indiscriminate on the basis of evidence regarding impact sites, in the absence of an established margin of error."[93]

Such comments overstate the importance of impact analysis in targeting law, which requires proof of intent to attack civilians at the time of attack[94] and rejects an inference of intent based solely on battle

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[90] *Id. Gotovina & Markač*, Case No. It-06-90-A, Appeal Judgment, ¶ 63 (Int'l crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[91] *Id.* ¶ 5 (Agius, J., dissenting), ¶ 10 (Pocar, J., dissenting) (asserting the 200 meter standard was "generous").

[92] *Id.* ¶ 8 (Agius, J., dissenting).

[93] *Id.*

[94] United States v. List ("The Hostage Case"), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, Oct. 1946–Nov. 1949 (1950). Nazi General Lothar Rendulic was charged with unlawful attacks on civilians and civilian objects during the Nazi retreat from Finland at the end of WWII. He was acquitted based on a finding that his decision to attack civilians and their property resulted from an honest but mistaken belief that Soviet armed forces were in hot pursuit—military necessity. *Id.* at 1296 ("But we are obliged to judge the situation as it

damage, civilian casualties, or other terminal effects at the impact point.[95] The law of armed conflict gives commanders considerable leeway in the use of artillery, requiring evidence of a specific intent to attack civilians or a wanton disregard for the core principle of distinction between combatants and civilians. This high standard of proof helps explain why convictions for unlawful shelling have been few in modern warfare.

Factors that might support an inference of culpability include an absence of lawful military targets in the impact area; an abuse of proportionality in the form of excessive civilian casualties or collateral damage to civilian objects compared to the military advantage gained; or evidence of an unlawful intent to attack civilians.[96] If complemented by such evidence, impact analysis would be probative, but it cannot serve as the sole basis for conviction. As one commentator observed, had it not been reversed, the Trial Chamber's undue reliance on impact analysis could have distorted the law of targeting, encouraging defending forces to locate military assets in populated areas, and ultimately endangering civilians.[97]

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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.").

[95] Huffman, *supra* note 2, at 26. An example of this principle was the American air strike on the Al Firdus bunker in central Baghdad during the First Gulf War, which killed several hundred Iraqi civilians. Intelligence sources indicated that the Iraqi high command was using the bunker. It was protected by camouflage, military guards, sandbags, and barbed wire. Based on these factors, Coalition authorities targeted the bunker, unaware that at night it was used as a civilian bomb shelter. An inquiry determined that the bunker was a lawful target and Coalition commanders acted properly, based on the information available to them at the time the bunker was slated for attack. *Id.* at 26 n.111 (citing U.S. DEPT. OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 702 (1992)).

[96] The ICTY has considered a range of factors relevant to determining the legality of shelling in other cases, including: (1) scale of casualties; (2) extent of damage to civilian objects; (3) means and methods of attack; (4) widespread or systematic nature of the attacks; (5) heavy fighting in the target area; (6) the 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) and status and appearance of victims. *See* Prosecutor v. Galić, IT-98-29-A, Appeal Judgment ¶¶ 132–33 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (listing factors based on other Appeals Chamber shelling cases).

[97] Huffman, *supra* note 2, at 49–51 (citing expert opinions as to how the Trial Chamber impact analysis could adversely affect future military practice and incentivize commanders to co-mingle military assets with civilians to avoid attacks by indirect fire).

Dissenting Judge Agius argued that the dispersion of impact points here supported an inference of indiscriminate attacks. He suggested that a broader 400-meter standard had some support in the evidence[98] and devoted a page to discussing the rounds found by the Trial Chamber to have exceeded a 400-meter radius. [99] Judge Agius urged as a fall-back standard: "the further away an impact site from a legitimate target, the higher the probability that the relevant projectile was not fired at that legitimate target."[100] Impacts beyond 400 meters, Agius writes, would support an inference of unlawful intent by the attacking force, because "the chance of projectiles falling more than 400 meters from a legitimate target as a result of the inaccuracy of the HV [Croatian] weaponry is extremely small."[101] He offered no evidentiary basis for a 400-meter standard, however, and did not explain how the trial record could support a finding of unlawful shelling beyond a reasonable doubt when less than 1% of the rounds fired fell beyond 400 meters.[102]

Judge Agius then suggested a form of impact analysis based on volume of fire, reasoning that the total number of impact points was excessive in relation to the military value of Knin.[103] He again cited no evidence or expert opinion to support his rather odd assertion that the volume of fire was excessive in these circumstances. The Trial Chamber certainly made no finding that the volume of fire was excessive. More troubling to law of war experts, Judge Agius argued that the volume of fire was indicative of illegal intent because "at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any

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[98] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 19 (Agius, J., dissenting).

[99] *Id.* ¶ 23. Judge Agius also stressed the testimony of several non-expert witnesses who formed a general impression that rounds were being fired indiscriminately or dangerously close to their locations in Knin. Such non-expert testimony of frightened persons in the impact area would seem to be of limited probative value, as the Trial Chamber acknowledged in *Prosecutor v. Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) (The court was "necessarily cautious in drawing conclusions…based on general impressions" of eyewitnesses during the "chaotic picture of events on the ground").

[100] *Id.* ¶ 19.

[101] *Id.* Indeed, this assertion repeats the Trial Chamber's error by failing to explain the evidentiary basis for such a rule, and by applying a uniform standard regardless of the conditions.

[102] *See supra* note 86 and accompanying text.

[103] *See Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 18 n.6 (Agius, J., dissenting) (arguing that at least 900 projectiles fell on Knin in just one and a half days, and there are no findings of any resistance coming from the town, implying that this volume of fire was excessive).

resistance coming from the town."[104] But the law of war has never required "resistance" as a condition of lawful attack, and Judge Agius offered no authority that would support a contrary view. This statement also ignores the Trial Chamber's finding of legitimate military targets in Knin, including an operational command center and the physical presence of the enemy's military leader of Serbian Krajina, upon whom the Serbian defense relied heavily.[105]

Attempts to salvage convictions at the appellate level by advancing novel theories suggested by neither the prosecutor nor the trial court, and inconsistent with the Trial Chamber's findings and the law of armed conflict, is, to put it gently, problematic. Nor does the Appeals Chamber have a duty to endorse a particular accuracy standard absent any supporting evidentiary record. Once the trial court's accuracy standard was ruled invalid, the Appeals Chamber's responsibility was to determine whether the convictions could be sustained on the basis of other evidence in the record on appeal. As the Appeals Chamber majority ruled, the record provided no valid basis to support the convictions.

B. The Appeals Chamber Applied the Correct Standard of Review

Appellate courts are relatively new to international criminal law. For example, none of the international criminal tribunals, or Nuremberg's "subsequent trials" following World War II provided for appellate review. The verdicts and sentences of those tribunals were final, and sentences were usually carried out expeditiously, other than in a few cases of collateral review in U.S. federal courts.[106] Since Nuremburg, an international consensus has developed that the right of appeal is a fundamental requirement of justice, and the International Covenant on Civil and Political Rights identifies it as a fundamental right.[107] The standards of appellate review taken for granted in domestic legal systems

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[104] *Id.* ¶¶ 18–20 n.6 (Agius, J., dissenting).
[105] *See Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Trial Judgment, ¶ 1175.
[106] *E.g.*, *In re Yamashita* 327 U.S. 1 (1946) (A sharply divided U.S. Supreme Court denied a habeas corpus petition from General Yamashita, who was sentenced to death by a U.S. military commission for widespread war crimes committed by his troops in the Philippines) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (denying habeas corpus petitions of German prisoners of war convicted of war crimes by U.S. military commissions in China).
[107] *See* The International Covenant on Civil and Political Rights, art. 15, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Appeals are also suggested in 1977 Additional Protocol I. Additional Protocol I, *supra* note 3, art. 75.4 (j).

are still evolving in international criminal tribunals, including the ICTY.[108] While the dissenting judges here criticize the majority for violating established standards of appellate review,[109] the central issues dividing the Appeals Chamber actually were the Trial Chamber's 200-meter standard, and the role of impact analysis in the law of armed conflict relating to use of indirect fire.

1. Standards of Review and Deference

The dissenters argued that on questions of fact, the appellate court was bound to defer to the trial judgment, and overturn its findings only "when no reasonable trier of fact could have reached the original decision."[110] According to the dissenting judges, this deferential standard of factual sufficiency review should have governed the Appeals Chamber's review, except for those findings narrowly related to the 200-meter standard and the impact analysis. The two dissenting appellate judges concluded that the other evidence was sufficient to sustain the findings of unlawful shelling and the defendants' JCE liability.[111] The majority ruled that such a degree of deference was unwarranted.[112]

The dissenting judges further faulted the majority for failing, after identifying an error of law, to "apply the correct legal standard to the evidence contained in the trial record."[113] In their view, the Court was duty-bound to identify and apply a correct standard of artillery accuracy or some other legal basis for impact analysis.[114] The dissenters' proposed new standard was premised on an interpretation of the trial judgment rejected by the Majority and, as previously discussed, was based upon a mistaken application of impact analysis.

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[108] *See* Fleming, *supra* note 18, at 111–12 (noting that appellate bodies in international tribunals are a recent development).
[109] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶¶ 5–6 n.6 (Pocar, J., dissenting) ("the Majority's approach is wholly erroneous and in violation of our standard of review on appeal. . .").
[110] *Id.* ¶ 13.
[111] *Id.* ¶ 12 (Agius, J., dissenting).
[112] *Id.* ¶ 64.
[113] *Id.* ¶ 14 (Agius, J., dissenting).
[114] *Id.* (The Appeals Chamber "has the duty to formulate its own margin of error or other standard with which to assess the evidence regarding impact sites and thus the lawfulness of the artillery attacks.").

Dissenting Judge Pocar also faulted the majority for failing to articulate a correct standard in place of the 200-meter standard. Unlike Judge Agius, he made no attempt to define an alternative standard but instead defended the Trial Chamber's finding that the defendants were parties to a JCE, even without a finding of unlawful shelling, relying instead on crimes committed by Croatian soldiers during and after Operation Storm as proof of the JCE: "The Majority ignores that the existence of the JCE was also based on evidence of . . . (ii) the crimes committed by the Croatian military forces and special police against the remaining Serb civilian population and property after August 5. . . ."[115] But that overlooked the Trial Chamber's specific finding that such crimes were not intended by members of the JCE, and that Gotovina and Markač could only be held responsible for such crimes through JCE 3 liability—as foreseeable but unintended consequences of the JCE. Judge Pocar does not explain how such conduct could simultaneously prove the existence of the JCE and also be an unintended consequence of the same JCE.

The dissenters were mistaken. Article 25 of the ICTY statute provides that "the Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice."[116] But under its own case law the Appeals Chamber then applies the correct standard to the relevant findings of fact, and affirms those findings only if *it is itself convinced beyond a reasonable doubt* that those factual findings are still correct.[117] As an American appellate court might put it, the court is testing to see if the legal errors are harmless beyond a reasonable doubt.[118]

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[115] *Id.* ¶ 25 The judge reiterates this when he asserts that these crimes "were evidence of the *existence* of the JCE." *Id.* ¶ 27 (emphasis in original).

[116] *Id.* ¶ 10. The Appeals Chamber held that the appropriate standard of review for errors of law is a *de novo* review ("[T]he correct standard to the evidence contained in the trial record and determines whether it is itself convinced beyond a reasonable doubt."); the standard for errors of fact is reasonableness ("[T]he Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.").

[117] *Id.* ¶ 12. As articulated by the majority this is not a deferential standard at all; the Appeals Chamber "determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged. . . ." *Id.* ¶ 12 & n.36 (citing *inter alia*, Prosecutor v. Haradinaj, No. IT-04-84-A, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010)).

[118] This is the U.S. Supreme Court standard for constitutional errors, as set out in *Chapman v. California*, 386 U.S. 18, 24 (1967); the court declared this standard to be

The Appeals Chamber properly recognized the Trial Chamber's failure to *articulate* its derivation of the 200-meter rule as a "legal error."[119] It then examined "the remaining evidence on the record to determine whether the conclusions of the Impact Analysis [were] still valid,"[120] and implicitly did so under the strict standard of proof beyond reasonable doubt—a review that is factual in nature, but not deferential.[121]

With respect to the true legal error, the majority *did* articulate the correct standard—namely, that the Trial Chamber should have provided a "reasoned opinion."[122] With respect to the resulting insufficiency of the Trial Chamber's findings, the Appeals Chamber was not required to articulate a standard *or even to assume there was one* for inferring criminal intent from impact locations alone.[123] The Appeals Chamber could not provide an alternative accuracy standard based on trial evidence because there no such evidence had been introduced at trial, and any attempt to now do so would replicate the very error of the Trial Chamber that led to reversal. It would also have required excessive factfinding on the Appeals Chamber's own part, something both the majority opinion and Judge Robinson's concurrence warned against.

Having rejected the 200-meter standard, the Appeals Chamber could hardly defer to the trial court's core findings of unlawful shelling, or that the defendants had participated in a JCE through such unlawful shelling. These facts simply were not established beyond reasonable doubt. The real question at that point was whether to enter verdicts of acquittal or to order a new trial; and as Judge Robinson articulated in his concurrence, there were excellent reasons for eschewing the latter course.[124]

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equivalent to determining "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."

[119] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 64.

[120] *Id.* ¶¶ 62–67.

[121] The deferential common law standard, *supra* note 20, is appropriate when the facts being reviewed do not result from a serious legal error that prejudices the accused's right to a fair trial (such as a failure to explain a new and dangerous standard for inferring intent).

[122] *Id.* ¶ 64.

[123] *See* Huffman, *supra* note 2, at 26 (suggesting that there may not be). "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." *Id.*

[124] *Gotovina & Markač*, No. IT-06-90-A, Appeal Judgment, ¶ 19 (Robinson, J., concurring). Judge Robinson concluded that retrial was not warranted because:

2. Role of the 200-Meter Standard

The two appellate camps also disagreed on the role of the 200-meter standard in the Trial Judgment. The majority ruled that invalidation of the 200-meter standard affected the entire judgment, destroying the trial court's core premise, thereby requiring a *de novo* assessment of whether the remaining findings and evidence could sustain the convictions. The Appeals Chamber ruled that the 200-meter error was too interrelated with the trial court's other findings and rationales to warrant deference to its findings.[125]

The dissenting judges, by contrast, viewed the erroneous 200-meter standard as but one non-essential element in the Trial Chamber's reasoning, so that invalidation of the standard should not upend the entire judgment.[126]

The majority was correct. As an example, Judge Agius thought the majority should have considered the order by General Gotovina to place the four towns "under fire" as supporting the JCE.[127] But the Trial Chamber itself had acknowledged this order was ambiguous. On its face it might have referred to either attacking legitimate military targets in these towns,[128] or attacking the civilian populations of these towns. The trial court resolved this patent ambiguity by referring to impact locations in light of the 200-meter rule.[129] Without such reasoning, the order was too ambiguous to serve as evidence one way or the other.

> (i) it would be unduly oppressive to put the Appellants to the burden of a retrial; (ii) a fair part of the sentences imposed upon convictions has already been served–in Gotovina's case, approximately one-third (7 years), and in Markač's case, approximately one half (8 and ½ years); (iii) a retrial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offense (1995) and the new trial.

Id.

[125] *Id.* ¶ 64.

[126] *Id.*, ¶ 12 (Agius, J., dissenting).

[127] *Id.* ¶¶ 36–37 (Agius, J., dissenting).

[128] As noted above, Gotovina's chief of artillery, Marko Rajčić, gave the latter interpretation, stating that the order implicitly included a limitation to lawful targets that had been discussed earlier. Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶ 1188 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[129] *See id.* ¶ 2583. "The trial Chamber found in Chapter 5.8.2.(i) [which introduces and, at considerable length, uses the 200-meter rule] that these were orders to treat whole towns

Judge Pocar thought the Appeals Chamber should have considered "the crimes committed by armed units . . . against the remaining Serb civilian population" after the shelling was over as evidence of the JCE.[130] But in deciding these crimes were part of a JCE (as opposed to criminal acts by individual soldiers and special police), the Trial Chamber itself said that it was considering "its conclusions in chapters 5.8.2."—i.e., the conclusions based on the 200-meter rule, which is found in that chapter.[131] And in deciding that there was a JCE at all, the Trial Chamber referred back to these crimes,[132] which it had interpreted using the 200-meter rule. Judges Agius and Pocar both referred to the minutes of a meeting on the Island of Brioni, where various ambiguous statements were made that the Trial Chamber ultimately interpreted as supporting a JCE.[133] But the Trial Chamber made this interpretation "in light of subsequent events [as shown by] chapters 4.4 and 5.8.2.(i),"[134] and chapter 5.8.2.(i) is the very one that introduces the 200-meter rule.[135] Thus, as the Appeals Chamber noted and Judge Pocar acknowledged, the major items of evidence used by the Trial Chamber *were* "mutually reinforcing."[136] That is precisely why the convictions could not stand when a major prop of this mutual reinforcement was removed.

. . . as targets when firing artillery projectiles during Operation Storm." Judge Pocar recognized this in paragraph 10 of his dissent.

[130] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 19(iv) ((Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (Pocar, J., dissenting).

[131] Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶¶ 1757, 1898 ((Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[132] *Id.* ¶¶ 1969, 2303

[133] *See id.* ¶ 1977. General Gotovina commented that a large number of Serb civilians were evacuating Knin *before* Operation Storm, and he thought it was a good idea to leave them a way to escape if they wished "because the army would follow them." What he did *not* say was that the Croatian Army should attack Serb civilians or force them out on purpose. *See id. See Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment ¶ 19(i) (Pocar, J., dissenting); *id.* ¶ 34 (Agius, J., dissenting) (referring to this meeting as evidence the majority should have considered in affirming the Trial Chambers judgment).

[134] *Gotovina, Čermak & Markač*, Case No. IT-06-90-T, Judgment, ¶ 2305.

[135] *See id. id.* ¶ 1898.

[136] *Gotovina & Markač*, Case No. IT-06-90-A, Appeal Judgment, ¶ 91; *id.* ¶ 3 (Pocar, J., dissenting).

V. Conclusion

The Appeals Chamber ruling fulfilled the purposes of appellate review. The Trial Chamber's decision had relied on a substantial error. Apart from the injustice to the accused individuals, failure to correct that error at the appellate level would have left the law of armed conflict as to attacks by indirect fire in a state of confusion, exposed civilians in future conflicts to increased dangers, and damaged the ICTY's legitimacy in the eyes of many in the international community. It would also have blurred the core law of armed conflict standards of distinction and military necessity—the requirement to distinguish between civilians and combatants, to distinguish between civilian objects and military objectives, and not to employ measures forbidden by international law in seeking to defeat the enemy.

Courts of law respect the presumption of innocence and require a rigorous evaluation of the competent evidence before deciding guilt or innocence. The credibility of all courts resides in their fidelity to the law and the evidence. Courts must be protected from political pressures and, where they are present, not accede to them. Reversing a conviction grounded on inadequate evidence and invalid legal standards preserves the credibility of the Court that is essential to justice. It also fulfills the ICTY Article 25 mandate for an independent appellate court.

When his fellow judges elected him to a second term as the ICTY's president, Judge Meron noted:

> I know that the crimes over which the Tribunal has jurisdiction are not without precedent. Horrific war-time atrocities appear throughout recorded history. What has changed in the past two decades, however, is the international community's commitment to ending impunity for such acts. The Tribunal is the manifestation of this commitment. . . . I know I speak for all judges . . . in reiterating our pledge that the Tribunal will continue to serve as an embodiment of the international community's noblest aspirations for justice.[137]

[137] Judge Theodor Meron, *Statement of the President of the Tribunal*, Nov. 17, 2011, *available at* http://www.icty.org/sid/10856.

Fulfilling such a lofty vision demands rigorous investigation, prosecution, and, where the evidence warrants, conviction of the guilty. Fulfilling this vision also requires the courage to acquit those wrongly accused, even when to do so may be unpopular or politically fraught with risk. Some critics lament the potential political fallout of the Gotovina-Markač decision. Fortunately for the cause of justice, the Court here ignored politics and confined its focus and its judgment to the requirements of the law.