

FOREIGN COURT JURISPRUDENCE

GOTOVINA CASE - AN UNJUST CHARGE OR A DELIBERATELY ERRONEOUS JUDGMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA?

Liviu Alexandru LASCU*
Ph.D., Lecturer,
AGORA University, Oradea, Romania

Abstract

This article aims to analyze a recent and controversial decision of the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia, on November 16, 2012, which acquitted two Croatian generals, famous personalities of the civil war in the former Yugoslavia, who had been tried for perpetrating several war crimes and crimes against humanity by participating to a joint criminal enterprise and for their responsibility as commanders for the criminal acts perpetrated by their subordinates. The Trial Chamber's judgment which condemned these defendants was entirely overturned in a very surprising way, through Appeals Chamber doing a very original interpretation of some legal concepts on which, there was already crystallized a constant jurisprudence of this court.

Keywords: *public law, joint criminal enterprise, war crimes, crimes against humanity, the superiors' responsibility.*

1. Introductory remarks

On the morning of November 16, 2012, the day on which a decision have been expected in the Case no. IT-06-90-A, *Case Gotovina et al.*, the International Criminal Tribunal for the former Yugoslavia (ICTY) had to face an unprecedented situation. In that case, the two accused were *Lieutenant-General Ante Gotovina*, a former commander of the Split Military District of the Croatian Army and *General-Colonel Mladen Markač*, former Deputy of the Croatian Interior Minister and head of the Croatian special police units. The two generals were accused by the ICTY Prosecutor of perpetrating three *crimes against humanity* and two *war crimes* against

* E-mail: liviu.lascu@univagora.ro; liviulascu@yahoo.com. The study has been published, in Romanian language, in DREPTUL, no. 7/2013, p. 258-274.

the Serb civilians in the so-called *Separatist Republic of Krajina* (RSK), during the military operation called "*Operation Storm*" (in Croatian: *Operacija Oluja*) from 4-7 August 1995.

Since the evening of the previews day, Ban Jelačić central square in Zagreb gathered tens of thousands people wearing Croatian flags, Croatian military uniforms, showing cardboards with slogans like: "*Our generals are heroes, not war criminals*", "*Croatia's honor*" or paintings of the two generals, and they were shouting slogans in supporting the two defendants.

On a giant screen installed in the market, as when the Croatian national team was playing an important football match, the demonstrators were waiting to watch live the verdict of the Appeals Chamber of ICTY, verdict scheduled to be delivered on November 16, around 9.00. During the night of November 15/16, in the most of Croatian Catholic churches, the priests held religious services for asking the deity's support for their national heroes and the hundreds of thousands who participated, lit candles and prayed for their acquittal.

TV reporters from several countries have expressed on media countless messages of support of the two accused from the former comrades in arms, veterans, associations, politicians and ordinary citizens¹.

Practically, it is impossible to know whether this manifestation of sympathy for some ICTY accused people, unprecedented in the history of nearly twenty years of this court, mattered or not the final outcome, but in fact, the "supporters" who gathered in Zagreb and other Croatian cities have recorded a victory with "the score of 3-2". This was the outcome of the panel's vote who decided the two accused' acquittal for all charges. Thus, the impressive show offered by the Croatian supporters "in the stands" was compensated "on the playing field" by the ICTY judges, because never in the history of the court ever mentioned that some accused convicted by the Trial Chamber to a punishment of 24 years in prison (accused *Gotovina*), respectively, 18 years in prison (accused *Markač*), both for committing no less than nine crimes, to be merely acquitted on all charges by the Appeals Chamber.

Neither in ICTY jurisprudence happened that some *dissenting opinions*² of the Appeals Chamber's judges to express a disapproval of the majority's decision and of the reason for taking it, to be done in such an absolute and vehement manner as did the judges *Fausto Pocar* (Italy) and *Carmel Agius* (Malta) in this case.

¹ See, B. Waterfield, *Croatian hero Ante Gotovina acquitted of war crimes*, in "The Telegraph", 16 November 2012, available on <http://www.telegraph.co.uk/news/worldnews/europe/croatia/9682855/Croatian-hero-Ante-Gotovina-acquitted-of-war-crimes.html>.

² Judgment, *Gotovina and Markac*, (IT-06-90-A), Appeals Chamber, 16 November 2012, Dissenting Opinion of Judge Carmel Agius, paragraph 5 and Dissenting Opinion of Judge Fausto Pocar, paragraph 39, available on http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf.

For these reasons, but not only, the mentioned above case arouse a wave of criticism and controversial debate, for which, aside from the emotional impact it had on the Croatian society, we intend to go beyond the appearances of this case and to present the legal aspects invoked in supporting the famous decision of acquittal on November 16, 2012.

2. About “Operation Storm” and the premises which led to the charges

For a more accurate understanding of the events that occasioned the perpetration of the crimes brought before ICTY, a brief overview of the political and military situation of the conflict in the former Yugoslavia which triggered “Operation Storm”, we think, is necessary.

Since the beginning of the year 1990, when the Socialist Republic of Croatia, as a constituent state of the Socialist Federal Republic of Yugoslavia showed for first time its intention to declare independence, the Serb population living in this Yugoslav state, having a percentage of approximately 12%, strongly reacted against this approach, warning that if Croatia decides to leave the Yugoslav federation, the Serbs living in the regions Krajina, Eastern Slavonia, Baranja and Western Sylvania (on the current territory of Croatia) will exercise their right to self-determination and the lands they live either will join Yugoslavia, or will declare as independent states.

These efforts of the ethnic Serbs were strongly encouraged by the Yugoslav political leadership of Belgrade at the time, especially by Slobodan Milošević and they were also relied on the military support that would be offered by the Yugoslav People's Army, JNA (*Narodna Jugoslovenska Armija*) consisting predominantly in ethnic Serbs and having a lot of units placed in all the Yugoslav republics.

Since the alternative plan of Yugoslavia's reorganization in a confederation of independent states failed in the spring of 1991 following a referendum, the nationalist parties of the Yugoslav socialist republics of Slovenia, Croatia and Bosnia-Herzegovina which won the elections, have shown clearly their intention to be out of the Yugoslav federation, and, following this aim, on June 25, 1991 Slovenia and Croatia formally declared their independence.

The former Yugoslav federal socialist state presented as an ethnic and religious mosaic, which is why, the existing tensions between the majority population in states that have declared independence and the Serb communities living in these countries, exponentially increased. Except for Slovenia which presented itself relatively homogeneous in terms of ethnic composition, in the other new republics, Croatia and Bosnia-Herzegovina, the tensions escalated into lasting armed conflicts.

As JNA intervened in support of the Serbian communities, asserting a protection of them from the abuses of the new authorities, some armed clashes

took place in a very imbalanced manner. At the time, JNA was one of the best equipped and trained armies in Europe which had heavy weapons, tanks, artillery, aviation and radars while the Croatian and the Bosnian states had only some soft infantry weapons and a number of small caliber artillery. Therefore, in areas predominantly inhabited by Serbs, after bloody fighting, the police and military forces of the newly created states were defeated. The Serb communities created some enclaves having their own authorities and proclaimed themselves as independent states.³

In Croatia, in early 1992, had been formed the so-called *Republic of Serbian Krajina (Republika Srpska Krajina)*, which was located in the Northern Dalmatia, including the territories of the north Adriatic Sea, along the western border of Bosnia-Herzegovina, having an area of about 10,000 square kilometers, with the capital in the city of Knin and, practically, splitting the coastline of Croatia in two.

This self-proclaimed Serbian republic kept also the territories inhabited by Serbs in eastern Croatia, located along the Danube, near to the border with Serbia, in the provinces of Eastern Slavonia, Baranja and Western Syrmia. Initially, the *Republic of Serbian Krajina (RSK)* intended to be part of what remained of the Yugoslav state, but due to political events of early 1992, this was not possible and chose to totally separate from the Croatian state and to build up its own state, even if, officially, it has never been internationally recognized⁴.

During the course of year 1991 and by February 1992, from the RSK territory, J.N.A, with the military and paramilitary units, consisting of Serbian volunteers from different parts of Yugoslavia, several times attacked the neighboring Croatian and Bosnian towns inhabited mostly by Croatian and Muslim population, so that RSK had at the time almost a third of the current territory of Croatia, an area of about 17,000 square kilometers.

In parallel, the RSK Serbian authorities conducted a comprehensive and systematic policy of ethnic cleansing of the controlled territories, consisting of armed attacks, murder, torture, persecution and discrimination against Croatian and other non-Serb civilians. Following this policy, around 80,000 non-Serbs civilians fled the R.S.K., most of them in Croatia⁵.

In early 1992, following a ceasefire agreement signed by the Yugoslav President Slobodan Milošević and Croatian President Franjo Tuđman, under the auspices of the UN, the armed conflict in the area has been frozen. Belligerents were forced to hand over their heavy infantry and artillery weapons, J.N.A. was to withdraw, R.S.K. authorities pledged to allow the displaced non-Serbian people to return home and RSK territory were to be declared a “demilitarized area” under

³ Judgment, *Martić*, (IT-95-11-T), Trial Chamber, paragraph 132-160, available on <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf>.

⁴ *Idem*

⁵ *Idem*

the UN protection. According to the agreement, in this region, some UN peacekeeping troops would arrive.

Basically, after this agreement, the armed conflict in this area ceased over the next three years, but the commitments of the parties have not been kept. Even though J.N.A. was withdrawn, it left to the newly founded army of R.S.K., most of its weapons, facilities, including some staff. R.S.K. authorities not only did not keep their promise to allow the return of Croatian refugees to their homes but on the contrary, it continued the policy of ethnic cleansing in the region and an impressive number of non-Serb civilians from the region, amounting tens of thousands, fled homes in the following years, because the systematic persecutions and reprisals from the Serbian authorities.

Given the above mentioned situation, in early 1995, while a third of Croatia's territory was in the hands of the Serb separatists and its attempts to regain through peaceful negotiations failed, the Croatian government, secretly, planned a major military offensive for territorial reunification⁶. By doing this plan, Croatian government assumed a certain risk of affecting its international reputation and credibility because, the military operations were not agreed, at all, by the EU and UN which were vehemently opposed to any escalation of the armed conflict in the former Yugoslavia, already crushed by the war and humanitarian disasters. Nevertheless, Croatia has benefited from a discrete but consistent U.S. support⁷ in doing this operation. In the summer of 1995, after an intensive program of training and endowment, the Croatian Army reached an entirely different scale than in

⁶ Judgement, *Gotovina, Markac and Cermac* (IT-06-90-I), Trial Chamber, 15 April, 2011, p. 993-1006, available on http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf

⁷ Faced with a reluctant attitude with numerous denials and delays of the Serbs to all the previews meetings aiming the settlement of the peace agreement in the former Yugoslavia, the U.S. government concluded that Slobodan Milošević and all the Serbian military factions engaged in the conflict (obviously under his overwhelming influence) would not accept compromises and not sign a peace treaty, as long as they had a military advantage on the battlefield. The American decision makers have realized that the genuine concern of the Serbs for sitting at the table of negotiations arises only after their supremacy in conflict will be about to be lost. As such, a number of actions aiming to rebalance the military situation in the conflict area were taken by the U.S. administration. In November 1994, the U.S. unilaterally abandoned the observance of the UN embargo on arms delivery to the parties involved in the conflict in Bosnia-Herzegovina. This allowed the Croatian Army to get arms and military equipment, as the most part of the itinerary for providing arms to the Muslim-Croat army in Bosnia and Herzegovina (ABiH) crossed the territory of Croatia. They allowed access to the Croatian military intelligence to have the satellite data and information that U.S. army had on the strategic positions of Serbian troops. Moreover, under the pretext of preparing the Croatian military contingent to participate in the program of the NATO Partnership for Peace, an American mission comprising military specialists - Military Professional Resources Incorporated (MPRI) arrived in Croatia in early January 1995 to advise the Croatian military commanders during the four months to April 1995. See D. Isenberg, *MPRI Couldn't Read Minds: Let's Sue Them*, published in "Huffington Post", August 19th, 2010, available on http://www.huffingtonpost.com/david-isenberg/mpri-couldnt-read-minds-l_b_688000.html.

1991 and was strongly determined to regain its territories in the hands of Serb separatists, especially because the international framework was favorable⁸.

During a meeting with the major Croatian political and military leaders on July 31st, 1995, in the Croatian island Brijuni, it was decided that in the coming days, the Croatian Army, supported by special police units, will trigger a major and wide spread attack toward East, with a front covering 630 kilometers, the entire border between Croatia and the R.S.K.

A very important aspect from the perspective of the ICTY case we refer to, is the fact that among the discussions within the Brijuni meeting, the Croatian political and military leaders agreed that the planed military operation will be undertaken in such a way as to intimidate the civilian population and to enforce the great majority of the Serbs to fled the region.

On the morning of August 4th, at 5:00 AM, the Croatian Army started a large-scale ground attack, called "*Operation Storm*", involving the military troops of five army corps, of estimated 130,000 soldiers, well equipped and trained, which were to face the resistance of around 50,000 Serb soldiers, many of them being poor trained recruits, with a pronounced obsolescence due to the isolation and the shortage of food and equipment.

The offensive was preceded by a violent artillery shelling and raids of the Croatian military aircrafts which bombed the most important centers of command, radar stations, warehouses and other logistics facilities of the R.S.K. Army. Afterward, a massive ground attack was triggered, so that, after only three days, except for some isolated points of resistance, the whole Krajina region was released. General *Ante Gotovina*, the commander of the Split Military District, was the leader of the operation in the sector named "*Storm 1*", acting on the Southern flank of the front and having the mission to release the capital of Knin and its surroundings. General *Mladen Markač*, having under his command the Croatian special police units, operated on the Northern flank of the army corps commanded

⁸ In July 1995, the Serbs were subjected to a strong wave of criticism and disapproval of the international community because in mid-July 1995, they attacked some demilitarized areas, the UN protected enclaves of Srebrenica and Zepa of the Eastern Bosnia and then committed the famous massacre of about 6,000 Muslim prisoners and civilian men. Moreover, they continued the attack on the enclave of Bihać in Western Bosnia, another demilitarized area and placed under UN protection. For this reason and aiming to stop these operations, in flagrant contradiction with the Bosnian Serbs' assumed obligations, the U.S. Air Force that supported the UN peacekeeping forces, conducted some air raids and shelled the Serbian positions, destroying a large part of their command centers, radar systems and communications. Taking advantage of this situation and due the fact that many of the armed forces of the RSK were concentrated in North to give military support to Bosnian Serb military in its siege of Bihac enclave, on 28 and 29 July 1995 by fast and surprising military operations, the Croatian army regained a particularly important area in the Southern part of the RSK, located between the cities Bosansko - Grahovo and Glamoc. In this way, the Croatian Army get an extremely important military advantage by, practically isolating the capital Knin and its surroundings from the rest of the RSK territory. See C. Ingrao, T.A. Emmert, *Confronting the Yugoslav controversies*, Purdue University Press, West Lafayette, Indiana, U.S.A., 2009, p. 232-270.

by General *Ante Gotovina*, with the mission to release the mountainous area of Velebit.

The successful completion of the Croatian military operation triggered in Croatia a wave of euphoria. The Croatian soldiers were considered national heroes and August 4, became a national holiday. The Western political leaders have not looked with great enthusiasm the Croatian military operation because it attacked an area that had been declared as demilitarized and under the UN protection⁹ as well as because the observers and eyewitness of the conflict, reported hundreds of cases of ill-treatment and executions of the remaining Serb population in the region, in the coming days after the start of *Operation Storm*. Most of the killed people were elderly who were not able to fled the region and after how looked many of their corpses, it became clear that before being killed, these people had been subjected to degrading treatment and humiliation, in order to create suffering.

The most painful aspect of this operation has been, however, the impressive number of refugees, about 200,000, almost the entire Serb population of R.S.K. who, before and during the shelling and the ground invasion, left their homes and fled in Bosnia-Herzegovina and Serbia¹⁰. *Operation Storm* would cause, according to some analysts, the largest number of refugees registered in Europe after the end

⁹ The Croatian offensive, *Operation Storm* caused losses not only to the Serbs but also the killing of four soldiers from UNPROFOR peacekeeping forces and the destruction of their logistic facilities. The worst aspect, according to the Western governments constituted, however, the fact their previous efforts to peacefully settle the conflict in the Western Balkans would be thwarted. This operation led to the escalation of armed conflicts after this offensive because a significant part of the Croatian Army, including the corps under the command of gen. Ante Gotovina, crossed the territory of Bosnia-Herzegovina in order to support the military operations of the Croat-Muslim Army (A.Bi.H). No less true is the fact, the Bosnian Serbs Army (VRS) lost, thus, its most strategic positions in Bosnia-Herzegovina and the threat of losing others became a realistic scenario. This situation made possible a genuine concern of them to sit at the table of negotiations and finally to conclude the Dayton Peace, in U.S., in December 1995, which practically ended the war in Croatia and Bosnia-Herzegovina.

¹⁰ Faced with an impressive number of Serb refugees from the conflict areas in August 1995, the Yugoslav government has discouraged their cantonment in so large numbers in the capital Belgrade and urged them to settle in Kosovo and Vojvodina, the two regions where there were a large number of non-Serb residents. The refugees have not agreed to settle in Kosovo, knowing the conflict in the area between the majority population of Albanians and the Serbs, but a significant part of them settled in Novi Sad, the capital of Vojvodina and in the neighboring towns. Some international humanitarian organizations reported incredible actions in the sense that some refugees from Krajina, encouraged by the local authorities, proceeded to forced eviction of ethnic Croats in order to settle in their homes. Other such aspects, as result of the massive influx of Serb refugees, happened in the areas of Bosnia and Herzegovina controlled by Bosnian Serbs, where, virtually all non-Serbian ethnic locals who somehow resisted the pressure in the previous years and did not leave their homes, on this occasion were forcibly evicted to make room in their homes for the Serb refugees coming from Krajina. An estimated 22,000 refugees have fled Bosnia-Herzegovina and moved to Croatia at the time. See J. Steele, *Break the cycle of abuse*, in "The Guardian", 14 June 1999, available on <http://www.guardian.co.uk/world/1999/jun/14/balkans11>.

of the Second World War¹¹. For all the reasons outlined above, the ICTY Prosecutor tried to identify the main culprits and to proceed to prosecution and judgment.

3. The prosecution and the trial judgment in the case no. IT-06-90-T

In the period following the year 2000, the investigations undertaken by the ICTY Prosecutor, Carla del Ponte, unveiled, according to her conclusions, that the *Operation Storm* as it was planned during the Brijuni meeting and afterward materialized in the field, was, beyond its military nature, a genuine *joint criminal enterprise*¹² of the key political and military leaders of Croatia, aiming at the *forced deportation* of the Serbian population of the former RSK, which is a crime according to the ICTY Statute¹³. The investigations have been conducted against the Croatian President, Franjo Tuđman, the Defense Minister, Gojko Šušak, the Chief of Staff of the Croatian Army, General Janko Bobetko, the Chief of Croatian Army Staff, Zvonimir Červenko and other army and police commanders like Ante Gotovina, Ivan Čermak and Mladen Markač. Of these above mentioned accused, only the last three generals were prosecuted, as President Tuđman and Minister Šušak died before the indictment had been concluded and General Bobetko died shortly after the indictment has been submitted to the Trial Chamber.

As for General *Ivan Čermak*, the court disjoined the case and acquitted him with the motivation that the accused did not actually participate to the military operations at the time but was appointed as military commander of the Knin garrison after the end of the operation and its mission was rather in the field of logistic and to restore the public order in the city.

In what regarding General *Ante Gotovina*, the ICTY Prosecutor concluded an indictment on June 8, 2001. After several adjustments through amendments, some of the charges were withdrawn. On July 14, 2006, the two cases, *Gotovina Case* and *Markač Case* (in this case, the indictment was concluded on February 24, 2004, on the relative the same charges like in the *Gotovina Case*) were joined as the alleged crimes to both accused were similar and closely related to the *Operation Storm*. On February 14, 2008 the final indictment, after being improved with some amendments and confirmed, has been submitted to the Trial Chamber. The charges for the both accused were identical: *persecution, deportation, inhumane acts consisting of forced deportation* (as crimes against humanity previewed by Article 5 of the ICTY Statute), *looting and destruction of private property, of the villages and towns, their devastation which was not justified by military necessity* (as violations of the laws of war, according to Article 3 of the ICTY Statute), *murder* (as a war crime as well as a

¹¹ The statement belongs to Carl Bildt, the E.U. peace negotiator in the civil war on the territory of former Yugoslavia. See D. Pearl, *At home in the world*, Helene Cooper Publishing House, New York, U.S.A., 2002, p. 224

¹² See, K. Ambos, *Joint Criminal Enterprise and Command Responsibility*, in "Journal of International Criminal Justice", no. 5/2007, p. 159-183.

¹³ Judgment, *Gotovina and Markac* (IT-06-90-A), Appeals Chamber, 16 November 2012, p. 983-986.

crime against humanity, according to Article 3 and 5 of the ICTY Statute), *inhuman acts* (as a crime against humanity according to the Article 5 of the ICTY Statute). In their essence, all these allegations concerned the participation of the two Croatian generals to a *joint criminal enterprise* that sought and achieved the forced deportation of more than 90,000 Serb civilians out of the territory of the former R.S.K. as well as their *superior responsibility* for the passive attitude towards the crimes perpetrated by their subordinates amounting the killing of 324 Serb civilians and prisoners of war during and in the aftermath of the Operation Storm.

It should be mentioned that in the case of General *Mladen Markač*, there were no problems regarding the accused cooperation with ICTY, as he willingly surrendered to the Croatian national authorities in March 2004, shortly after the confirmation of the indictment and arrest warrant was issued on his name. Unlikely, General *Ante Gotovina* avoided his prosecution and managed to hide from the national and international authorities for a long time. On his name, ICTY issued an arrest warrant on July 26, 20001 and even to his capture there were involved the national police, INTERPOL, the Croatian secret services and others of some West-European countries, he managed to evade more than 4 years, until the end of 2005, when, on December 7, he was taken by the Spanish police from the hotel of *Playa de Las Americas, Tenerife*¹⁴. On December 12, 2005, General *Ante Gotovina* has been handed over to the Hague and appeared before the Trial Chamber where he pleaded „not guilty” "on all charges, saying to the judges that „... I'm not the man described in each and every count”¹⁵.

The judgment of the Trial Chamber began on March 11th, 2008 and lasted until 1st of September 2010, when the parties presented their final conclusions. Based on evidences, the Trial Chamber determined, first, that the facts related to the case have been perpetrated during an international armed conflict, a very important aspect in terms of legal qualification of the facts. The Court also concluded that during the military operations, in August 4 to 7, 1995 and in the weeks that followed, the military Croatian forces and the Croatian special police perpetrated crimes of *murder, inhumane treatment, destruction, plunder, persecution and forced deportation* against the Serb population in the Krajina region.

In what concerning the participation of the two accused to the perpetration of the above mentioned crimes, the Trial Chamber concluded that they were members of a *joint criminal enterprise* with the objective of permanently removing the majority of the Serb civilian population from the Krajina region. In assessing whether there was a *joint criminal enterprise*, the Court thoroughly reviewed the

¹⁴ See, V. Perić, *Croatians Rally Behind 'National Hero' after General Is Snatched*, in "The Independent", December 12, 2005, available on <http://www.questia.com/read/1P2-1988662/croatians-rally-behind-national-hero-after-general>.

¹⁵ See, *War crimes accused says he's 'not the man'* in "The Scotsman", December 13, 2005, available on <http://www.scotsman.com/news/international/war-crimes-accused-says-he-s-not-the-man-1-1113051>.

details of the discussions within Brijuni meeting on July 31, 1995¹⁶, chaired by the Croatian president Franjo Tuđman and where, together with the two accused, participated, also, some important political and military Croatian leaders. The participants discussed about the importance of Serbs to leave the region Krajina as a result of “*Operation Storm*”. It was recorded on this occasion the intervention of the accused Gotovina who, addressing to President Tuđman, said: “*A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won’t be so many civilians just those who have to stay, who have no possibility of leaving*”¹⁷. Taking into account the discussions at other meetings of the senior Croatian officials at the time, as well as their public statements, the Trial Chamber considered that, taken in account what happened to the Serb civilians in Krajina in the immediate aftermath of the Operation Storm, these Croatian leaders had a *common goal* of permanent removal of the great majority of the Serb population in the area¹⁸. They decided that this *common goal* should be achieved by force or threat of force, namely *the deportation, transfer, persecution, imposing restrictions and discriminatory measures, unlawful armed attacks* against the population and the civilian objects.¹⁹

The Court concluded that General Ante Gotovina was, without any doubt, a member of the *joint criminal enterprise* as he knew its *common goal*, had assumed it and had a *significant contribution* to its implementation. The findings of the Court regarding the existence of the accused Gotovina’s *significant contributions* to the implementation of the *common goal* was based on evidence that demonstrated the special role he played in planning and preparing the “*Operation Storm*” which included unlawful attacks on some objectives, militarily unjustified, and because he did not take any action, as a commander, to prevent and punish his subordinates who perpetrated crimes against the Serb civilians. This deliberate non-involvement of the accused, according to the findings of the court, has

¹⁶ See footnote no. 7.

¹⁷ Judgment, *Gotovina, Markac and Cermac* (IT-06-90-T), Trial Chamber, 15 April, 2011, paragraph 2304

¹⁸ The evidentiary material shows that the Croatian political and military leaders were aware of the repercussions internationally that would have caused a forced deportation of the entire Serb population from the Krajina region and therefore have set the target for a minimum of Serbs to remain there. See, *ibidem*, paragraph 2314.

¹⁹ From the evidence, the Trial Chamber concluded that political and military leaders who attended the conference in Brijuni on July 31, 1995, decided that the entire urban area of the city of Knin, Benkovac, Obrovac and Gračac be shelled on the morning of August 4, 1995, and according to General Gotovina’s order, it was performed on this way, non-discriminatory, without distinguishing between legitimate military targets and civilian targets, for which the court determined that at least some of the attacks directed against the above mentioned cities, were illegal. Over 20,000 civilians in the area of the 4 cities left their homes and headed to Bosnia-Herzegovina and Serbia. According to the court findings, the manner of conducting the attack constituted a *forced deportation*. See, *ibidem*, paragraph 2305.

inoculated among his subordinates a feeling that the crimes against Serb civilians are tolerated and thus generated, implicitly, the framework for expanding the criminal acts. For all this, the Trial Chamber held that the accused is guilty, being directly responsible for his participation in a *joint criminal enterprise*, so, implicitly, perpetrating the crimes stipulated in the *common goal* and, also, being indirectly responsible for the crimes perpetrated by his subordinates, which although were not part of the *common goal*, they have been perpetrated as a natural and foreseeable consequence within the conduct of the actions which followed the *common goal*.

Regarding the accused *Mladen Markač*, the Court relied on similar issues, stressing the importance of his contribution to the fulfillment of the *joint criminal enterprise's* goal by participating at Brijuni meeting, planning and preparing the “*Operation Storm*” and the orders he gave to his subordinates to shell civilian targets in Gračac and its surroundings. He was also charged because his tolerant attitude towards the crimes perpetrated by his subordinates instead of doing the due obligations of a commander, that is, the prevention and punishment of these facts which, ultimately, allowed the widespread perpetration of the crimes against Serb civilians in the area under his control.

In light of the above mentioned facts, on April 15, 2011, the Trial Chamber, with the panel of 3 judges acting unanimously, ruled that the two accused, *Ante Gotovina* and *Mladen Markač* are both guilty for committing, in the light of the Article 7, paragraph. (1) of the ICTY Statute (as individual criminal liability), the following crimes: *persecution, deportation, murder and inhumane acts* as crimes against humanity (according to the Article 5 of the ICTY Statute) and *plundering public and private property, willful destruction, murder and inhumane treatment* as war crimes (according to the Article 3 of the ICTY Statute). Based on these findings, the accused *Ante Gotovina* was sentenced to 24 years in prison and the accused *Mladen Markač* to 18 years in prison²⁰.

Some commentaries on how the Trial Chamber ruled in the above mentioned case, should be added. According to the indictment, the ICTY Prosecutor was seeking the three accused *Gotovina, Markač* and *Čermak* to be tried for perpetrating the aforementioned crimes under the auspicious of the Article 7, paragraph. (1) of the ICTY Statute (regulating the individual criminal liability), as *co-perpetrators*, through their participation in a *joint criminal enterprise* with the alternative charges of *instigating, ordering and planning* the same crimes and, very important, cumulatively, in pursuant to the Article 7, paragraph. (3) of the ICTY Statute, for their responsibility as *commanders* for the same crimes perpetrated by their subordinates.

As the Trial Chamber found that the required conditions for convicting the two accused for perpetrating the crimes as *authors* are fulfilled, the alternative

²⁰ *Ibidem*, paragraph 2592-2619.

conviction for *instigating, ordering, planning* these crimes, was, naturally, dismissed, given the fact the latter modes of criminal liability are derivative and accessory to the *authorship/co-authorship*. Surprisingly, in this case, although the ICTY Prosecutor asked the conviction of the two accused both as *co-authors* and *commanders*, the Trial Chamber ruled only on the participation in a *joint criminal enterprise* (assimilated as *co-authorship*) of these two accused, referred implicitly in the Article 7, paragraph. (1) of the ICTY Statute. According to lengthy jurisprudence of the *ad-hoc tribunals*, the criminal liability as *commander/superior*, subsists and the accused must be convicted cumulatively, as *author/co-author* as well as *commander/superior*, even in relation with the same crimes. We note, however, that in motivating its judgment, the Trial Chamber included the material acts, we usually meet as the grounds of convicting the accused as *superior*, respectively the *excusing, minimizing the facts, not preventing the perpetration and not punishing the subordinates who perpetrated the crimes*, among the material acts which constitute a *contribution* to the fulfillment of the *joint criminal enterprise's* goal.

Basically, the Trial Chamber pointed out that the deliberate failure of doing the duties as *commanders/superiors*, can be seen as an element of the *actus reus* of participating to a *joint criminal enterprise*. This approach of the Trial Chamber, even though not entirely out of reasoning, is, however, one that exceeds the previous practice of the ICTY because it is the first time when a chamber of this court decides that some facts, usually seen as the *actus reus* for *superior liability* can be absorbed by the *actus reus* of the *joint criminal enterprise*.

It is also surprising the position of the ICTY Prosecutor who did not appeal the trial judgment, although, it was an obvious overlooking of the Trial Chamber on the count of the *superior liability* of the two accused. The trial judgment neither offered explicit references of acquittal on the count of *superior liability*, nor motivated why the *actus reus* of the *superior liability's* concept have been embedded within the *actus reus* elements of the *joint criminal enterprise*. The ICTY Prosecutor, nevertheless, did not filled any notice of appeal.

4. The Appeals Chamber's judgment and the grounds of acquittal

In the absence of the ICTY Prosecutor's appeal, the Appeals Chamber, in a panel of 5 judges, ruled only on the notice of appeal submitted by the two accused. The Defense attempted to dismantle the concept of „*unlawful attacks*” on the four cities, Knin, Benkovac, Obrovac and Gračac mainly by showing that Trial Chamber erred in determining the 200 Meters Standard of the margin of Croatian artillery shelling because its judgment does not contains any indication or evidence in this respect, so, depriving it of any legal basis²¹.

It should be mentioned that the Trial Chamber, admitting the allegations of the Prosecutor, showed in the so-called „*Impact Analysis*” about the spread of Croatian

²¹ See, *Case Gotovina et. al.*, Appeals Chamber judgment, p. 10-16

artillery strikes, the existence of a non-discriminatory fire of artillery which did not aim exclusively the military targets or justified on military grounds but rather on civilian population and buildings in these four cities. In this regard, the Court asked for the artillery target list of the Croatian Army and questioned the head of the Croatian artillery corps, *Colonel Marko Rajčić*, at the moment, under *General Gotovina's* command. From the statement of this witness, on the precision of the artillery fire, the Trial Chamber found that 200 meters is the minimum margin of precision of the Croatian artillery and so being, all the exploded shells discovered out of the distance of 200 meters of the planned targets, have been launched in order to achieve other purposes than military targets, actually, for furthering the intention to destroy civilian targets and to determine the Serb population to leave the area.

The Trial Chamber's conclusions on the "*unlawful artillery attack*" was based on the fact that ICTY Prosecutor has identified at least 50 shells in some places at even 300-700 meters far away from the planned targets and no less than 900 fired shells on Knin city, while the bulk of the fighting forces of the RSK Army have already left the city before the Croatian attack in August 4, 1995²².

The Appeals Chamber, unanimously upheld the Defense's allegations of the Trial Chamber error in law when adopting the 200 Meters Standard for the precision of the Croatian artillery shelling, because this standard is not based on any reasonable evidence and there is no any reasoned opinion on how the Trial Chamber reached this standard. With a majority of 3 to 2 judges, the Appeals Chamber found as irrelevant the findings of the Trial Chamber on the presence of a large number of shells outside of the margin of even 400 meters, because it has not been taken into account within the "*Impact Analysis*" the shots fired on some targets of opportunity, other than planned, such as those moving, for example²³. The Appeals Chamber has neither taken in account the ICTY Prosecutor's allegations that the 200 Meters Standard had been chosen as a margin in benefit of the two accused, since other military experts, out of the witness *Colonel Marko Rajčić* proposed by the Defense, being interviewed by the Trial Chamber, indicated an even smaller margin of precision for the Croatian artillery, of 80-90 meters, nor the ICTY Prosecutor's argument of the fact, according to the evidences, the Croatian artillery fired only one shot on a target of opportunity by hitting a moving Serbian police car in Knin.

Based on the finding the Trial Chamber erroneously upheld the so called "*Standard of 200 Meters*", the Appeals Chamber, with a majority of 3 to 2, concluded as insufficiently proved the "*unlawful attacks*" on the four cities, and, implicitly, the absence of a *joint criminal enterprise* in respect of all charges. Consequently, the

²² See, *Case Gotovina et al.*, Trial Chamber judgment, p. 594-733.

²³ See, *Case Gotovina et al.*, Appeals Chamber judgment, p. 17-26.

Appeals Chamber ordered the acquittal of the two accused on all charges and released them²⁴.

In what regarding the alternative charges of *inciting, aiding, planning* and *ordering* the crimes, as well as on the criminal liability of the two accused as *commanders /superiors* for the criminal acts of their subordinates, the Trial Chamber held that entering a judgment on these charges is inadmissible in appeal because it would be a *de novo* judgment on those charges.

As a overall conclusion, the Appeals Chamber made it appear that the whole strategy of the ICTY Prosecutor, based on an impressive evidence and accompanied by a variety of arguments is nothing but a great castle built on the sand that collapsed due to a small but famous error, the "Standard of 200 Meters".

This Appeal Chamber's decision of acquitting the two accused, both of them great figures of the civil war, has sparked a wave of criticism from the government of Serbia and of the supporters of the Serb leaders, already convicted or facing the trial to the Hague tribunal, in a moment in which, somehow, the Serbian authorities and the people accepted the idea that ICTY is a court which must be taken in account and cooperate with, if they want an European integration of their country. In their view, this decision did permanently discredit the ICTY and it is a clear evidence, in addition to others, to what the Serbs claimed for a long time, that is, ICTY is nothing more than a tool of the occidental powers seeking the stigmatization of the Serbian people and a severe punishment of its leaders.

The virulent criticism of this decision did not come only from the people who asses in a subjective way the ICTY activity and who can do only an extrinsic analysis of the justice's mechanisms. First, in chronological order and yet the most demanding criticism of this decision came from the two judges - *Fausto Pocar* and *Carmel Agius* - who ruled in minority against the acquittal of the two accused.

5. The criticism of the Appeals Chamber's decision of acquittal

Within the first phrase of his *dissenting opinion*, Judge Carmel Agius mentioned a surprisingly trenchant delimitation from what decided the Majority, in a manner never expressed before, in the entire ICTY jurisprudence: "*For the reasons set out below, I respectfully but strongly disagree with almost all of the conclusions reached by the Majority in this Appeal Judgment. Furthermore, I wish to register my disagreement with the approach taken by the Majority throughout the Appeal Judgment, and to distance myself from that approach*".

Within his *dissenting opinion* of no less than 30 pages²⁵, Judge Carmel Agius exposed in details the reasons for which he disagreed the conclusion of the Majority. In their essence, they would be: although it let be understood that the finding of the Trial Chamber in what regarding the Standard of 200 Meters as the

²⁴ *Ibidem*, p. 55.

²⁵ *Ibidem*, Dissenting opinion of Judge Carmel Agius, cap. VIII, p. 1-30.

maximum permissible error of the Croatian artillery shelling is an *error of law*, “arising from the application of an incorrect legal standard”, the Majority did not establish another standard, based on its own judgment, thus, to offer an appropriate alternative for doing the “*Impact Analysis*” and consequently to conclude whether the Croatian artillery shelling constituted or not, an “unlawful attack”, crediting so a standard of precision, *ad infinitum*; although from the trial judgment is clear that the finding of this Chamber on the “illegal attack” was made as a result of an impressive evidence, the Majority held that the “*Impact Analysis*” is central and determinant in assessing the “illegal attack” and simply ignored any other evidence, even the impressive number of 900 shells fired on the city of Knin in less than half a day, in absence of any minor resistance of the Serbs; although the Majority considered as erroneous the conclusions of the Trial Chamber on the “*Impact Analysis*” because it didn’t take in account the possibility of aiming some targets of opportunity, it failed to prove that there were such firings of the Croatian artillery; in what regarding the only one proved target of opportunity, a moving police car in the city of Knin, the Majority concluded that the Croatian artillery was accurate enough as it hit the target with only one shot but didn’t wonder themselves why it was so imprecise the shelling on the fixed and previously planned targets; although it shows that according to the Trial Chamber’s evidence, the bulk of the Serb refugees fled the Krajina region following the urging of the RSK authorities, even before the start of the Croatian artillery attack, making so plausible the lack of tie between the “unlawful attack” and their departure, the Majority ignored in its assessment how much mattered the crimes committed by Croatian soldiers against the remaining Serb civilians in this region and any other evidence suggesting that the armed forces and the Croatian authorities made everything possible to prevent the return of Serb refugees, so fueling their fear to come home.

In his *dissenting opinion*, Judge Fausto Pocar succinctly reiterated his colleague Agius Carmel’s opinions, basically referring to the same issues that we have mentioned above. On the decision of the Majority, he, also, stated “... *with all due respect, I disagree with the reasoning and all its major conclusions*”²⁶.

The both judges acting in Minority argue that the lack of entering convictions under alternate modes of liability for the two accused, as a consequence of re-qualification or the revision of the Trial Chamber’s error in law by adopting an inappropriate mode of liability as well as the failure to enter convictions based on their responsibility as commanders on the ground that it would have meant a *de novo* entry of charges in appeal, otherwise inadmissible, not only unveiled a puerile reasoning but also overturned a long lasting practice of the ICTY Appeals Chamber in this respect. Judges Agius and Pocar invoked the cases *Blaskić*, *Simić*,

²⁶ *Ibidem*, Dissenting opinion of Judge Fausto Pocar, cap. X, p. 1.

Rukundo and *Krstić*²⁷ where the Appeals Chamber found that according to the evidence, a certain mode of liability adopted by the Trial Chamber must be substituted by another. In these cases, the conviction for a specific crime was not affected because the Appeals Chamber has not entered a new conviction on appeal. It, actually, revised or re-qualified the Trial Chamber's verdict of guilt so that the appellant was still found guilty but under an alternate mode of liability. At the time of the above mentioned cases' judgment, nobody considered, the Appeals Chamber, by doing so, actually enters a *de novo* conviction.

6. Conclusions

The criticism that the two judges in Minority depicted in their dissenting opinion, seems to be absolutely relevant and, also, fully compliant with the jurisprudence of nearly 20 years of the ICTY Appeals Chamber. We dare, also, to consider that the Appeals Chamber's decision of acquittal in *Case Gotovina et al.* is not alone wrong but it came as a consequence of the erroneous judgment of the Trial Chamber and the wrong decision of the ICTY Prosecutor. Thus, although it was clear the fact the ICTY Prosecutor asked the two accused to be tried for their *commander's liability* in what concerns the criminal acts committed by their subordinates, according to Article 7 paragraph. (3) of the ICTY Statute, among other charges mentioned in the Indictment, the Trial Chamber embedded all the material acts which according to the previews jurisprudence belong to this mode of liability within the *actus reus* of participation in a *joint criminal enterprise* and merely ignored the charge of criminal liability as *commanders*, of the two accused. Nevertheless, in his turn, the ICTY Prosecutor did not appeal the trial judgment on this charge or in any other else. We don't want to suggest so, the Appeals Chamber's decision invoking an entering of a *de novo* conviction in appeal is thorough but the failure of the Prosecutor to appeal the trial judgment in this respect, did nothing more than offered a reason for Majority to disregard the *command responsibility* of the two accused as the Majority clearly mentioned the lack of the Prosecutor's appeal on the charge of *command responsibility*. So, as the proverb says, if the Prosecutor gave them a lemon, they did nothing else than made juice.

Unfortunately, this decision, beyond its more or less accurately legal reasons, disregarded the suffering and tragedy of hundreds of thousands innocent people who now live a deep sense of injustice. We don't want to dwell on some underground speculative issues related to this judgment, like the fact the president of the appeal panel, Judge Theodor Meron (United States) did not intend a condemnation who could tie, somehow, the U.S. Army and U.S. Administration with the war crimes and crimes against humanity committed by these Croatian generals who were involved in the training for NATO Partnership for Peace led by

²⁷ *Ibidem*, p. 17.

the American military mission MPRI, in the months preceding the “Operation Storm” or the fact, a conviction of these two accused would have led to an alarming Euro-skepticism in Croatia in the very year of its entry into the European Union. What, actually, matters now, is the fact the decision of acquittal is done, the credibility of ICTY is suffering and the surprising ways of doing the interpretation of some legal aspects by the Appeals Chamber, have created an unexpected and perfect judicial precedent for other two famous accused, *Radovan Karadžić* and *Ratko Mladić* whose trials are still ongoing and whose criminal liability could be seriously diminished in the light of the appeal judgment in the *Case Gotovina et al.*

References

- [1] Ambos, K., (2007), *Joint Criminal Enterprise and Command Responsibility*, “Journal of International Criminal Justice”, no. 5, Oxford University Press, p. 159-183.
- [2] Cassese, A., (2007), *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, in “Journal of International Criminal Justice”, no. 5/2007, Oxford University Press, p. 109-133.
- [3] Clark, J.N., (2013), *Courting Controversy* in “Journal of International Criminal Justice”, no. 11, Oxford University Press, p. 399- 423.
- [4] Ingraio, C., Emmert, (2009), T.A., *Confronting the Yugoslav controversies*, Purdue University Press, West Lafayette, Indiana, U.S.A.
- [5] Pearl, D., (2002), *At home in the world*, Helene Cooper Publishing House, New York, U.S.A.
- [6] Perić, V., (2005), *Croatians Rally Behind 'National Hero' after General Is Snatched*, in “The Independent”, December 12.
- [7] Steele, J., (1999), *Break the cycle of abuse*, in “The Guardian”, 14 June.