Before: **Judge Alphons Orie**

Judge Uldis Ķinis

Judge Elisabeth Gwaunza

Registrar: **Mr. John Hocking**

Motion: **16 July 2010**

PROSECUTOR

v.

ANTE GOTOVINA, IVAN ČERMAK AND MLADEN MARKAČ

PUBLIC

DEFENDANT MLADEN MARKAČ'S PUBLIC REDACTED FINAL TRIAL BRIEF

The Office of the Prosecutor:

Mr. Alan Tieger

Mr. Stefan Waespi

Counsel for the Accused:

For Ante Gotovina: Mr. Gregory Kehoe, Mr. Luka S. Mišetić, and Mr. Payam Akhavan

For Ivan Čermak: Mr. Steven Kay and Ms. Gillian Higgins

For Mladen Markač: Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović

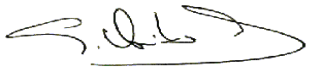
DEFENDANT MLADEN MARKAČ'S PUBLIC REDACTED FINAL TRIAL BRIEF

1. The Defence for Mladen Markač hereby submits its Public Redacted Final Trial Brief. The Defence's Final Trial Brief was originally filed confidentially on 16 July 2010.

Word Count: 27

Dated: 6 September 2010

Respectfully submitted,



_____ _____

Mr. Goran Mikuličić
Counsel for Mladen Markač

Mr. Tomislav Kuzmanović
Counsel for Mladen Markač

INTRODUCTION

1. These are the submissions of General Mladen Markač ("Markač") which address the charges in the Amended Indictment ("Indictment"), summarize the applicable law, and analyze the evidence presented at trial. At the end of the day, after over two years of trial, the only logical conclusion that can be made is that the Prosecutor ("OTP") has not proven, beyond reasonable doubt, that Markač is guilty of the crimes alleged against him, his co-accused, and untold others.

2. In particular, the allegations of Joint Criminal Enterprise ("JCE") provide no underlying evidence that Markač possessed the requisite discriminatory intent of a common criminal purpose to permanently remove the Serb population from the Krajina Region. In fact, the evidence as to Markač himself is just the opposite. He has been shown to be a man of character who adheres to the rule of law.

3. While each of the counts in the Indictment will be addressed separately below, special mention needs to be made of the incident in Grubori. This submission sets forth a separate section in addressing Grubori under Article 7(3) of the Statute.

4. Much has been said about Grubori at trial. Setting aside the tragic fact that five people perished on 25 August 1995 in that hamlet, the critical legal and factual issue revolves around Markač's ability or inability to do anything about what happened there based upon the information he received, what specific powers he had under Croatian Law to investigate or discipline based upon the information he had at the time, without the benefit of fifteen years of hindsight. Another issue is whether he, in fact, "covered up a crime" which was so well publicized, even on the day of the event.

5. As to these issues the OTP has failed to prove beyond a reasonable doubt that Markač was responsible for failing to investigate or punish members of the Special Police for their alleged action in Grubori, or that he covered up what happened there.

Defence Case

6. The Markač Defence submits that the Office of the Prosecutor ("OTP") has failed to prove the existence of the Joint Criminal Enterprise ("JCE") alleged in the Indictment beyond a reasonable doubt. The evidence does not establish the existence of a common criminal purpose to displace, murder, and mistreat Serb civilians. None of the crimes alleged in the Indictment are proved to have been committed pursuant to any common criminal policy or agreement to which Markač was a party. Nor has the OTP proved that he ordered, authorized, or condoned any of these crimes. None of the allegations made by the OTP concerning his contribution to the alleged JCE have been established on the evidence.

Structure of Brief

7. This Brief is divided into the following sections:

Part 2 Burden of Proof. This section sets forth the legal standards against which the sufficiency of the Prosecutor's evidence must be measured.

Part 3 Armed Conflict. This section sets forth the Defence submissions on the operative date for the start of an internal armed conflict for the purposes of Articles 3 and 5 of the Statute.

Part 4 Joint Criminal Enterprise. This section sets forth the Defence submissions regarding the failure of the OTP to establish the existence of a JCE in which Markač participated.

Part 5 Superior Responsibility. This section sets forth the Defence submissions on Markač's alleged superior responsibility, particularly as it pertains to the Grubori incident.

Part 6 Crimes Alleged in the Indictment. This section sets for the Defence submissions on specific counts, relating to Persecution, Deportation and Forcible Transfer, Plunder, Wanton Destruction, Murder, Inhumane Acts, and Cruel Treatment.

Part 7 Crimes Against Humanity. This section sets forth the Defence submissions concerning the allegation that the Special Police engaged in a widespread or systematic attack on a civilian population.

Part 8 Character of Markač, and Sentencing. This section sets forth the Defence submissions on Markač's character in the event that the Trial Chamber imposes a sentence.

Part 9 Conclusion.

8. The Markač Defence joins in the arguments set forth by counsel for Ante Gotovina on the issue of JCE, and counsel for both co-accused on counts 1 through 9.

BURDEN OF PROOF:

8. The principle that guilt must be proven beyond reasonable doubt is enshrined in Rule 87(A) of the Rules of Procedure and Evidence of the International Tribunal.[1] A Trial Chamber may only find an accused guilty of a crime if the OTP has proved beyond reasonable doubt. (1) each element of that crime and of the mode of liability, and (2) any fact which is indispensable for the conviction.[2] The standard of proof beyond a reasonable doubt " 'requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.' " [3]

9. This standard applies whether the evidence evaluated is direct or circumstantial.[4] "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination

[1] *Prosecutor v. Halilović*, Case No. IT-01-48, Appeal Judgement, 16 October 2007, para. 111 ("*Halilović* AJ*")*
[2] *Halilović* AJ para. 125. Prosecutor v. *D. Milošević,* Case No. IT-98-29/1-A, Appeals Judgement, , 12 November 2009, para. 20 ("*D. Milošević* AJ"), citing *Prosecutor v. Ntagerura et al*., Case No. ICTR-96-10A, Appeals Judgement, 7 July 2006, paras. 174-75 ("*Ntagerura et al.* AJ").
[3] *D. Milošević* AJ, para 20, quoting *Prosecutor v. Mrkšić and Šljivančanin,* Case No. IT-95-13/1, Appeals Judgement, 5 May 2009, para. 220 ("*Mrkšić and Šljivančanin AJ"*).
[4] *Prosecutor v. Blagojević and Jokic*, Case No. IT-02-60, Appeal Judgement, 9 May 2007, para. 226. ("*Blagojević and Jokic* AJ").

only because the accused did what is alleged against him."[5] "[A]n inference drawn from circumstantial evidence to establish a fact that is material to the conviction or sentence" will not satisfy the standard of proof beyond a reasonable doubt "if another reasonable conclusion consistent with the non-existence of that fact was also open on that evidence."[6]

10. At the first stage, the Trial Chamber has to assess the credibility of the relevant evidence presented.[7] "At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction."[8] The credibility of relevant evidence cannot be assessed piecemeal; rather, individual items of evidence must be analysed in light of the entire body of evidence.[9] Thus, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.[10] Only after analyzing all relevant evidence can the Trial Chamber determine whether the evidence upon which the OTP relies establishes the existence of the facts alleged.[11]

11. The MD submits that the Trial Chamber in this case cannot find "that there is no reasonable explanation of the evidence other than the guilt of the accused." The OTP has not met its burden of proof, thus Markač must be acquitted.

---

[5] *Halilović* AJ , footnote 322 in para. 119, quoting *Prosecutor v. Mucic et al. (Čelebići)*, Case No. IT-96-21, "Appeals Judgement," para. 458, ("*Čelebići* AJ").
[6] *D. Milošević* AJ, para 20, citing *Čelebići* AJ, para. 458.
[7] *Halilović* AJ para. 125, citing *Ntagerura et al*. AJ, para. 174.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id.*

ARMED CONFLICT

Introduction

12. The alleged crimes with which Markač is charged in the Indictment must have been committed in an 'armed conflict' in order for the Tribunal to have jurisdiction over alleged crimes pursuant to Article 3 and Article 5 of the Statute.

13. In this case the OTP submits that at all times relevant to the Indictment, from at least July 1995 to about 30 September 1995, a state of armed conflict existed in the Krajina region of the Republic of Croatia.[12]

14. The Markač Defence submits that non-international armed conflict ended in Sector South on or about 8 August 1995. The Defence's assertion is in line with the *Tadić* Appeal Chamber's interpretation of the Security Council Resolution establishing this Tribunal[13] that the conflict between the Croatian Government and Croatian Serb rebel forces in Krajina was one of a non-international character.[14]

15. The Defence further submits that OTP has not proved beyond reasonable doubt its assertion that an armed conflict existed in Sector South beyond 8 August 1995. The OTP failed to demonstrate that the alleged incidents can be characterized as protracted armed violence or that the incidents

[12] Indictment, IT-06-90-T, 12 March 2008
[13] Security Council Resolution 827 (1993)
[14] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 72 ("Tadić Decision on Jurisdiction")

were carried out by organized armed groups.[15] The incidents that took place should thus be characterized as "banditry, unorganized and short-lived insurrections, terrorist activities or civil unrest"[16] or as "internal disturbances."[17]

16. Accordingly, the Markač Defence submits that any crimes that were allegedly committed after the completion of Operation Storm did not occur in a state of armed conflict, as required by Articles 3 and 5 of the ICTY Statute. As a result all counts against Markač should be dismissed for lack of jurisdiction.

Law Applicable to the Existence of a Non-International Armed Conflict

17. The Trial Chamber in *Rutaganda* stated that "[t]he definition of an armed conflict per se is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis."[18]

18. The legal test for the existence of armed conflict was set down by the Appeals Chamber in *Tadić*:

---

[15] The OTP's only attempt in proving that a state of an armed conflict existed throughout the Indictment period was during Peter Galbraith's testimony (transcript reference: 4967:17 to 4968). During direct examination Galbraith testified that the armed conflict ended with the conclusion of the Erdut Agreement on 12 November 1995. OTP have not addressed the issue of the existence of armed conflict at any other time.

[16] *Prosecutor v Tadić*, Case No. IT-94-1, Trial Chamber Judgement, 7 May 1997, paras. 565-567 ("*Tadić* TJ"); *Prosecutor v Mucic et al.*, Case No. IT-96-21, Trial Chamber Judgement, 16 November 1998, para. 188-190 ("*Čelebići* TJ"); *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Trial Chamber Judgement, 6 December 1999, para. 93 ("*Rutaganda* TJ"); *Prosecutor v Hadžihasanović & Kubura*, Case No. IT-01-47, Trial Chamber Judgement, 15 March 2006, para. 23 ("*Hadžihasanović* TJ"); *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Trial Chamber Judgement, 30 November 2005, paras. 171-172 ("*Limaj* TJ")

[17] Additional Protocol II

[18] *Rutaganda* TJ, para. 93

> *Armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*[19]

19. The *Tadić* definition also specifies the period of the Tribunal's jurisdiction over an armed conflict, which operates "[f]rom the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, peaceful settlement is achieved."[20]

20. The above definition further reveals the Tribunal's criteria for the existence of an armed conflict: (1) intensity, and (2) the organization of its respective parties. This approach was confirmed in *Tadić*:

> *The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict: the intensity of the conflict and the organisation of the parties to the conflict. In an armed conflict of an internal or mixed character, those closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.*[21]

[19] *Tadić* Decision on Jurisdiction, para. 70
[20] *Tadić* Decision on Jurisdiction, para. 70
[21] *Tadić* TJ, paras. 561-562, 628

21. The Trial Chamber in *Akayesu* upheld the Tadić test.[22] In *Delalić*, the Trial Chamber offered further guidance: "[i]n the latter situation (ie. non-international armed conflicts) in order to distinguish an internal armed conflict from terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of the organisation of the parties involved."[23] Post-*Delalić* the same definition was implemented in subsequent Judgements. It therefore appears that the '*Tadić* definition' sets out a precedent in establishing the existence of an armed conflict.

22. Further guidance on non-international armed conflict is provided by the International Committee of the Red Cross (ICRC) in the Commentaries to Additional Protocol II,[24] which apart from Common Article 3 also covers conflicts of non-international character. The ICRC Commentaries have been taken into consideration by the previous Trial Chambers.[25]

23. In the ICRC Commentaries to Additional Protocol II internal disturbances are described as:

> *[s]ituations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between*

[22] *Prosecutor v Akayesu*, Case No. ICTR-96-4, Trial Chamber Judgement, 2 September 1998, paras. 120, 602-3 ("*Akayesu* TJ")
[23] *Čelebići* TJ, paras. 183-184
[24] ICRC Commentaries to Additional Protocol II, pp. 1347-1356. Article 1(1) of the Additional Protocol II covers those internal conflicts "*which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*."
[25] *Hadžihasanović* TJ. In addition, the Trial Chamber in *Prosecutor v. S. Milošević*, "Decision on Motion for Judgement of Acquittal," 16 June 2004, stated at para. 19 that the ICRC Commentaries "*may be considered when determining whether an armed conflict exists*."

> *more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.*[26]

24. This position was reiterated in the International Review of the Red Cross:

> *Internal disturbances are marked by serious disruption of domestic order resulting from acts of violence which do not, however, have the characteristics of an armed conflict. For a situation to be qualified as one of internal disturbances, it is of no consequence whether State repression is involved or not, whether the disturbances are lasting, brief with durable effects, or intermittent, whether only a part or all national territory is affected or whether the disturbances are of religious, ethnic, political or any other origin*.[27]

25. Moreover, in 1971 the Sub-Group of the Working Group established at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts recommended three criteria, subsequently incorporated in Additional Protocol II, which have to be satisfied on the side of the insurgents for the recognition of the existence of an internal armed conflict: (1) a responsible command; (2) such control over part of the territory as to enable them to carry out sustained and concerted military operations; and (3) the ability to implement the protocol.

[26] Commentary to Additional Protocol II, p. 1354 at 4475
[27] International Review of the Red Cross, May-June 1993, No. 294

26. With regard to the first requirement, a responsible command, the ICRC states that:

> *[t]he existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority*.[28]

27. In relation to control over territory the ICRC states:

> [*i*]*n many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of the territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol*."[29]

28. Finally, regarding the ability to implement Additional Protocol II, the ICRC underscores that:

[28] ICRC Commentary to Additional Protocol II, p. 1352 at 4463
[29] ICRC Commentary to Additional Protocol II, p. 1352 at 4467

> [*t*]*his is the fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, the insurgents must be in a position to implement the Protocol. The threshold for application therefore seems fairly high. Yet apart from the fact that it reflects the desire of the Diplomatic Conference, it must be admitted that this threshold has a degree of realism. The conditions laid down in this paragraph 1, as analyzed above, correspond with actual circumstances in which the parties may reasonably be expected to apply the rules developed in the Protocol, since they have the minimum infrastructure required therefore*."[30]

29. The Inter-American Commission on Human Rights referred to the criteria developed by the ICRC in its Commentary on the 1973 Draft Additional Protocols to the Geneva Conventions in the *Tablada Case*.[31] In demarcating the applicability of the international humanitarian law in non-international armed conflict, the Commission drew on the ICRC's criteria determining the existence of internal disturbances and tensions. Accordingly, internal disturbances and tensions may include situations such as: 1) riots, that is to say, all disturbances which from the start are not directed by a leader and have no concerted intent; 2) isolated and spoRadić acts of violence, as distinct from military operations carried out by armed forces or organized armed groups; 3) other acts of a similar nature which incur, in particular, mass arrests of persons because of their behavior or political opinion.[32]

[30] Commentary to Additional Protocol II, p. 1353 at 4470.
[31] Case 11.137 (*La Tablada*), *Juan Carlos Abella Argentina*, Report No 55/97 of the Inter-American Commission on Human Rights, 18 November 1997, para. 149.
[32] *Id.*

30. The above sources appear to concur that situations of internal disturbances do not necessarily fall within the concept of armed conflict. Apart from the Tadić definition of intensity and organization of the parties no other set of standards is laid down on how to recognize non-international armed conflict from internal disturbances and how to protect the victims during such situations.

The Markač Defence's position on the issue of peace settlements concluding non-international armed conflicts

31. Before the Markač Defence addresses the *Tadić* criteria for the existence of armed conflict in Sector South during the period of the Indictment, the Defence wishes to address the temporal and geographical concept set out in the Tadić Appeals Judgement at para. 70.[33] Specifically the issue of non-international armed conflicts ending with the achievement of peace settlements.

32. It is the Defence's submission that the *Tadić* test does not account for variety of conflicts as it assumes that an armed conflict can only conclude in a peace settlement. This test appears to pertain to situations involving two parties who are locked in armed conflict until a peace settlement is agreed upon. The Defence submits that this test does not provide for conflicts such as the one that occurred in Sector South. After Operation Storm ended the levels of intensity and organization no longer met the armed conflict threshold. The armed conflict ceased to exist after 8 August 1995. Moreover, without a formal declaration of war, the achievement of a peace settlement is unnecessary because the cessation of combat activities could result *via facti* as when the political and

[33] *Tadić* Decision on Jurisdiction.

military structures abandoned the territory of the so-called RSK, leaving only minor, unorganized members of the formed ARSK behind.

Application of the Law on the Existence of a Non-International Armed Conflict

33. The Trial Chamber in *Limaj* stated that, "[t]he determination of the intensity of a conflict and the organization of the parties are factual matters which need to be decided in the light of the particular evidence and on a case-by-case basis."[34] Similarly, the *Musema* Trial Chamber held that "[t]he expression 'armed conflicts' introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbance and tensions, characterized by isolated or spoRadić acts of violence, do not therefore constitute armed conflicts in the legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order."[35]

The Requirement of Protracted Armed Violence

34. As set out in *Tadić,* for international humanitarian law to apply, the OTP must show beyond reasonable doubt that the conflict as described in the Indictment reached the level of "protracted armed violence."[36] The term "protracted armed violence" appears to refer to the intensity of the conflict.[37]

---

[34] *Limaj* TJ, para. 90.
[35] *Prosecutor v Musema* Judgement and Sentence, Case No. ICTR-96-13, Trial Chamber Judgement, 27 January 2000, paras. 248-251 ("Musema TJ").
[36] *Tadić* Decision on Jurisdiction, para. 70.
[37] *Tadić* TJ, para. 562.

35. In assessing the requirement of protracted armed violence the following conditions were considered by the *Limaj* Trial Chamber to be indicative of the intensity of hostilities: seriousness of attacks, increase in armed clashes, spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilization and distribution of weapons among both parties to the conflict.[38]

36. The ICTY practice appears to demonstrate that where the requirement of protracted armed violence was satisfied, the intensity of hostilities between the parties was serious and the armed clashes continued to be intense throughout the Indictment period and beyond. In *Tadić*, the hostilities between the parties continued throughout Bosnia and Herzegovina until the conclusion of the Dayton Peace Agreement. Even when the cease-fire agreements were entered into by the parties no general cessation of hostilities had occurred.[39] The *Čelebići* Trial Chamber found hostilities to be "clearly intense." For instance, the town of Konjic was shelled continuously for 3 years.[40] In the *Slobodan Milošević* case there is evidence of several armed clashes, including a massive attack conducted by Serb forces. The hostilities appear to have continued throughout the indictment period.[41] Armed clashes between the Croatian Defence Council and the Bosnian Army in *Kordić and Čerkez* were "serious" and continued "for an extended period of time."[42] In *Halilović*, at the relevant time and in the various parts of Bosnia and Herzegovina, it appears that the parties were engaged in continuous combat. The Trial

[38] *Limaj* TJ, para. 90.
[39] *Tadić* TJ, para. 566.
[40] *Čelebići* TJ, para. 134.
[41] *Prosecutor v Slobodan Milošević*, Case No. IT-02-54, Trial Chamber Judgement, Rule 98*bis* Decision, 16 June 2004, para. 28 ("Decision on Motion for Judgement of Acquittal").
[42] *Prosecutor v Kordić & Čerkez*, Case No. IT-95-14/2, Appeal Judgement, 17 December 2004, para. 341 ("*Kordić & Čerkez* AJ")

Chamber in *Limaj et al* found that during the Indictment period "*periodic armed clashes occurred virtually continuously*."[43] In *Hadžihasanović and Kubura*, the Chamber concluded that fighting during the period and place material to the Indictment "raged"[44] and that the hostilities continued with "varying degrees of intensity" until the signing of the Washington Peace Accords by the parties.[45] In *Martić* the Trial Chamber concluded that during the time relevant to the Indictment attacks against the Croat and other non-Serb civilian population were "systematic."[46] The *Mrkšić et al* Trial Chamber found that at the relevant time daily clashes were occurring "usually involving artillery, mortars, armoured vehicles, including tanks, weapons, such as multiple rocket launchers and anti aircraft batteries, as well as infantry weapons, and at times air and naval forces."[47] Towards the end of the Indictment period the combat operations were not as intense but they nevertheless continued.[48]

37. The Markač Defence submits that on or about 8 August 1995 military operations in Sector South ceased.[49] Any alleged incidents that occurred after that day were scarce and not sufficiently intense to be characterized as an armed conflict. The evidence, *infra*, illustrates that the armed

[43] *Limaj* TJ, para. 168
[44] *Hadžihasanović* TJ, para. 20
[45] *Hadžihasanović* TJ, para. 22
[46] *Prosecutor v Martić*, Case No. IT-95-11, Trial Chamber Judgement, 12 June 2007, para. 352 ("*Martić* TJ").
[47] *Prosecutor v Mrkšić et al*., Case No. IT-95-13/1, Trial Chamber Judgement, 27 September 2007, para. 419 ("*Mrkšić et al.* TJ")
[48] *Mrkšić et al.* TJ, para. 419
[49] D554, p. 4. See also P2176, Summary of a diary entry marked LM/8 as an attachment to Mate Lausic's video interview; D882, 9 August 1995 Order of the Republic of Croatia's Minister of Defence, Gojko Susak on demobilization of 70,000 soldiers; D1820 Croatian Mission in UN, Notes on UN SG Boutros Ghali's Report further to UN Security Council Resolution 1009 and his suggestions to change the UNCRO mandate in Republic of Croatia; P2602 Report by General Červenko to President Tuđman on Operation Storm.

conflict in Sector South cannot reasonably be described as protracted after the 8 August 1995 as the ARSK left the Krajina.[50]

The evidence

38. On 7 August 1995, during the 259th Session of the Government of Croatia, Minister Šušak declared that military operations were completed and that the process of demobilization had begun.[51] On 9 August orders were dispatched from the Ministry of Defence to begin demobilization of units, institutions and commands of the Armed Forces of HV.[52] The report on Operation Storm submitted on 21 August 1995 by the Main Staff of the Croatian Army to President Tuđman also confirms that by 10 August 1995 the Operation was completed.[53] Finally, the UN Secretary General Boutros Boutros Ghali, in his report to the Security Council,[54] recommended a drastic decrease of the UNCRO forces in the territory of Croatia [55] due to "[t]he collapse and departure of the political leadership and the armed forces of the Krajina Serbs…"[56]

39. Witnesses also confirmed that an armed conflict was not intense after the 8 August 1995:
    - Milan Ilic (W-24) stated that by 7 August 1995 the ARSK had left the so-called Krajina. During his testimony he recalled: "*As for RSK army, there was no one there. They had all left.*"[57]

[50] Report of the Secretary General submitted pursuant to Security Council's Resolution 1009 (1995) from 23 August 1995.
[51] D980.
[52] D882.
[53] P2602, p. 2.
[54] D90 & D1820.
[55] D90 para. 28 p. 8.
[56] D90 para. 24 p. 7.
[57] T.7554:6-7554:11.

- Laila Malm (W-129) observed the ARSK units leaving with a refugee convoy towards Bosnia and Herzegovina on 6 or 7 August 1995.[58]
- Soren Liborious (W-127) testified that on 4 August 1995 "*the military and political leaders seem to have disappeared*."[59] This fact was also confirmed by Liborious' UN counterparts.[60]
- Kosta Novaković (W-40) confirmed his statement from Banja Luka on the 7 August 1995 that a large number of the ARSK soldiers had withdrawn to other territories from the Serbian Krajina.[61] Similarly, on the 8 August 1995 Minister Jarnjak declared that combat operations had ended and that the Croatian government began its work on rebuilding the newly liberated areas.[62]
- AG-58 testified that on the morning of 4 August 1995 two-thirds of the so-called RSK government left Knin and by 6 August 1995 most of the military evacuated to Bosnia and Herzegovina or Serbia.[63] As early as 5 August 1995 General Mrkšić admitted to AG-58 that he was no longer able to exercise command over the army.[64]
- Mile Mrkšić (AG-38) testified that by 10 August 1995 the bulk of units of the ARSK as well as the command structure left the Serbian Krajina and crossed into Serbia (sic).[65]
- Jack Deverell (IC-13) stated that by 10 August 1995 military operations had ended.[66]

[58] T.8166:2-8166: 9.
[59] T.8591:9-8591:13.
[60] T.8591: 19-8591:22.
[61] D925 & T.11800:24-11800:25.
[62] D411.
[63] T.18482:24-18483:7.
[64] T.18482:5-18482:14.
[65] T.19007:15-19007:21.
[66] T.24218:7-24218:10.

40. The Markač Defence submits that the fact that the units of the Special Police were ordered by the Main Staff of the Croatian Army to carry out mop up operations in the newly liberated territory[67] is not indicative of intensity. The main task of Markač's units was to deal with terrorism[68], in other words difficult situations with which the army and the regular police were not adept at handling. Forces of the Special Police possessed the knowledge and experience to deal with circumstances that occurred post Storm.[69] After Operation Storm ended members of the Special Police provided assistance by moving through difficult terrain[70] to uncover hidden armed former enemy soldiers, mines and/or weapons[71] in order for the regular police to safely establish law and order. Those activities should not be perceived as part of an armed conflict.

41. The above evidence reveals that the armed conflict in Sector South was not protracted after 8 August 1995 and thus the alleged crimes were part of internal disturbances and not an armed conflict.

The Requirement of Organization of Parties Involved

42. The organization of the parties to the conflict is the second requirement which needs to be satisfied for an armed conflict to exist and for international humanitarian law to apply. The Trial Chamber in *Limaj* held that to constitute an organized group "*some degree of organization by the parties will suffice*."[72] However, in *Haradinaj* the Trial Chamber set out a higher threshold for this requirement when stating that an armed conflict

[67] D557, D561.
[68] T.25315:6-25315:16.
[69] T.25315:6-25315:16.
[70] T.25383:25.
[71] T:25278:11-25278:20; 26194:10-26194:13.
[72] *Limaj* TJ, para. 89.

can only exist between parties that are sufficiently organized to confront each other with military means.[73]

43. The *Tadić* Jurisdiction Decision did not define what constitutes an "organized armed group." Subsequent case-law of the Tribunal provided for several indicators: the existence of a command structure and headquarters, disciplinary rules and mechanisms, control of territory, weapons and other military equipment, recruits, military training, military operations, strategy and tactics, and the ability to speak with one voice.[74]

44. ICTY practice offers helpful insight into how the requirement of the organization of the parties was interpreted. In *Tadić*, Bosnia and Herzegovina was an "organized political entity" until 22 May 1992 when it became a *de jure* state.[75] The Bosnian-Serb Army was an "organized military force" under the command of the Bosnian Serb administration that occupied "determinate, if not definite, territory" in Bosnia and Herzegovina.[76] In *Čelebići*, all parties to the conflict satisfied the organization requirement as they were "governmental authorities" or "organized armed groups."[77] The Trial Chamber in the *Slobodan Milošević* case held that the KLA constituted an organized military force having an official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport and distribute arms.[78] In *Halilović*, the Croatian Defence Council, the Bosnian Army and the Bosnian Serb Army satisfied the criterion because the parties possessed,

[73] *Prosecutor v Haradinaj*, Case No. IT-04-84, Trial Chamber Judgement, 3 April 2008, para. 60 ("*Haradinaj* TJ").
[74] *Limaj* et al. TJ, para. 90.
[75] *Tadić* TJ, para. 563.
[76] *Tadić* TJ, para. 564.
[77] *Čelebići* TJ, para. 191.
[78] *Slobodan Milošević* Decision on Motion for Judgement of Acquittal, para. 23.

among others, command structure, control of territory and they were able to employ strategy and tactics during the fighting.[79] The *Limaj et al* Trial Chamber concluded that Serbian forces involved constituted "governmental authorities" and that the KLA satisfied the characteristics of an organized armed group.[80] In *Hadžihasanović and Kubura*, the Trial Chamber concluded that the organization element was satisfied based on orders and cease-fire agreements between the parties[81] as well as the existence of "repeated failed attempts to form a joint command."[82] In *Martić* the existence of factors such as military assistance,[83] training,[84] agreements between the parties,[85] and organizing operations[86] satisfied the "organization" requirement for the Trial Chamber. In *Mrkšić et al* the Trial Chamber was satisfied that the Serbian and Croatian forces constituted "organized armed groups." The Serb forces with time increased in strength, acted under a command and were able to conduct military operations.[87] The Croatian forces acted under a unified command and had designated headquarters.[88] In *Haradinaj*, the Trial Chamber followed the indicators set out in paragraph 32, *supra*, to conclude that the KLA qualified as an "organized group."[89] It appears that the KLA acted under a command structure from a designated headquarters. They also had control over "a considerable amount of territory," access to weapons, received military training, and issued "communiqués" on behalf of the KLA.[90]

[79] *Halilović* TJ, paras. 162-172.
[80] *Limaj et al.* TJ, para. 93.
[81] *Hadžihasanović & Kubura* TJ, para. 20.
[82] *Hadžihasanović & Kubura* TJ, para. 23.
[83] *Martić* TJ, para. 344.
[84] *Martić* TJ, para. 344.
[85] *Martić* TJ, para. 345.
[86] *Martić* TJ, para. 344.
[87] *Mrkšić et al* TJ, para. 409.
[88] *Mrkšić et al* TJ, para. 417.
[89] *Haradinaj* TJ, para. 89.
[90] *Haradinaj* TJ, para. 89.

45. The Republic of Croatia was during Operation Storm, and still is, an organized political entity, with institutions dedicated to its defence. Croatia gained independence from Yugoslavia in 1991 and became a *de jure* state in 1992.[91] The Croatian Army, MUP being part of it, at the time relevant to the Indictment, constituted "governmental authority" within the meaning of the *Tadić* test.

46. The Republic of Serbian Krajina (RSK) was at the relevant time a self-proclaimed and internationally unrecognized entity. The Army of the Republic of Serbian Krajina (ARSK) was part of the RSK. ARSK constituted an organized group in accordance with the '*Tadić* definition' but only until the beginning of Operation Storm. The evidence presented below will demonstrate that the ARSK did not constitute an organized armed group after 8 August 1995.

The evidence

47. The Markač Defence wishes to draw the Chamber's attention to the report from 8 August 1995 by Zvonimir Červenko to President Tuđman, which gives an account of the surrender of the XXI Kordun Corps. This is known to be the last organized ARSK unit that withdrew from the Krajina.[92]

[91] Security Council Resolution No. 753.

[92] D554, p. 4. See also P2176, Summary of a diary entry marked LM/8 as an attachment to Mate Lausic's video interview; D882, 9 August 1995 Order of theRepublic of Croatia's Minister of Defence, Gojko Susak on demobilization of 70,000 soldiers; D1820 Croatian Mission in UN, Notes on UN SG Boutros Ghali's Report further to UN Security Council Resolution 1009 and his suggestions to change the UNCRO mandate in Republic of Croatia; P2602 Report by General Červenko to President Tuđman on Operation Storm. .

48. Many witnesses also confirmed that as early as 4 August 1995 the RSK and with it the ARSK began to withdraw from all over the Krajina. As such the organization of the ARSK was almost non-existent on or about 8 August 1995.

- Mikhail Ermolaev testified that he was aiding an unorganized group of ARSK stragglers to escape from Croatia into Bosnia by giving them a map.[93]
- Mile Djuric (P-16) testified that on 4 or 5 August 1995 many individual ARSK soldiers were passing his summer house on their way to Bosnia and Herzegovina.[94]
- Claude Bellerose (P-97) stated that during the night of 5 or 6 August 1995 individual ARSK soldiers sought and were given refuge at the UN Camp.[95]
- Lennart Widen (P-153) testified that after Operation Storm ended ARSK soldiers could not be seen in Knin.[96]
- Sava Mirkovic (P-38) stated that on the evening of 4 or the morning of 5 August 1995 in the area of Polace the ARSK were nowhere to be seen.[97]
- Milan Ilic (P-24) testified that by 7 August 1995 the ARSK left Donji Lapac.[98] He said: "[*A*]*s for RSK army, there was no one there. They had all left*."
- Laila Malm (P-129) testified that on 6 or 7 August 1995 ARSK soldiers were leaving in conjunction with the convoys towards Bosnia.[99]
- Soren Liborious (P-127) had learnt from the UN that on 4 August 1995 both ARSK military and political leadership had disappeared.[100]
- Robert Williams (P-154) testified that on 5 August 1995 he saw the evacuation of the ARSK's 15th Lika Corps towards Otric.[101] Furthermore,

[93] Ermolaev, M. (P-111), P94, P95, and T.2420-2423.
[94] T.4871:14-4871:22.
[95] T.5898:8-5899:10.
[96] T.7313:15-7313:18.
[97] T.7450:6-7450:12.
[98] T.7554:6-7554:11.
[99] T.8166:2-8166:9.
[100] T.8591:9-8591:23.
[101] T.9646:22-9647:18.

on 6 August he witnessed an ARSK convoy of approximately 150 people, 6 trucks, 2 guns, 1 tank, and police vehicles heading from the RSK through Martin Brod to Bosnia and Herzegovina.[102]

- Erik Hendriks (P-119) testified that the majority of the ARSK soldiers began to abandon their positions after the notice on Radio Knin on the 4 August, but some left even before that notice on the radio was given.[103]
- Rajko Gusa (P-23) was told by his unit commander, Maricic, to withdraw at around 19hrs on 4 August 1995.[104]
- Stig Marker-Hansen (P-130) testified that on 13 August remnants of the ARSK were hiding in the hills.[105] This fact was also confirmed in the ECMM report from 13 August 1995.[106]
- Marko Rajcic (P-172) testified that on 9 August groups of ARSK forces were pulling out of Donji Lapac.[107]
- Mile Mrkšić (AG-38) testified that some units of the ARSK were left behind in the Serbian Krajina[108] and the remnants of those groups were moving through the woods attempting to cross the Una River to reach Ostrelj, an area under the control of Republika Srpska.[109] The groups contained five or six soldiers but they kept splitting into smaller groups to avoid being discovered.[110] Furthermore, the witness noted on 5 August 1995 in his order specifying measures to stabilize defence that ARSK soldiers and officers were leaving their units and some of the units were even annulled.[111]

[102] T.9649:1-9649:16.
[103] T.9682:22-9683:3.
[104] T.9859:19-9859:25.
[105] T.15007:7-15007:16.
[106] T.15009:12-15009:20.
[107] T.17658:14-17659:12.
[108] T.19007:5-19007: 10.
[109] T.19009:16-19009:25.
[110] T.19008: 6-19008:15.
[111] D1511.

49. The fact that the Special Police were ordered to track remnants of the ARSK in their mop-up operations as part of establishing law and order in the newly liberated areas is another indication that the army of the RSK was not organized in accordance with the '*Tadić* definition' after 8 August 1995.

- Zoran Cvrk (MM-04) testified that there was contact with enemy soldiers between 21 August and 3 September 1995.[112]
- Davor Pavlović (MM-05) testified that as late as 21 August the Special Police were given the task of uncovering armed enemy soldiers hiding in the hills and forests.[113]
- Dragutin Repinc (MM-21) confirmed during his testimony that there were remnants of enemy forces in Sector South.[114]

50. The evidence, *supra*, proves that the ARSK began to dissolve early on in Operation Storm and did not constitute an organized group according to the *Tadić* test after 8 August 1995.

Conclusion

51. The Markač Defence respectfully submits that the two cumulative criteria of intensity and organization of the parties, set forth in Tadić, have not been satisfied. Any crimes that were allegedly committed after the completion of the Operation Storm, that is on or about 8 August 1995 did not occur in a state of armed conflict, as required by Articles 3 and 5 of

[112] T.25429:6-25430:8.
[113] T.25278:11-25278:20.
[114] T.26872:21-26874:21.

the ICTY Statute. The charges against Markač should be dismissed for lack of jurisdiction.

CRIMES AGAINST HUMANITY

52. The OTP has not met its burden of proof to support a conviction of Markač on the charge of Crimes Against Humanity.

Legal Requirements

53. To establish crimes against humanity under Article 5 of the Statute the OTP must prove an attack on the civilian population *per se*, that is of a sufficiently widespread or systematic character to exclude unorganized, random and unconnected acts.

54. As the Appeals Chamber has held:

> *The assessment of what constitutes a 'widespread' or 'systematic' attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken in account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-à-vis this civilian population.*[115]

55. The term "population" does not imply that the attack must be directed against the entire civilian population of a given territory. It must be shown, however, that enough individuals are targeted in the course of the

[115] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Judgement, 12 June 2002, para. 95 ("*Kunarac et al.*, AJ).

attack, or that they were targeted in such a way as to satisfy the Trial Chamber that the attack was in fact directed against the civilian "population" rather than against "a limited and randomly selected number of individuals."[116]

56. Although the existence of a policy is not a legal requirement of Article 5:

> *evidence of a policy or plan is an important indication that the acts in question are not merely the working of individuals acting pursuant to haphazard or individual design, but instead have a level of organizational coherence and support of a magnitude sufficient to elevate them into the realm of crimes against humanity. It stands to reason that an attack against a civilian population will most often evince the presence of policy when the acts in question are performed against the backdrop of significant State action and where formal channels of command can be discerned."*[117]

INDIVIDUAL CRIMINAL RESPONSIBILITY

Planning

57. Planning requires that one or more persons design criminal conduct constituting one or more statutory crimes that are later perpetrated,[118] with the awareness of the substantial likelihood that a crime would be

[116] *Kunarac* AJ para. 90.
[117] *Limaj* TJ, para. 212.
[118] *Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2, Appeals Judgement, 17 December 2004, para. 26 (*Kordić and Čerkez* AJ).

committed in the realization of that act or omission.[119] This applies whether the *mens rea* of a crime is general or specific[120]

58. While there are often several people involved in a plan, planning can be done by one person acting alone.[121] It is not necessary to establish that the crime at issue would not have been committed absent the accused's plan; however, the Appeals Chamber has held that the plan must have been a factor "substantially contributing to … criminal conduct constituting one or more statutory crimes that are later perpetrated."[122] there cannot be liability for planning of the crime which the accused is charged with planning if the crime was not actually committed.[123]

59. There is no evidence to support the OTP's allegation that Markač planned and/or participated in the planning of any of the crimes alleged in the Indictment.

Instigating

60. Instigation requires that the OTP prove that an accused prompted another person to commit a crime,[124] with the intent that a crime be committed,[125] or prompted an act or omission with the awareness of the substantial likelihood that a crime would be committed in the realization

[119] *Kordić and Čerkez* AJ, para. 31.
[120] See *Kordić and Čerkez* AJ, para. 112, referring to *Blaškić* AJ, para. 166. The *Kordić and Čerkez* Appeals Chamber first considered the requisite *mens rea* for establishing liability under Article 7(1) of the Statute, pursuant to planning and subsequently applied it to the crime of persecution.
[121] *Kordić and Čerkez* AJ, para. 26.
[122] *Kordić and Čerkez* AJ, para. 26.
[123] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Appeals Judgement, 24 March 2000, para. 165 ("*Aleksovski* AJ"). See also *Prosecutor v. Orić,* Case No. IT-03-68, Trial Judgement, 30 June 2006, para. 269, fn. 732 ("*Orić* AJ"); *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Judgement, 1 September 2004, para. 271 (*Brđanin* TJ); *Prosecutor v. Simić et al.*, Case No. IT-95-9, Trial Judgement, 17 October 2003, para. 161 ("*Simić et al*. TJ").
[124] *Brđanin* AJ, para. 312; *Kordić and Čerkez* AJ, para. 27.
[125] *Brđanin* AJ, para. 312; *Kordić and Čerkez* AJ, para. 27.

of that act or omission.[126] This applies whether the *mens rea* of a crime is general or specific.[127]

61. The prompting that constitutes instigation need not be direct or public.[128] Moreover, liability for instigation may be incurred even though an accused lacks any sort of authority over the person committing the crime.[129]

62. While the OTP need not prove that the crime at issue would not have been committed absent the accused's prompting, the Appeals Chamber has held that the prompting must have been a factor substantially contributing to the conduct of another person in committing the crime."[130] The logical implication of this pronouncement is that there cannot be liability for instigating, if the crime which the accused is charged with instigating, was not actually committed.[131]

63. A causal relationship between the instigation and commission of the crime must be proved before an instigator will be deemed criminally responsible.[132] To establish a causal link, it must be demonstrated that

[126] *Kordić and Čerkez* AJ, para. 30.
[127] *Kordić and Čerkez* AJ, para. 32, 112. See also *Blaškić* AJ, para. 166.
[128] *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Appeal Judgement, 1 June 2001, para. 483. (This is distinct from acts of incitement to commit genocide under Article 4(3)(c) of the Statute which must be direct and public) ("*Akayesu* AJ").
[129] *Orić* TJ, para. 272; *Brđanin* TJ, para. 359; *Prosecutor v. Semanza,* Case No. ICTR-97-20-A, Appeals Judgement, para. 257, 20 May 2005, ("*Semanza* AJ").
[130] *Kordić and Čerkez* AJ, para. 27. See also *Prosecutor v. Gacumbitsi,* Case No. ICTR-2001-64, Appeals Judgement, 7 July 2006, para. 129 ("*Gacumbitsi* AJ"); *Kordić and Čerkez* AJ, para. 27.
[131] This conclusion has been explicitly stated by several Trial Chambers. See, *e.g. Orić* TJ, para. 269, fn 732; *Brđanin* TJ, para. 267; *Prosecutor v. Galić*, Case No. IT-98-29, Trial Judgement, 5 December 2003, para. 168 ("*Galić* TJ"). See also *Prosecutor v. Mpambara* Case No. ICTR-01-65-T, Trial Judgement, 12 September 2006, para. 18 ("*Mpambara* TJ").
[132] See *Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-T, Trial Judgement, 7 June 2001, para. 30 ("*Bagilishema* TJ"); *Prosecutor v. Blaškić,* Case No. IT-95-14, Trial Judgement, 3 March 2000, para. 278 ("*Blaškić* TJ"); *Prosecutor v. Muhimana*, Case No. ICTR-95-1-I, Appeals Judgement, 21 May 2007, para.

the instigation was a factor substantially contributing to the conduct of another person committing the crime, but it need not be proved that the crime would not have been committed without the accused's involvement.[133]

64. In order to establish that an accused possesses the requisite *mens rea* for instigating a crime, it must be shown that the Accused directly or indirectly intended that the crime in question be committed and that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.[134] The instigator must be aware of the type and elements of the crime that is being instigated.[135] *Mens rea* cannot be established by acts or words that are ambiguous and can be interpreted in more than one way.[136]

65. In spite of the broad allegation of instigation, the OTP has failed to adduce any evidence that Markač prompted anyone to commit a crime with the intent that a crime be committed, or prompted an act or omission with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission.

---

504 ("*Muhimana* AJ"). This causal relationship is a significant element of the *actus reus* of instigating and distinguishes it from the *actus reus* of aiding and abetting for which no causal link with the commission of the crime is required (*Prosecutor v. Fofana & Kondewa*, SCSL, AJ, 28 May 2008, para. 129) ("*Fofana & Kondewa*, SCSL AJ").

[133] *Kordić & Čerkez* TJ, para. 27; *Limaj et al.*, TJ, para. 514; *Orić* TJ, para. 274; *Nahimana et al.* AJ, para. 480 and 502; *Gacumbitsi* AJ, para. 129.

[134] Prosecutor v. *Nahimana,* Case No. ICTR-96-11, Appeals Judgement, 28 November 2007, para. 480 ("*Nahimana* AJ"); *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Trial Judgement, 12 September 2006, para. 465 ("*Muvunyi* TJ"); *Kordić & Čerkez,* TJ, para. 32; *Limaj et al.*, para. 514; *Orić* TJ, para. 279; *Brima et al.* SCSL "Decision on Defence Motions for Judgement of Acquittal to Rule 98," 31 March 2006, para. 293; *Fofana & Kondewa* SCSL TJ, para. 223

[135] *Orić* TJ, para. 279.

[136] *Fofana & Kondewa*, SCSL AJ, para. 56.

Ordering

66. Ordering requires that an accused instructed another person to engage in an act or omission[137] with the intent that a crime be committed in the realization of that act or omission,[138] or with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission.[139]

67. The *Blaskic* Appeals Chamber held that "an individual who orders an act with the awareness of a substantial likelihood that persecutions as a crime against humanity will be committed in the order's execution, may be liable under Article 7(1) for the crime of persecutions."[140]

68. The OTP need not demonstrate that a formal superior-subordinate relationship existed between the accused and the individual committing the crime.[141] Instead, it must merely put forth "proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order."[142] The accused need

[137] *Prosecutor v. Galić,* Case No. IT-98-29, Appeals Judgement, 30 November 2006, para. 176 ("*Galić* AJ"); *Kordić and Čerkez* AJ, para. 28. See also *Semanza* AJ, para. 361.
[138] *Kordić and Čerkez* AJ, para. 29. See also *Ntagerura et al.* AJ, para. 365.
[139] *Galić* AJ, para. 152; *Kordić and Čerkez* AJ, para. 30; *Blaškić* AJ, paras. 41-42.
[140] *Blaškić* AJ, para. 166. See also *Prosecutor v. Blaškić,* Case No. IT-95-14-A, Appeals Judgement, 29 July 2004, para. 42 ("*Blaškić* AJ"); *Kordić and Čerkez* AJ, para. 30.
[141] *Galić* AJ, para. 176. See also *Semanza* AJ, para. 361; *Prosecutor v. Kamuhanda,* ICTR-99-54, Appeals Judgement, 19 September 2005, para. 75 ("*Kamuhanda* AJ"). (In contrast to superior responsibility under 7(3), an accused may incur liability for ordering even though he did not enjoy effective control over the person ordered, *Kamuhanda* AJ, para. 75).
[142] *Semanza* AJ, para. 361. See also *Galić* AJ, para. 176; *Kamuhanda* AJ, para. 75; *Kordić and Čerkez* AJ, para. 30.

not give the order directly to the person committing the crime,[143] and the order need not be in writing or in any particular form.[144]

69. The order must have had "a direct and substantial effect on the commission of the illegal act."[145] There cannot be liability for ordering, if the crime which the accused is charged with ordering was not actually committed.[146]

70. No evidence has been adduced at trial to support the OTP's allegation that Markač instructed another person to engage in an act or omission with the intent that a crime be committed in the realization of that act or omission, or with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission.

Aiding and Abetting

71. Aiding and abetting is a form of accomplice liability.[147] In *Blagojević and Jokić*, the Appeals Chamber reiterated that:

> an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain crime … The requisite mental element of aiding and abetting is

[143] *Prosecutor v. Strugar* TJ, Case No. IT-01-42, Trial Judgement, 31 January 2005, para. 331 ("*Strugar* TJ"); *Brđanin* TJ, para. 270; *Prosecutor v. Naletilic and Martinovic,* Case No. IT-98-34, Trial Judgement, 31 March 2003, para. 61 ("*Naletilic and Martinovic* TJ"); *Kordić and Čerkez* TJ, para. 388.
[144] *Kamuhanda* AJ, para. 76.
[145] *Kamuhanda* AJ, para. 75. See also *Strugar* TJ, para. 332; *Galić* TJ, para. 169.
[146] *Prosecutor v. Martić,* Case No. IT-95-11, Trial Judgement, 12 June 2007, para. 441 ("*Martić* TJ"); *Brđanin* TJ, para. 267; *Prosecutor v. Kajelijeli,* Case No. ICTR-98-44A-T, Trial Judgement, 1 December 2003, para. 758 ("*Kajelijeli*"); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber Judgement, 15 May 2003, para. 229 ("*Semanza* TJ").
[147] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgement, 15 July 1999, para. 229 ("*Tadić* AJ").

knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator.[148]

72. The Appeals Chamber, however, observed that "specific direction" was not always included as an element of the *actus reus* of aiding and abetting.[149]

73. An aider and abettor contributes "to the preparation" of a crime, whether he assists a crime committed by a physical perpetrator or a participant in a joint criminal enterprise who might not be a physical perpetrator.[150] There cannot be liability for aiding and abetting if the crime which the accused is charged with aiding and abetting was not actually committed.[151]

74. An accused needs to know that his acts assist the commission of the crime that he is charged with aiding and abetting, though the accused does not need to have the intent to commit the crime.[152] The aider and abettor does not need to know who is committing the crime.[153] The person(s) committing the crime need not have been tried or identified, even in

[148] *Blagojević and Jokić* AJ, para. 127. See also, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Judgement, 28 November 2006, para. 85-86 ("*Simić* AJ"); *Prosecutor v. Vasiljevic*, Case No. IT-98-32, Appeals Judgement, 25 February 2004, para. 102 ("*Vasiljevic* AJ"); *Blaškić* AJ, para. 45; *Tadić* AJ, para. 229. See also, *Ntagerura et al.* AJ, para. 370.
[149] *Blagojević and Jokić* AJ, para. 189, referring to *Prosecution v.* Krnojelac, Case No. IT-97-25, Appeals Judgement, 17 September 2003, para. 37, ("*Krnojelac* AJ"), citing *Tadić* AJ, para. 229; *Čelebići* AJ, para. 345, citing *Tadić* TJ, para. 668.
[150] *Blagojević and Jokić* AJ, para. 127; *Brđanin* AJ, para. 484; *Simić* AJ, para. 86; *Blaškić* AJ, para. 49; *Vasiljevic* AJ, para. 102.
[151] *Aleksovski* AJ, para. 165.
[152] *Brđanin* AJ, para. 484; *Blaškić* AJ, para. 49; *Vasiljevic* AJ, para. 102, 142-13; *Aleksovski* AJ, para. 162; *Tadić* AJ, para. 229.
[153] *Prosecutor v. Krstić* Appeals Judgement, Case No. IT-98-33, 19 April 2004, para. 143 ("*Krstić* AJ"). See also *Brđanin* AJ, para. 355. The *Krstić* Appeals Chamber held Krstić responsible for aiding and abetting genocide, irrespective of the fact that the individuals committing the genocide were not identified.

respect of a crime that requires specific intent.[154] Neither does the person(s) committing the crime need to be aware of the involvement of the aider and abettor.[155] Accordingly, the OTP generally needs to provide evidence that a plan or an agreement existed between the aider and abettor and the person(s) committing the crimes.[156]

75. While an accused may know of a number of crimes that might be committed with his contribution, he must be aware, at a minimum, of the essential elements of the crime for which he is charged with aiding and abetting.[157] The accused needs to know that the person(s) in the joint criminal enterprise intended the crime he is charged with aiding and abetting.[158] With respect to specific-intent crimes such as genocide and persecution, the accused needs to know that the person(s) in the joint criminal enterprise possessed the requisite discriminatory intent.[159]

76. The assistance, encouragement, or moral support provided by an aider and abettor must have had a substantial effect on the commission of the crime.[160] The OTP need not, however, prove that the crime would not have been committed absent the contribution of the aider and abettor.[161]

---

[154] *Krstić* AJ, para. 143. See also *Brđanin* AJ, para. 355.
[155] *Tadić* AJ, para. 229.
[156] *Krnojelac* AJ, para. 33. *Tadić* AJ, para. 229.
[157] *Brđanin* AJ, para. 484; *Simić* AJ, para. 86; *Aleksovski* AJ, para. 162.
[158] *Brđanin* AJ, paras. 487-488.
[159] *Krstić* AJ, para. 143; *Vasiljevic* AJ, paras. 142-143. See *Blagojević and Jokić* AJ, para. 127; *Simić* AJ, para. 86; *Krstić* AJ, para. 140 (genocide); *Krnojelac* AJ, para. 52 (persecution). See also *Semanza* AJ, para. 316 (genocide); *Prosecutor v. Ntakirutimana and Ntakirutimana,* Case No. ICTR-96-10-A-ICTR-96-17-A, Appeals Judgement, 13 December 2004, para. 501(genocide) ("*Ntakirutimana and Ntakirutimana* AJ").
[160] *Brđanin* AJ, para. 348; *Simić* AJ, para. 85; *Blaškić* AJ, para. 46; *Vasiljevic* AJ, para. 102; *Čelebići*AJ, para. 352; *Aleksovski* AJ, para. 162; *Tadić* AJ, para. 229. See also *Gacumbitsi* AJ, para. 140; *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Judgement, 10 December 1998, para. 234 ("*Furundzija* TJ").
[161] *Mrkšić and Šljivančanin* AJ, para. 81 (holding [t]here is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that

77. The Appeals Chamber has held that omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.[162] The *actus reus* of aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realization of that crime.[163] Moreover, the Appeals Chamber has consistently found that, in the circumstances of a given case, the *actus reus* of aiding and abetting may be perpetrated through an omission.[164] The *Orić* Appeals Chamber held that:

> *At a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (actus reus). The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal* (*mens rea*).[165]

---

such conduct served as the precedent to the commission of the crime"); *Brđanin* AJ, para. 348; *Simić* AJ, para. 85; *Blaškić* AJ, para. 48 ("[i]n cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to the official sanction of the crime and thus substantially contributes to it" (*Brđanin* AJ, para. 277, referring to *Kayishema and Ruzindana* AJ, para. 201; *Akayesu* TJ, paras. 706-707; *Furundzija* TJ, para. 207-209; *Aleksovski* TJ, para. 88*; Bagilishema* TJ, para. 36; *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Trial Judgement, 15 July 2004, para. 457 ("*Ndindabahizi* TJ").

[162] *Mrkšić and Šljivančanin* AJ, para. 49, citing *Orić* AJ, para. 43; *Brđanin* AJ, para. 274; *Galić* AJ, para. 175; *Blaškić* AJ, para. 663; *Ntagerura et al.* AJ, paras. 334, 370. See also *Tadić* AJ, para. 188.

[163] *Mrkšić and Šljivančanin* AJ, para. 49, paraphrasing *Orić* AJ, para. 43, citing *Nahimana et al.* AJ, para. 482; *Simić* AJ, para. 85.

[164] *Mrkšić and Šljivančanin* AJ, 134, referring to *Blaškić* AJ, para. 47. See also *Nahimana et al.* AJ, para. 482; *Ntagerura et al.* AJ, para. 370.

[165] *Orić* AJ, para. 43. See also *Mrkšić and Šljivančanin* AJ, para. 49.

78. Thus, the *actus reus* and *mens rea* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.[166] The critical issue to be determined is whether, on the particular facts of a given case, it is established that the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime, and had a substantial effect on it. In particular, the question as to whether an omission constitutes "substantial assistance" to the perpetration of a crime requires a fact-based inquiry.[167] The fact that the accused provided a more limited assistance to the commission of a crime than others does not preclude the accused's assistance from having had a substantial effect on the perpetration of the crime.[168] With regard to the standard of proof, the OTP must show (i) that the omission had a substantial effect on the crime in the sense that the crime would have been substantially less likely had the accused acted; and (ii) that the accused knew that the commission of the crime was probable and that his inaction assisted it.[169]

79. The *Mrkšić and Šljivančanin* Appeals Chamber considered that aiding and abetting by omission necessarily requires that the accused has "the ability to act, or, in other words, that there were means available to the accused to fulfil his duty."[170]

80. The OTP's allegation that Markač aided and/or abetted the commission of crimes fails under scrutiny. Markač took no positive or passive steps to

[166] *Mrkšić and Šljivančanin* AJ, para. 146, referring to *Orić* AJ, para. 43; *Blaškić* AJ, para. 47. ("The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting").
[167] *Mrkšić and Šljivančanin* AJ, paras. 146, 200, referring to *Blagojević and Jokić* AJ, para. 134 ("The Appeals Chamber observes that the question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry"); *Muvunyi* AJ, para. 80.
[168] *Mrkšić and Šljivančanin* AJ, para. 200, citing *Blagojević and Jokić* AJ, para. 134.
[169] *Mrkšić and Šljivančanin* AJ, paras. 97, 101; *Orić* AJ, para. 43.
[170] *Mrkšić and Šljivančanin* AJ, paras. 97, 101; *Orić* AJ, para. 43.

encourage the commission of crime. Further, even if members of the Special Police had committed crimes, the crimes in question were effectively concealed from Markač by virtue of inaccurate reporting through the chain of command.[171]

81. Markač was entitled to rely upon the information communicated to him by his subordinates. In light of the information available to him, Markač acted with probity and professionalism, and played no role in encouraging (be it by commission, omission, or a combination of the two) his forces to engage in criminal conduct of any description.

82. In the event that the Trial Chamber were to determine that Markač had, by commission, omission, or a combination of the two, made a substantial contribution to the crimes alleged in Grubori, his contribution would have to have been made *ex post facto*. In light of the fact that the Tribunal's Statute does not recognize aiding and abetting on an exclusively retroactive basis as a crime, Markač cannot be held criminally responsible under Article 7(1) of the Statute for aiding and abetting the alleged crimes.[172]

Committing, including Participation in a Joint Criminal Enterprise

[171] See also Section on Superior Responsibility.

[172] See *Blagojević and Jokić* TJ, para. 731. Though various judgements (See, for example, *Kunarac* TJ, para. 391; *Blaškić* TJ, para. 285; *Naletilic and Martinovic* TJ, para. 63; *Prosecutor v. Kvocka,* Case No. IT-98-30/1, Trial Judgement, 2 November 2001, para. 256 ("*Kvocka* TJ"); *Brđanin* TJ, para. 271) of the Tribunal state in general terms that aiding and abetting may consist of assistance given "before, during or after" the commission of the crime, such general statements cannot be taken to mean that assistance given after the commission of a crime can constitute aiding and abetting in the absence of prior agreement.

Joint Criminal Enterprise (JCE)

83. The OTP alleges the existence of a JCE between at least July 1995 and 15 November 1995, the common purpose of which was "the permanent removal of the Serb population from the Krajina by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means."[173]

84. The OTP alleges that the joint criminal enterprise came into existence during a meeting in Brioni on 31 July 1995, and that counts 1-5 were intended and within the purpose of the joint criminal enterprise ("JCE I").[174] As to counts 6-9, the OTP alleges that these crimes were not within the purpose of the JCE but were the natural and foreseeable consequence of the JCE ("JCE III").[175]

85. The indictment states that "members of the joint criminal enterprise used or cooperated with others, including those under their command or effective control, to facilitate or carry out the *actus reus* of crimes against the Serbian civilian population and civilian property."[176]

86. In particular, the OTP alleges that Markač participated in the JCE by:

    i. participating in the planning and preparation of the operational use of the Special Police and attached HV rocket and artillery units in Operation Storm and the continuing related operations and/or actions in the region, from at least July 1995 to early August 1995;

[173] The Indictment, para. 12.
[174] *The Prosecutor v. Gotovina et a*l, IT-06-90, OTP Pre-Trial Brief, 23 March 2007, para.16, Amended Joinder Indictment of 12 March 2008, para 39.
[175] Amended Joinder Indictment of 12 March 2008, para 42
[176] Amended Joinder Indictment of 12 March 2008, para. 16.

ii. ordering the Special Police and attached HV rocket and artillery units in Operatiaon Storm to carry out the operation, from at least July 1995 to approximately 9 August 1995;

iii. ordering the Special Police to carry out continuing related operations and/or actions in the region from at least 10 August 1995 to 30 September 1995;

iv. permitting, denying and/or minimizing the ongoing criminal activity, including participating in the reporting of false, incomplete or misleading information regarding crimes committed, while knowing that widespread destruction and plunder of property belonging to Serb civilians and the unlawful killing and inhumane treatment of Krajina Serbs were ongoing;

v. failing to establish and maintain law and order among, and discipline of, his subordinates, and neither preventing nor punishing crimes committed by them against the Krajina Serbs.

87. The Accused are charged pursuant to JCE I and JCE III. In respect of both categories, the requirements of a JCE are: (i) a plurality of persons[177], (ii) a common criminal plan, design or purpose which amounts to or involves

[177] *Tadić* AJ, para. 227.

the commission of a crime[178] and (iii) participation of the Accused in the common design.[179]

On the Legality of JCE

88. As a preliminary matter, the Markač Defence contests the legality of JCE as a mode of criminal liability within the scope of the Tribunal's Statute. Indeed, the Defence wholly endorses former ICTY Judge Wolfgang Schomburg's view that "the doctrine of JCE in its entirety is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of … [the] ICTY and ICTR, however invented and applied by the Appeal[s] Chamber of both Tribunals."[180]

89. The Defence concurs with Schomburg's view that to apply JCE as a mode of criminal liability is to risk violating the accused's fundamental right not be punished without law (*nullum crimen, nulla poena, sine lege*).[181] It further concurs that JCE III is entirely without basis in the ICTY Statute.[182]

---

[178] *Id.*

[179] *Id.* See also *Limaj* TJ, para. 511, citing *Tadić* AJ at para. 227-28 .

[180] Schomburg, Wolfgang, "Jurisprudence on JCE – revisiting a never ending story," *Cambodia Tribunal Monitor* <http://blog.cambodiatribunal.org/,> 3 June 2010, p. 2. See also: Badar, Mohamed Elewa, "'Just Convict Everyone!' – Joint Perpetration from *Tadić* to *Stakić* and Back Again," *International Criminal Law Review* 6 (2006), pp. 293-302. See also: Bogdan, Attila, "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the Ad Hoc International Criminal Tribunal for the former Yugoslavia," *International Criminal Law Review* 6 (2006) pp. 63-120; Hamdorf, Kai, "The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: a Comparison of German and English Law," *Journal of International Criminal Justice*, 5 (2007) pp. 69-90; Ohlin, Jens David, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise," *Journal of International Criminal Justice*, 5 (2007) pp. 69-90.

[181] *Schomburg* piece, p. 2.

[182] *Schomburg* piece, p. 2. This claim is supported in part by a recently released decision of the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), in which it is observed that some of the case law which the *Tadić* Trial Chamber had determined to be formative of customary international law was unreasoned, and so the basis of liability relied upon by the courts in question unclear ("Decision on the Appeals Against the Co-investigative Judges (sic) Order on Joint Criminal Enterprise (JCE)," Case File No. 002/19-09-2007-ECCC/OCIJ (PTC38), 20 May 2010, paras. 79-82). This finding acted in support of the Pre-Trial Chamber's conclusion that "the authorities relied upon in *Tadić* … constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002" (*Ibid,* para. 83).

On JCE

90. In the event that the Trial Chamber does accept the legality of the JCE doctrine, the Markač Defence submits that the OTP has failed to prove the existence of the alleged JCE. As the Appeals Chamber underscored in *Brđanin*:

a. JCE is "not an open-ended concept that permits convictions based on guilt by association."[183]
b. The Accused must do "far more than merely associate with criminal persons."[184]
c. The OTP must prove beyond a reasonable doubt that:

(i) The participants had a common state of mind to commit the crimes that constitute the criminal purpose of the JCE (or that such offences were a natural and foreseeable consequence of the JCE and the Accused knowingly assumed the risk that they would occur).[185]
(ii) The alleged members of the JCE acted together, or in concert with each other, in the implementation of a common objective.[186]
(iii) The Accused shared the requisite criminal intent. In order to prove this, the OTP must show it is the "only reasonable inference on the evidence."[187]
(iv) The Accused either committed crimes forming part of the JCE, or made a significant contribution,[188] either by

[183] *Brđanin* AJ, para. 428.
[184] *Id.* para. 431.
[185] *Id*. para. 430.
[186] *Prosecutor v. Krajisnik,* Case No. IT-00-39-T, Trial Judgement, 27 September 2006, para. 884, ("*Krajisnik* TJ").
[187] *Brđanin* AJ, para. 429.

procuring or by giving assistance to the execution of crimes forming part of the common objective.[189]

On Participation in a JCE

91. The level of participation attributed to the Accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function.[190]

92. An accused must have carried out acts that substantially assisted or significantly affected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a JCE. The culpable participant would not need to know of each crime committed.[191]

Elements of a JCE

93. Three elements are required for a finding of criminal liability under the JCE doctrine. The first element is the participation of a plurality of

---

[188] *Brđanin* AJ, para. 430.
[189] *Krajisnik* TJ, para. 883.
[190] *Kvocka* TJ, para. 311.
[191] *Kvocka* TJ, para. 312.

persons in a common purpose.[192] The second element is the existence of a common purpose that amounts to or involves the commission of a crime provided for in the Statute.[193] The common purpose need not be previously arranged or formulated but "may materialize extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise."[194] The Trial Chamber must "specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)."[195] The Appeals Chamber has held that where the common purpose is alleged to include crimes committed over a wide geographical area, an accused may be found criminally responsible for his participation in the enterprise, even if his contributions to the enterprise occurred only in a much smaller geographical area.[196]

94. The third element is the participation of the accused in the common purpose.[197] An accused may contribute to and further the common purpose of JCE by various acts, which need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all.[198] While a crime must have been committed for

[192] *Brđanin* AJ, para. 364; *Prosecutor v. Stakić*, Case No. IT-97-24, Appeals Judgement, 22 March 2006, para. 64 ("*Stakić*, AJ"); *Kvocka et al.* AJ, para. 81; *Vasiljevic* AJ, para. 100; *Krnojelac* AJ, para. 31; *Tadić* AJ, para. 227. See also *Ntakirumana and Ntakirutimana* AJ, para.466.
[193] *Brđanin* AJ, para. 364; *Stakić* AJ, para. 64; *Kvocka et al.* AJ, para. 81; *Vasiljevic* AJ, para. 100; *Krnojelac* AJ, para. 31; *Tadić* AJ, para.227; See also *Ntakirumana and Ntakirutimana* AJ, para.466; *Kayishema and Ruzindana* AJ para. 193.
[194] *Furundzija* AJ, para. 119, quoting *Tadić* AJ, para. 227. See also *Brđanin* AJ, para. 418.
[195] *Brđanin* AJ, para. 430.
[196] *Tadić* AJ, para. 199, fn 243, citing two cases of the Supreme Court for the British Zone (of occupied Germany) dealing with the participation of accused in the *Kristallnacht* riots: *Case no. 66*, Strafsenat. Urteil vom 8 Februar 1949 gegen S. StS 120/48, vol. II, pp. 284-290 and Case no. 17, vol. I, pp. 94-98.
[197] *Brđanin* AJ, para. 364, 427; *Stakić* AJ, para. 64; *Kvocka et al.* AJ, para. 81; *Vasiljevic* AJ, para. 100; *Krnojelac* AJ, para. 31; *Tadić* AJ, para.227. See also *Ntakirutimana and Ntakirutimana* AJ, para. 466; *Kayishema and Ruzindana* AJ, para. 193.
[198] *Krajisnik* AJ, para. 215; *Brđanin* AJ, para. 427; *Stakić* AJ, para. 64; *Kvocka et al.* AJ, para. 99; *Tadić* AJ, para. 227.

liability through JCE to ensue,[199] the Prosecutor need not demonstrate that the accused's participation is essential to the commission of the crime.[200]

95. The Appeals Chamber has held that, for liability for participation in a JCE, it suffices that an accused perform acts "that in some way are directed to the furthering of the common plan or purpose."[201] The participation or contribution of an accused to the common purpose need not be substantive,[202] but "it should at least be a significant contribution to the crimes for which the accused is found responsible."[203]

96. The common criminal objective of the JCE may also evolve over time, as the Appeals Chamber has held, "a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means."[204] It means that the crimes that make up the common purpose may evolve and change over time and as such the JCE may have different participants at different times. Determinative factors are the accused's intention and whether the expanded crimes became part of the common objective.[205]

97. The Appeals Chamber has held that persons carrying out the *actus reus* of the crime forming part of the common purpose need not have been

[199] *Brđanin* AJ, para. 430.
[200] *Kvocka et al.* AJ, para. 98, 193; *Tadić* AJ, para. 191, 199.
[201] *Brđanin* AJ, para. 430.
[202] *Kvocka et al*., AJ, para. 187; *Vasiljevic* AJ, para. 102; *Tadić* AJ, para. 229.
[203] *Krajisnik* AJ, para. 215; *Prosecutor v. Babić*, Case No. IT-03-72, Appeals Judgement, 18 July 2005, ("*Babić* AJ"), para. 38; *Kvocka et al.* AJ, para. 99; *Ntakirutimana* AJ, para. 466; *Vasiljevic* AJ, para. 100; *Krnojelac* AJ, para. 31, 81; *Tadić* AJ, para. 227(iii).
[204] *Krajisnik* AJ, para. 163; *Brđanin* AJ, para. 410.
[205] *Krajisnik* AJ, paras. 164-173.

participants in or members of the JCE.[206] Consequently, persons carrying out the *actus reus* of the crime need not share the intent of the crime with the participants in the common purpose.[207] Nor is the mental state of persons carrying out the *actus reus* of a crime a determinative factor in finding the requisite intent for the participants in a JCE.[208] It is necessary, however, that the JCE member used the non-member to commit the *actus reus* of a crime that can be imputed to the member of the JCE.[209] This is assessed on a case-by-case basis.[210]

On JCE III

98. For an accused to incur JCE III liability, the OTP must first prove, as for the first category, that the accused possesses the intent for the crimes forming part of the common purpose.[211] Further, an accused "can only be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group[212] and (ii) the accused willingly took that risk."[213] The Appeals Chamber specified that "willingly took that risk" means that the accused "with the awareness that

[206] *Brđanin* AJ, para., 413, 419, 430. See also *Krajisnik* AJ, para. 25; *Prosecutor v. Martić*, Case No. IT-95-11, Appeals Judgement, 8 October 2008, para. 168 ("*Martić* AJ").
[207] *Brđanin* AJ, para. 362.
[208] *Krajisnik* AJ, para. 226.
[209] *Krajisnik* AJ, paras. 225-226. "Factors indicative of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime. However, it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that he knew of the existence of the JCE; what matters in [JCE I] is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose." *Ibid* para. 226.
[210] *Krajisnik* AJ, para. 226; *Martić* AJ, para. 168; *Brđanin* AJ, para. 413.
[211] *Stakić* AJ, para. 65; *Kvocka et al*., AJ, para. 83; *Vasiljevic* AJ, para. 101; *Krnojelac* AJ, para. 32; *Tadić* AJ, para. 220.
[212] The crimes may also be "perpetrated by one or more of the persons used by [the accused] (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose" (*Brđanin* AJ, para. 413).
[213] *Brđanin* AJ, para. 365, 411. See also *Stakić* AJ, para. 87; *Kvocka et al.*, AJ, para. 83; *Blaškić* AJ, para. 33; *Vasiljevic* AJ, para. 101. See also *Ntakirutimana and Ntakirutimana* AJ, para. 467.

such a crime was a possible consequence of the implementation of that enterprise, decided to participate in the enterprise."[214]

99. For JCE III liability, the accused does not need to possess the requisite intent for the extended crime.[215] This also applies to specific intent crimes.[216] The mental state of the person or persons carrying out the *actus reus* of the extended crimes is therefore not relevant for the finding of the mental state of the accused, but is determinative to the finding of which extended crime is committed, if any.

100. A person participates in a JCE either:

(i) by participating directly in the commission of the agreed crime itself (as a principal offender)
(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the JCE to commit that crime; or
(iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of

[214] *Brđanin* AJ, para. 411.
[215] *Brđanin* March 2004 Interlocutory Appeal Decision, paras. 5-7.
[216] *Brđanin* March 2004 Interlocutory Appeal Decision, para. 6, 9. The *Brđanin* Appeals Chamber found that an accused can be found criminally responsible for the crime of genocide under JCE III if the OTP can "establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) [of the Statute] would be committed and that it would be committed with genocidal intent." Genocidal intent on the part of the accused is not required. *Id.*

the nature of that system and intent to further that system.[217]

101. The OTP must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed. The arrangement or understanding need not be express, and it may be inferred from all the circumstances.[218]

102. JCE III requires the intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[219]

On JCE and Aiding and Abetting

103. Participation in a JCE is a form of 'commission' under 7.1. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a JCE, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus*

[217] *Krnojelac* TJ, para. 81.
[218] *Vasiljevic* TJ, para. 66.
[219] *Krnojelac* AJ, para. 32.

reus as well as to the *mens rea* requirements between both forms of individual criminal responsibility.

104. The Appeals Chamber set forth the distinction between co-perpetration by means of a JCE and aiding and abetting, in *Vasiljevic*:

a. the aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a JCE to perform acts that in some way are directed to the furtherance of the common design.

b. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a JCE, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

105. When an aider and abettor is held responsible for assisting an individual crime committed by a single perpetrator or for assisting in all the crimes committed by the plurality of persons involved in a JCE depends on the effect of the assistance and on the knowledge of the accused. The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or a plurality of persons. Where the aider and abettor only

knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a JCE involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of the group of persons involved in a JCE and shares the intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.[220]

106. The requisite *mens rea* for JCE III is twofold. First, the Accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the JCE.[221]

107. It is evident that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective that makes those persons a group.[222]

108. As stated in *Kvocka*, there is no form of responsibility provided for in the Statute or in customary international law which could be described as 'aiding and abetting a JCE.' Gradations of fault within the JCE are possible, and may be reflected in the sentences given. However, a person's conduct

[220] *Kvocka* AJ, para. 90.
[221] *Kvocka* AJ, para. 83.
[222] *Krajisnik* TJ, para. 884.

either meets the conditions of JCE membership in which he is characterized as a co-perpetrator, or the conduct fails the threshold, in which case there is no JCE responsibility.[223]

109. For it to be possible to hold an accused responsible for the criminal conduct of another person, there must be a link between the accused and the crime as legal basis for the imputation of criminal liability.[224]

110. The imposition of liability upon an accused for his participation to further a common criminal purpose does not require an understanding or an agreement between the accused and the principal perpetrator of the crime to commit that particular crime.[225] However, it is undeniable that proving the existence of such an agreement may be an appropriate way of establishing that a crime formed part of the common purpose, especially with respect to JCE I and JCE III … this finding cannot be interpreted … to mean that the criterion set by the Appeals Chamber in the *Tadić* case requires, in addition to the existence of a common purpose amounting to or involving the commission of a crime provided for in the Statute, an agreement between the Accused and the principal perpetrator for JCE I and JCE III.[226]

111. In cases where the person who carried out the *actus reus* of the crime is not a JCE member, the key issue remains that of ascertaining whether the crime in question forms part of the common criminal purpose. [227]

[223] *Krajisnik* TJ, para. 886.
[224] *Brđanin* AJ, para. 412.
[225] *Brđanin* AJ, para. 415.
[226] *Brđanin* AJ, para. 418.
[227] *Brđanin* AJ, para. 418.

112. The contours of the common criminal purpose must be properly defined in the Indictment, and supported by the evidence beyond reasonable doubt.[228]

113. The requirement of participation for both forms of JCE is satisfied when the accused assisted or contributed to the execution of the common purpose. The accused need not have performed any part of the *actus reus* of the perpetrated crime. It is also not required that his participation be necessary or substantial to the crimes for which the accused is found responsible. Nevertheless, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[229]

Markač and the JCE

114. The JCE, as alleged by the OTP in paras. 12-20 of the Indictment, is not proven. No evidence has been presented to the Trial Chamber that Markač worked in concert with the co-accused, or anyone else, to realize the alleged JCE at any time. Indeed, the evidence supports the contrary conclusion.

115. There was no JCE. [230] Indeed, the Croatian Administration had nothing to gain and much to lose from executing the JCE alleged by the OTP.[231]

116. In support of the Defence's position, various high-ranking members of the Croatian Administration have testified that they were not subject to

[228] *Brđanin* AJ, para. 424.
[229] *Martić* TJ, para. 440.
[230] Alain Forand, Commander of UN Sector South, testified that there was no criminal plan. T.4506:12-25, 6 June 2008. See also D346 (Globus Article).
[231] Hendriks, E. (P-119), T. 9715:13-9716:3; ECMM, Stig Marker-Hansen, at T. 15088:9-15091:7; (REDACTED)(AG-18), (REDACTED).

any pressure to effect the so-called JCE,[232] and various witnesses have delivered testimony which has further served to discredit the JCE allegation,[233] some of them suggesting that many of the crimes at issue were committed not by Croatian Forces, but civilians.[234] Others have testified that the Croatian administration was heavily under-resourced and ill-prepared to manage the many difficulties which arose in the wake of Operation Storm.[235] Crimes the OTP has framed as integral components of the alleged JCE were most likely perpetrated by individuals set well apart from the Republic of Croatia's administration. Indeed, the Croatian authorities, Markač included, were acting to prevent and prosecute lootings, killings, and burnings.[236]

[232] See, *inter alia*, (REDACTED); Civilian Police Coordinator for the Municipality of Knin, T.: 10117:10-15; Chief of the Republic of Croatia's Military Police, Lausic, M., T. 15668:14-15669:14; President Tuđman's Assistant Chief of Staff, Vesna Skare-Ozbolt (AG-39), T. 18089:14-19 & 18229:20-18230:5 & 18232:13-18; IC-8, Dondo, K. (IC-08), T. 22473:12-24; Pasic, P. (Pasic, P.) Government Commissioner/Trustee for Knin, at T. 22739:7-14, and T.22784:16-21; Cipci, I. (IC-43) Chief of the Kotar-Knin Police Administration, T. 23100:17-23 and 23149:4-24; Cetina, I. (IC-05), Chief of the Zadar-Knin Police Administration T. 23639:22 to 23640:5; Granić, M. (MM-15), the Republic of Croatia's Minister of Foreign Affairs, at T. 24874:25 to 24875:7; Pejkovic, L. (MM-17), T. 25103:7-23; Morić, M. (MM-01), T. 25641:18-25642:11, explains that he was under enormous pressure from the Government of the Republic of Croatia to prevent the commission of crimes; Bagic, S. (MM-28), T. 26559:19 to 26560:8

[233] ECMM, Marker-Hansen, S. (P-130), T. 14983:6-14984:4; Skare-Ozbolt, V. (AG-39), 18090:17-18091:4 and 10891:11-10892:8; The Republic of Croatia's Ambassador to the United Nations (1993-1995), Zuzul, M. (AG-66), T. 18327:4-9 and 18330:24; (REDACTED) (AG-18), (REDACTED); Member of the Republic of Croatia's 15th Guards Brigade, Bilic, V. (AG-8), T. 19638:12-21 (inclusive of D1548, Official Note re: Bilic); Chief of President Tuđman's Cabinet, Radin, G. (IC-11), T. 22148:22-22149:11 and 22150:1-10, and 22179:8-22180:10; Deputy Prime Minister of Economy, Skegro, B. (IC-26), T. 22209:24-22210:18, and 22259:22- 22260:17 (GRUBORI); Pasic, P. (IC-37), Government Commissioner/Trustee of Knin, at T.22742:18 to 22743:7; IC-35, Expert Witness Albiston, C. (IC-35), T. 23857:22 to 23858:22 and 24108:13-24109:3; Granić, M. (MM-15) the Republic of Croatia's Minister of Foreign Affairs, T. 24664:22 to 24665:23, and 24683:11-24685:3, and 24689:8-16, and 24693:3-19, and 24705:23 to 24706:11, and 24723:13 to 24724:8, and 24763:9 to 24763:19, and 24791:20 to 24792:21 and 24957:6-23, and 24993:16-25; Morić, J. (MM-1), at T. 25741:25 to 25742:12 and 25937:6 to 25938:8 (On impossibility of large-scale cover-up).

[234] (REDACTED); the Republic of Croatia's Foreign Minister, Granić, M. (MM-15), at T. 24970:2-24971:21, and T.24973:9-21.

[235] Albiston, C. (IC-35), T. 24112:16-24113:22, and T.24114:22-24115:7.

[236] See Bilic, V. (AG-8) 19640:15 to 19641:9.

117. Several witnesses testified that Markač never exerted any pressure on them to engage in the commission of crimes.[237]

Shelling of Gračac and Donji Lapac

118. Markač was not involved in planning the artillery attacks on these towns.[238] The targets during Operation Storm in the Special Police axis of attack, which included Gračac, were military targets.[239] Exhibit P102, an UNMO Report, states that 15 shells came down in Gračac. This assessment is confirmed by Mile Sovilj and Josip Turkalj's testimony.[240] Civilian areas were not targeted by the Special Police.[241] For further argument on this issue, please refer to the section on Wanton Destruction.

119. The OTP has produced no evidence nor any witness who has testified that there were any civilian casualties in Gračac, or in Donji Lapac.

120. Ive Kardum testified that Gračac was almost completely preserved.[242]

121. General Forand discussed the significant contribution of the Special Police during Operation Storm and praised the Special Police campaign in the Velebit Mountains at Mali Alan.[243]

---

[237] See, for example, Granić, M. (MM-15) at T.24721:5-16; Pavlović, D. (MM-5) at T.25284:7-25286:16; Cvrk, Z. (MM-4) at T.25394:24-25395:22; Morić, J. (MM-1) at T.25584:1-19; Vurnek, D. (MM-12) at T.26195:14-26196:1; Janic, Z (P-81) at T.6383:20-6384:3; Zganjer, Z (P-91)at T.11610:17-11611:3; Sacic, Z. (CW-3), at (REDACTED); Zinic, S. (CW-4) at T.28165:13-17; (CW-4) Identity Protected, at T.28334:6-20; Balunovic, B. (CW-6) at T.28431:14-25; Bajic, M. (AG-5) at T.20781.

[238] P2385, P614, and P552, statement of Janic, Z. (P-81)

[239] See T. 6392:16.

[240] Sovilj, M. (P-48), T.2241:5-12; Turkalj, J. (P-90), T.13706:19-13707:6.

[241] Rajcic, M. (P-172), P2329; Janic, Z. (P-81), T.6392:18-6592:21.

[242] Kardum, I. (P-167), T.9508:5-9508:8.

[243] "The HV [sic] exploited this success … and advanced almost unopposed to Gračac and then further east, thereby cutting off Knin and the south of Krajina. This hub of road junctions effectively

122. General Forand further stated, about the use of artillery, that "their use of artillery was excellent, but the coordination between artillery tanks and infantry was not evident."[244]

123. Military targets in Gračac and Donji Lapac included the Police Headquarters, the Headquarters of the 9th Motorized Brigade of the ARSK, the key crossroads,[245] two large military barracks.

124. The use of artillery in Gračac by the Special Police was legitimate. Only military and strategic items were targeted. The Special Police did not use artillery against Donji Lapac.[246]

125. Neither the Special Police nor Markač were in Donji Lapac on 6 August. The Special Police entered Donji Lapac on 7 August, set up on the outskirts of Donji Lapac, and then left for Kulen Vakuf on the afternoon of the same day.[247]

126. In addition the credibility of OTP witness General Leslie was completely destroyed when in an interview he gave regarding artillery deaths, D329, stated as fact that estimates of dead civilians ranged from 10 to 25,000 due to "deliberate targeting, on a massive scale, of residential areas." For further argument in relation to this matter, please refer to the section on Wanton Destruction.

Conclusion

127. As stated above, a charge or participation in a JCE will only stand if an accused's contribution to the enterprise is determined to have been

---

controlled all north/south communications in the Krajina and could be qualified as a strategic success" (P401).

[244] P401.

[245] Sovilj, M. (P-48) on the strategic importance of Gračac. See: T.2242; T.2244-7; P88 (marked map); and P2250.

[246] D1932, paras. 85-86, describing Gračac as an ARSK centre of gravity.

[247] Pavlovic, D. (MM-5) T.25310; Cvrk, Z. (MM-4) T.25378; Vitez, D. (MM-10) T.25990-92 (specifically stating that Markač came and went on 7 August). See also Markač report to HV Main Staff on 8 August 1995 (P585). See also P614.

significant. According to the Tribunal's jurisprudence, the level of an accused's participation is gauged principally by the following indicators:

i) the position of the accused;
ii) the amount of time the accused spent participating with knowledge of the criminal nature of the system;
iii) the efficiency of the participation;
iv) and any effort to prevent crimes.

128. Markač was, at the time of the Indictment, the Assistant Minister of the Interior, and the Commander of the Special Police.

129. The OTP has not adduced any compelling evidence to suggests that Markač was aware that a criminal enterprise of any description was at play. Accordingly, point (iii) is rendered moot, as an exploration of efficient or inefficient participation should scarcely be embarked upon in the absence of demonstrable participation on the part of the Accused.

130. Insofar as Markač's efforts to prevent crimes are concerned, his conduct was exemplary.[248]

131. In support of the allegation that Markač was a member of a joint criminal enterprise, the purpose of which was the permanent removal of the Serb population from the Krajina region by various illegal means, the OTP points to the fact that Markač, along with a number of high-ranking officials of the Republic of Croatia, attended a meeting on the island of

[248] See Section on Superior Responsibility.

Brioni, at which possibly imminent military action was discussed. According to the transcript,[249] the sum total of Markač's spoken contribution to the meeting consisted of the following:

> *There is no change in the task, except that Norac is heading upward. That means that we are going to drive them into a pocket here and from that point we can head towards Norac, while Norac can head towards Lapac, and we have practically evacuated the entire area. Everything fits in and to all practical purposes we gain with this plan proposed by Gotovina.*[250]

132. These three sentences, which form the lynchpin of the OTP's JCE allegation, contain no suggestion of ethnic hatred and/or intolerance. Indeed, in this quotation no crime is ordered and/or planned, nor can any trace of intention to condone the commission of any crimes be discerned. There is no intimation of JCE.

ARTICLE 7(3): SUPERIOR RESPONSIBILITY

The Legal Standard for Superior Responsibility

133. International law and the Statute of the Tribunal recognize superior responsibility as a theory of criminal liability for superiors who fail to prevent or punish crimes committed by subordinates.[251] The law of superior responsibility predates the Tribunal's Statute, with origins in early law of armed conflict custom, treaties, and case law.[252] The

[249] P461, p. 19.
[250] Exhibit P461, p. 19.
[251] Statute of the International Criminal Tribunal for Former Yugoslavia, U.N. Sec. Council Res. 827, Art. 7(3) (1993) ["ICTY Statute"].
[252] *See* Hague Convention IV Respecting the Laws and Customs of War on Land, art. 1 (1907); *Report Presented to the Preliminary Peace Conference*, *in* THE LAW OF WAR: A DOCUMENTARY HISTORY 842 (Leon

Tribunal has recognized on numerous occasions that superior responsibility existed as a form of liability in customary international law prior to and during the armed conflicts under its jurisdiction.[253]

134. "[S]uperior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not only the 'committing' of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1)."[254] The purpose of superior responsibility is to ensure compliance with international humanitarian law.[255] "[M]ore particularly, the purpose of superior responsibility in Article 7(3) is to hold superiors 'responsible for failure to prevent a crime or to deter the unlawful behaviour of [their] subordinates.'"[256]

135. Superior responsibility exists in international law not as a separate substantive offense but rather as a theory of liability -- a legal means of imputing the crimes of subordinates to a superior notwithstanding failure to take direct part in their commission.[257] In this sense, superior responsibility addresses superiors' culpable omissions rather than affirmative acts contributing to the commission of crimes.[258] Because it treats the accused as a principal to the crimes of subordinates, superior responsibility doctrine reflects a severe approach to omissions. Regarded by legal imputation as a principal to the underlying offense, the convicted superior is potentially subject to the full range of punishment that may be

---

Freidman ed., 1972); *Trial of General Tomoyuki Yamashita in* 4 U.N. War Crimes Commission, Law Reports of Trials of War Criminals, (1997); *In re Yamashita*, 327 U.S. 1 (1946); *United States v. Wilhelm von Leeb et al.*, U.S. Military Tribunal, Nuremberg, *in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462 (1997).

[253] *Prosecutor v. Delalic et al.,* Case No. IT-96-21-A, Judgement (20 Feb. 2001), para. 195 (*Čelebići* Appeal Judgement); *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement (16 Nov. 2005), paras. 39 *et seq*. *See also* GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 462 (1968).

[254] *Blagojević* AJ, para. 280.

[255] *Id.*, para. 281.

[256] *Id.*, quoting Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 56.

[257] *Halilović* TJ, para. 54.

[258] *Id.*

imposed on the actual perpetrators. In this respect, superior responsibility constitutes an exception to widely accepted criminal law limits on liability.[259] Accordingly, the Tribunal has carefully borne in mind the principles of legality and culpability when applying the doctrine.[260] Prosecutions under superior responsibility theory have been extremely rare in domestic military criminal justice systems.[261] In fact, a number of domestic military criminal codes have declined to adopt superior responsibility theory in favor of separate substantive crimes related to dereliction of duty.[262]

136. International law does not include the offense of dereliction of duty, nor does the Tribunal's Statute enumerate such an offense.[263] States appear instead to have preserved the offense as a matter of national responsibility.[264] Consequently, the Tribunal's competence and jurisdiction to redress superiors' alleged failings as such are limited to omissions that satisfy the demanding elements of superior responsibility theory. Domestic or municipal criminal tribunals, therefore, more appropriately treat criminal adjudication of dereliction of duty.

---

[259] *Yamashita* 327 U.S. 1, 39 (1945) (J. Murphy dissenting)(observing "the established principles of international law afford not the slightest precedent for such a charge. This indictment . . . permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in less respected nations in recent years.").

[260] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 38-41 (2008).

[261] *See United States v. Medina*, 20 U.S. Court of Mil. App. 430 (1971) (reviewing the only reported U.S. military criminal OTP under command responsibility theory). A U.S. federal court reviewed and affirmed professional administrative measures imposed on a U.S. officer for failure to investigate the My Lai incident during the Vietnam War. *See Koster v. United States*, 685 F.2d 407 (1982).

[262] *See* United States Uniform Code of Military Justice, article 92(3); Victor Hansen, *What's Good for the Goose Is Good for the Gander Lessons From Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility towards Its Own*, 42 GONZAGA L. REV. 335, 387-97 (2007) (observing U.S. commanders' omissions are traditionally prosecuted as derelictions of duty or under aiding or abetting theories rather than under command responsibility theory). *See also* Trial Testimony, AG-5 (Mladen Bajic) (24 Aug. 2008) at 20766 (relating that Croatia had not implemented command responsibility into domestic law until 2008).

[263] ICTY Statute, Arts. 5-7 (enumerating substantive offenses and theories of liability within the Tribunal's jurisdiction).

[264] *See Koster*, 685 F.2d 407.

137. Within the doctrine of superior responsibility, the Tribunal's cases have distinguished failure to prevent and failure to punish prongs as distinct from one another.[265] The most telling distinction between the offenses is temporal. Where failure to prevent charges address superiors' omissions before subordinates commit crimes, failure to punish cases usually address superiors' omissions with respect to past or completed offenses by subordinates.[266] The charges and the OTP's superior responsibility case against Markač focuses on failure to punish.

138. Two scenarios are likely to give rise to failure to punish charges. First, a superior may face liability where his failure to punish past crimes creates an impression of approval or a climate of impunity leading to future crimes. Though not strictly or proximately required, in such cases a thread of causation becomes apparent between the superior's leadership failures and his subordinates' offenses. As a theory of liability, superior responsibility doctrine imputes the later or resulting crimes to the leader.

139. A superior might also face liability for failure to punish crimes that are completed or essentially *fait accompli*. In such cases, no subsequent offense necessarily follows the alleged failure to punish. Perhaps better characterized as examples of dereliction of duty, logically and legally these cases present a more strained argument for imputed liability. Because the superior's alleged omission follows the crimes in a temporal sense, it is difficult to conceive of the superior's omissions as contributing in a causal sense to the crimes. Thus in such cases it may be more palatable to ground liability in the superior's responsibility for the perpetrators' impunity rather than in his responsibility for the crimes' commission.

[265] *Čelebići* AJ, paras 190-93, 198; *Prosecutor v. Hadžihasanović*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 Jul. 2003), para. 55 (recognizing duties as "separable").
[266] *See Blaškić*, AJ, para. 83.

140. The Tribunal's jurisprudence concerning such cases is uncertain and is evolving.[267] Despite previous Judgements rejecting causation as a requirement, the Tribunal recently observed, "command responsibility may be imposed only when there is a relevant and significant nexus between the crime and the responsibility of the superior accused of having failed in his duty to prevent. Such a nexus is implicitly part of the usual conditions which must be met to establish command responsibility."[268]

141. International law commentators share these misgivings concerning superior responsibility and absence of causation. Endorsing the Appeal Chamber's rejection of superior responsibility against a commander that failed to punish crimes that occurred before he took command, Christopher Greenwood concluded such an approach best reflects the state of customary international law.[269] The same view is a major thesis in a recent treatise on command responsibility.[270] Both commentators observe that causation appears to be a prerequisite for superior liability under the International Criminal Court's Statute.[271] Article 28 of the Rome Statute limits a superior's liability to crimes committed "*as a result of* his or her failure to exercise control properly."[272] It is likely that the Rome Statute's formulation concerning causation best reflects the state of modern customary international law. Though not dispositive on the point, that the Rome Statute reflects a standard parties envisioned applicable to their own commanders and leaders strengthens the case that it accurately reflects widely respected custom.

---

[267] *See id.* (rejecting causation as a prerequisite for superior responsibility). *But see Hadžihasanović*, TJ, para. 192.
[268] *Hadžihasanović*, TJ, para. 192.
[269] Christopher Greenwood, *Command Responsibility and the* Hadžihasanović *Decision*, 2 J. INT'L CRIM. JUST. 598 (2004)(analyzing *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 Jul 2003)).
[270] Guénaël METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 82-89 (2009).
[271] Greenwood, *supra* note 269, at paras. 603-04; METTRAUX, *supra* note 270, at para. 33.
[272] Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 Jul. 1998, art. 28 (emphasis added).

142. At a minimum, the Tribunal has made clear that the basic elements of superior responsibility apply equally to failure to punish cases.[273] The Tribunal has identified three elements of superior responsibility, all of which must be proved by the OTP beyond reasonable doubt.[274]

Superior-Subordinate Relationship

143. To be held criminally responsible, an accused must have held a position of authority with respect to the subordinate offender.[275] Indeed, the control over subordinates' actions that accompanies command authority is the bedrock of superior responsibility doctrine. While the court has recognized both formal, *de jure* authority and informal or *de facto* authority as sufficient to support superior responsibility,[276] "possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control"[277]

144. In each case the superior must have had 'effective control' of the subordinate perpetrators.[278] The Tribunal has observed, "it is necessary that the superior have effective control . . . in the sense of having the material ability to prevent and punish the commission of the . . .

[273] *See Hadžihasanović* TJ, paras. 76-124.
[274] *Halilović* AJ, para. 174; *Blaškić* TJ, para. 308. In *Orić*, the Trial Chamber identified four elements of superior responsibility by adding commission of an underlying criminal offense as a first element. *Orić* Trial Judgement, para. 294. International law commentators have accounted for this additional element as a condition of application of the doctrine generally rather than as an element of liability. *See* METTRAUX, *supra* note 270, paras. 131-32.
[275] *See Čelebići* AJ, paras. 251-52. *See also*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3, art. 86 [hereinafter Additional Protocol I]; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (PROTOCOL I), para. 3524 (Yves Sandoz, et al., eds., 1987) [hereinafter PROTOCOL I COMMENTARY].
[276] *Čelebići* AJ, para. 193.
[277] *Blagojević* AJ, para. 302, quoting *Čelebići* AJ, para. 197.
[278] *Čelebići* AJ, para. 197.

offenses."[279] "[E]ffective control is the ultimate standard and… a showing of effective control is required in cases involving both *de jure* and *de facto* superiors."[280] Factors indicative of an accused's position of authority and effective control include: "the official position held by the accused, his capacity to issue orders, the procedure for appointment, the position of the accused within the military or political structure and the actual tasks that he performed."[281]

145. Superior responsibility is entirely premised on military and similarly empowered superiors' extraordinarily broad powers to compel and redress subordinates' behavior through their exceptional relationships.[282] Addressing the requisite nature of control, the Tribunal has observed, "superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[283] Thus the doctrine anticipates a high degree of authority and influence, analogous to that present in military command relationships.

146. In failure to punish cases, the Tribunal has regarded material ability to punish as an absolute prerequisite to liability and has affirmed acquittals on the basis of an accused's lack of punitive authority.[284] Yet punitive authority is not limited to penal, criminal, or disciplinary measures. Superior-subordinate relationships that feature the power to investigate, initiate investigations, or refer matters to higher authorities for punishment also satisfy the first element of superior responsibility.[285] Indicia of effective control accepted by the Tribunal include: formal

[279] *Id.* (quoting *Prosecutor v. Delalic*, IT-96-21-T, Judgement (16 Nov. 1998) (*Čelebići* TJ). *See also Blaškić* AJ, para. 67; *Hadžihasanović*, IT-01-47-T, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule *98bis* motion Motions for Acquittal (11 Mar. 2005), para. 164.
[280] *Hadžihasanović* AJ para 20.
[281] *Halilović* AJ, para. 139.
[282] *Mrkšić et al.*, TJ, para. 559.
[283] *Čelebići*, AJ, para. 378.
[284] *Halilović* TJ, para. 182; *Halilović* AJ, para. 194.
[285] *Halilović*, AJ, para 182.

procedures of appointment; power to issue orders; power to take disciplinary action; power to arrest perpetrators; and capacity to transmit reports to authorities to initiate redress.[286]

147. At the same time, the Tribunal has recognized circumstances and conditions that tend to undermine or counter effective control. These include: lack of legal authority over perpetrators; poorly functioning channels of command; chaotic conditions of operation; existence of parallel chains of command or lines of disciplinary authority; and subordinates' failure to report offenses.[287]

Mens Rea

148. The Tribunal's Statute restricts liability to instances where the superior "knew or had reason to know" that a subordinate was preparing to or already committed acts within the Statute's substantive criminal jurisdiction.[288] Interpreting Article 7(3) of the Statute, the Tribunal has rejected strict liability, emphasizing that a superior must have been actually aware of his position of authority and had, or had available, information alerting him to the underlying offenses.[289] Articulating its understanding of the customary international law formulation of superior responsibility *mens rea*, the *Čelebići* Trial Chamber observed, "a superior can be held criminally responsible only if some specific information was

[286] *Orić* TJ, para. 312 (citing *Halilović*, TJ, para. 58; *Aleksovski*, TJ, paras 78, 101, 104; *Blaškić*, TJ, para. 302; *Čelebići* TJ, para. 206).
[287] *Orić*, TJ, paras. 503, 705-707. *See also* METTRAUX, *supra* note 270, at 169-70 (cataloging conditions militating against findings of effective control).
[288] ICTY Statute, Art. 7(3).
[289] *Orić* TJ, para 318 (citing *Čelebići* TJ, para. 383; *Brđanin*, TJ, para. 278; *Blagojevic*, TJ, para. 792; *Halilović* TJ, para. 65).

in fact available to him which would provide notice of offences committed by his subordinates."[290]

149. Either actual or imputed knowledge is sufficient to establish *mens rea*.[291] The Tribunal has construed customary international law to permit conviction not only on the basis of information an accused superior actually viewed, but also on the basis of knowledge reasonably available to him that would have put him on notice of the relevant offenses.[292] However, the Tribunal has consistently rejected theories of a general duty to know of offenses.[293] Rather, the Tribunal has maintained that to be held liable under the doctrine, customary international law dictates that superiors either be in possession of such information or actually have information sufficiently available to render notice of the offenses.[294]

150. With respect to failure to punish charges, the OTP must prove beyond reasonable doubt that the accused knew or had reason to know that his subordinates committed qualifying crimes that he had authority to punish or investigate.[295] Although circumstantial evidence may prove the accused's access to sufficient information and knowing disregard thereof, the accused must be shown to have actually possessed or had access to such information.[296] Importantly, the relevant information concerning offenses may not be general in nature but must be sufficiently specific to indicate that the situation demanded punishment or investigation of the superior's personnel.[297]

151. The *Čelebići* Trial Chamber noted the utility of several indicia of whether a superior had the requisite knowledge to establish *mens rea*

[290] *Čelebići* TJ, para. 388 (cited by *Blaškic* TJ, para. 310).
[291] *Čelebići* AJ, para. 241.
[292] *Id.*
[293] *Kordić* TJ, paras 432-37 (citing Additional Protocol I, art. 86).
[294] *Id.* (citing *Čelebići* AJ, paras 238-41).
[295] *Orić* TJ, para. 319.
[296] *Id.*, para 322.
[297] *Id.*

including: "the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the commander at the time."[298]

Actus Reas

152. As mentioned previously, superior responsibility doctrine concerns leaders' omissions rather than affirmative contributions to crimes. Accordingly, the *actus reas* element of superior responsibility requires that the OTP prove beyond reasonable doubt that an accused's inaction breached a legal duty to act with respect to an underlying offense.[299] Superior responsibility doctrine requires that failures to prevent and failures to punish offenses be personal to the accused.[300] Neither subordinates', nor associates' or counterparts' omissions satisfy the *actus reas* element. Thus, a superior may be convicted only for failing to take measures of prevention or punishment that were within the scope of his personal authority, competence, and material ability.[301]

153. In the Tribunal's failure to punish jurisprudence, superiors are only liable for failing to take "necessary and reasonable measures" relating to

[298] *Blaškić*, TJ para 307 (citing Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/1994/674, para. 58; *Čelebići* TJ, para. 386).
[299] *Orić* TJ, para. 293 (noting "superior responsibility is characterised by the mere omission of preventing or punishing crimes committed by (subordinate) others.") (parenthetical in original).
[300] *United States v. Wilhelm von Leeb et al.*, United States Military Tribunal, Nuremberg, *in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 543-44 (1997) (observing, "[T]here must be a personal dereliction. . . . [I]t must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.").
[301] *Halilović* TJ, para. 73 (observing, "A superior will be liable for a failure to take such measures that are 'within his material possibility.'")(quoting *Čelebići* TJ, para. 395).

subordinates' offenses.[302] "Necessary" measures generally refer to actions that discharge the superior's duties "under prevailing conditions."[303] While "reasonable measures" constitute actions the accused superior was actually situated to undertake in the ruling circumstances."[304] What measures are "necessary" or "reasonable" constitute questions of evidence or fact.[305] Such determinations relate not only to the circumstances surrounding the underlying offense, but also to the degree and nature of the superior's control over the subordinates in question.[306] In this sense, the *actus reas* prong is closely related to the first prong of superior responsibility, accounting for the nature of the superior's authority over subordinates.

154. Breaches of the duty to punish are not limited to failures to impose punitive measures. The Tribunal has observed, "The duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities."[307] In this sense a superior may be held liable for unreasonable failures to investigate known crimes or failures to report such events to competent authorities.[308]

155. By the same token, superiors lacking power or competence to punish subordinates may discharge their duties by reporting suspected offenses to higher or legally competent authorities.[309] Superiors need not personally investigate or refer such cases – they need only ensure such actions are accomplished within their command. Awareness that

[302] ICTY Statute, Art. 7(3); *Halilović* TJ, para. 73.
[303] BETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT, 693 (2007)(citing *Blaškić* TJ, para. 333).
[304] *Id.*
[305] *Halilović* TJ, para. 73.
[306] *Id.*
[307] *Id.*, para. 97.
[308] *Kordić & Cerkez*, TJ, para 446.).
[309] *Hadžihasanović* AJ, para. 154 (citing *Blaškić* TJ, para. 335; *Blaškić* AJ, para. 72).

subordinates have referred a matter or that other competent agencies or persons have initiated investigations or discipline generally excuses a superior's inaction with respect to crimes involving subordinates.[310] For example, in the *Boskoski* case, reports by a police leader's subordinates informing "authorities responsible for investigation of criminal matters" of "several dead bodies" without significantly more detail, satisfied the leader's duty with respect to addressing his subordinates' conduct.[311] The Chamber concluded that the fact that criminal investigators never conducted a full investigation was not relevant to Boskoski's liability under command responsibility theory as he satisfied his duty by ensuring appropriate authorities had information that would ordinarily have been sufficient to trigger a full investigation.[312] The Appeals Chamber recently affirmed the *Boskoski* Trial Chamber's understanding of reports satisfying the duty of superiors lacking punitive authority.[313] The Appeals Chamber concurred that under customary international law a superior may satisfy his duty to take necessary and reasonable measures by reporting to competent authorities, and that an actual investigation is not required where the report concerned should have been sufficient to trigger an investigation.[314]

156. The quantity and quality of information sufficient to trigger the duty to investigate is unclear. State practice concerning commanders' reporting requirements is reflected in a recent change made to United States Department of Defense policy. In a previous law of war program, the U.S. Department of Defense required commanders to report all "possible, suspected, or alleged violations of the law of war" to higher

310 *Prosecutor v. Boskoski & Tacrulovski*, Case No. IT-04-82-T, Judgement (10 Jul. 2008), paras 529-36, ("*Boskoski & Tacrulovski*, TJ").
311 *Id.*
312 *Id.* at para. 536.
313 *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-A, Judgement (19 May 2010) para. 231, ("*Boskoski & Tacrulovski*, AJ).
314 *Id.*

authorities.[315] In 2006, after review, the U.S. amended the policy's definition of "reportable incidents" to better reflect accepted superior responsibility doctrine. The current policy requires U.S. commanders report only violations accompanied by "credible information."[316]

157. Finally, superiors need not necessarily establish novel or *ad hoc* investigative processes where standing procedures are in place.[317] Superiors may rely on third party investigations, discipline, or punishment to discharge their duties assuming they are not or do not appear to be sham procedures.[318] However, superiors may be held liable where they have interfered with or impeded competent authorities' investigations or covered up their subordinates' crimes.[319]

Analysis of Markač's Responsibility with Respect to Grubori

158. Applied to Markač's case the legal standard generates significant doubt concerning Markač's liability for events at Grubori under superior responsibility doctrine. The following reservations accord with the elements of superior responsibility doctrine, each of which the OTP has failed to prove beyond reasonable doubt with respect to Markač.

---

[315] UNITED STATES DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, *DOD Law of War Program*, paras 3.2, 4.3 (9 Dec. 1998). *See also* UNITED STATES DEPARTMENT OF DEFENSE, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01B, *Implementation of the DOD Law of War Program*, paras 5b., 7a. (25 Mar. 2002)(requiring U.S. commanders to report "possible, suspected, or alleged violations of the law of war");

[316] UNITED STATES DEPARTMENT OF DEFENSE DIRECTIVE 2311.01E, *DoD Law of War Program*, paras 3.2, 6.3. (9 May 2006).

[317] METTRAUX, *supra* note 270, at 251-52 (citing *Hadžihasanović* AJ, para. 154; *Blaškić* TJ, para. 335; *Blaškić* AJ, para. 72).

[318] *Strugar*, AJ, para. 3 (Separate Opinion of Judge Shahabuddeen).

[319] *See id.*, para. 7 (Joint Dissenting Op. of Judges Meron & Kwon).

Superior-Subordinate Relationship

159. It is imperative that the Tribunal accurately assess the nature of authority Markač held over employees of the Special Police. As Assistant Minister of the Croatian Ministry of Interior Special Police Division, Markač did not enjoy a level of control entirely analogous to a military command relationship. Instead, he operated under a substantially incomplete command relationship with his forces. Therefore, especially as regards his power to punish, Markač's relationship with his forces generated limited duties under superior responsibility doctrine.

160. First, and critically, while his forces carried out military or paramilitary operations and while he held authority to issue tactical orders analogous to the power a military commander would possess, Markač did not hold the broad and nearly plenary power to punish or discipline his forces classically attendant to military command. The Croatian Government's Decree on Ministry of Interior Organization and Operation (MUP Decree) outlines Markač's authority as Assistant Minister for the Special Police Sector.[320] The MUP Decree reveals that Markač had no express, independent authority to punish or criminally prosecute members of the Special Police.[321] Markač could not conduct criminal investigations, nor could he convene or refer his employees to criminal tribunals. Instead, the Decree limited his power to discipline to proposing administrative measures related to employment.[322] For example, Markač had power to suspend police, issue fines, and reprimand.[323] In this respect his authority more closely resembled that of

[320] D527, GOVERNMENT OF THE REPUBLIC OF CROATIA, *Decree on Internal Organization and Operation of the Ministry of Interior of the Republic of Croatia* (23 Feb. 1995).
[321] *Id.,* art. 27.
[322] *Id.*
[323] *Id.*

a civilian employer or civilian government agency administrator than a military commander.

161. Yet even in matters of administrative control, it is clear Markač had a supporting rather than leading role as Assistant Minister. The MUP Decree offers in relevant part that the Assistant Minister, "*proposes the adoption* of acts related to . . . internal discipline of special police."[324] Testimony made clear that subordinate team leaders were responsible for initiating the use of disciplinary measures within the Special Police.[325] Under the MUP Decree, Markač merely had the power to refer his subordinates to a disciplinary board convened by the MUP that was empowered to adjudge appropriate professional consequences for administrative infractions.[326]

162. It is abundantly clear that Markač lacked authority and technical competence to address serious crimes such as homicide. Given the gravity of the events alleged at Grubori, it is worth noting that the MUP Decree's use of the term "internal discipline" with respect to the Special Police stands in contrast to its earlier use of the term "prevention and repression of crime" describing the duties of the MUP Criminal Police Sector.[327] Within the MUP, responsibility for criminal offenses, even those committed by police, is vested in the Criminal Police Sector.[328] Responsibility to initiate, investigate and prosecute criminal activity by Special Police was identical to that relating to Croatian citizens

[324] *Id.* (emphasis added).
[325] *See* Trial Testimony CW-7, Stjepan Zinic, (14 Apr. 2010) at 28142, 28144; D1833, *Witness Statement*, *Zoran Cvrk*, (13 May 2009) para. 10.
[326] P2531, Office of the Prosecutor, V000-5070 English Final Transcript, *Interview with Markač*, 60-61, (Jun. 2004). *See also* D1833, *Witness Statement*, *Zoran Cvrk* (13 May 2009), para. 9 (describing multi-tiered disciplinary review board structure and judicial review of disciplinary measures within MUP).
[327] D527, GOVERNMENT OF THE REPUBLIC OF CROATIA, *Decree on Internal Organization and Operation of the Ministry of Interior of the Republic of Croatia* art. 17, (23 Feb. 1995).
[328] *Id.*

generally.[329] More specifically, Croatian law vested competence and responsibility to investigate war crimes in the War Crimes and Terrorism Department of the Criminal Police Sector.[330] Thus the incident at Grubori was within the jurisdiction and competence of a coordinate branch of the MUP rather than with Markač and the Special Police. Only the Croatian Criminal Police Sector held authority to investigate and address an event like that alleged at Grubori.

163. Second, although his forces were operationally assigned to the HV for the period relevant to the indictment,[331] his forces were not subject to the military criminal jurisdiction that governed the armed forces units he supported.[332] Although attachment to military units frequently subjects the attached unit to military criminal and administrative control, no evidence before the Tribunal suggests this was the case with respect to the Special Police during or immediately after Operation Storm. Thus the Special Police attachment to the HV and Markač's subordination to the HV Main Staff did not alter his limited authority to discipline his subordinates. Nor did it vest him with any military criminal jurisdiction over their actions. In other words, attachment to the HV did not convert Markač into a military commander vested with traditional, plenary criminal jurisdiction over his forces. Instead, his forces remained subject to civilian criminal jurisdiction and MUP administrative control. That the MUP retained aspects of control over the Special Police is supported by Markač's daily telephonic contact with Minister Jarnjak notwithstanding that he took and executed orders from the HV Main Staff.[333]

---

[329] D1833, *Witness Statement*, *Zoran Cvrk* (13 May 2009) para. 11.
[330] D527, GOVERNMENT OF THE REPUBLIC OF CROATIA, *Decree on Internal Organization and Operation of the Ministry of Interior of the Republic of Croatia* art. 18, (23 Feb. 1995).
[331] P2531, Office of the Prosecutor, V000-5070 English Final Transcript, *Interview with Markač*, 11, 17, (Jun. 2004).
[332] *See* Trial Testimony, W-91 (Zeljko Zganjer) (11 Nov. 2008) at 11570-77.
[333] P2531, Office of the Prosecutor, V000-5070 English Final Transcript, *Interview with Markač*, 45-47 (Jun. 2004).

164. While superior responsibility doctrine recognizes *de facto* authority to punish in addition to *de jure* authority, nothing suggests that Markač held such *de facto* authority to punish employees of the Special Police. No evidence indicates that the Special Police employed informal discipline or that Markač had available extra-legal or summary penal powers as a matter of fact. Rather, the evidence indicates that, notwithstanding the state of armed conflict, the MUP, including the Special Police, continued to apply the disciplinary procedures outlined in the peacetime Decree.[334]

165. To summarize on command authority, leaders' duties under superior responsibility doctrine are only coextensive with their authority. The legal consequence of Markač's limited disciplinary authority over the Special Police is a reduction in the scope of his duties as a superior. As a superior that lacked material ability to impose punishment commensurate with the offenses alleged at Grubori, Markač's duty as a superior was limited to a duty to report what information he had concerning his subordinates to authorities competent to investigate and initiate appropriate sanctions. Thus while not sufficient to insulate Markač entirely from superior responsibility, the reduced nature of his authority and control over his subordinates certainly narrowed the scope of his duties with respect the events at Grubori.

Mens Rea

166. Pursuant to the *mens rea* requirement of superior responsibility, Markač's liability is a function of what he knew or had reason to know about his subordinates' activities following the events at Grubori. Markač can only be held liable if he knew or had information specifically

[334] D1078, Ministry of Interior, *Suspension of Mario Spekuljuk* Document Number 511-01-30-248/95, (29 Mar. 1995).

indicating that his forces carried out illegal killings in Grubori. Specifically, the OTP must prove beyond reasonable doubt that Markač had information sufficient to put him on notice of his subordinates' involvement and of the illegal nature of the deaths.

167. From the evidence, it is clear that by the evening of 25 August 1995, Markač had some information concerning Grubori.[335] Yet it is also apparent that Markač had no clear sense of the details of the incident. (REDACTED)[336] On the other hand, Markač received information from a unit coordinator and a report from the acting-Lučko Anti-Terrorist Unit leader, indicating routine events associated with mop-up operations.[337] Markač's report to his superior, General Červenko at the HV Main Staff confirms his initial impression of routine events, indicating that the Lučko Unit encountered no resistance in Grubori.[338] (REDACTED)[339] (REDACTED).[340]

168. (REDACTED) by 27 August, Markač likely knew or had available the following information: that bodies had been discovered in Grubori calling into question the accuracy of the Lučko unit's earlier report of no contact;[341] (REDACTED)[342] (REDACTED) W-86 and Buhin of the civil police were awaiting instructions from Cetina;[343] (REDACTED)[344] (REDACTED).[345] Furthermore, (REDACTED) it is reasonable to conclude that with respect to

[335] Trial Testimony of CW-3 (Identity Protected) (22 Mar. 2010) at (REDACTED); P2531, Office of the Prosecutor, V000-5070 English Final Transcript, *Interview with Markač*, 70 (Jun. 2004).
[336] *Id.*
[337] *Id.*; *see also* P.761, Office of the Prosecutor, *Witness Statement*, *Josip Celic* para. 40 (26 Nov. 2002).
[338] P575, Special Police Report to HV Main Staff (25 Aug. 1995).
[339] Trial Testimony CW-3 (Identity Protected) (22 Mar. 2010) at (REDACTED); Trial Testimony, P-86, Identity Protected, (27 Jun. 2010) at (REDACTED).
[340] Trial Testimony, CW-3 (Identity Protected) (22 Mar 2010) at (REDACTED).
[341] Trial Testimony, P-77 (Josip Celic)(4 Sep. 2008) at T.7946-47.
[342] Trial Testimony, P-77 (Josip Celic)(4 Sep. 2008) at T.7948.
[343] Trial Testimony, P-86 (Identity Protected)(27 Jun. 2008) at (REDACTED).
[344] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at (REDACTED). *See also* Trial Testimony, W-76 (Stjepan Buhin)(6-8 Oct. 2008) at 9935; P671, *Witness Statement*, *Josip Celic* 136 (26 Nov. 2002).
[345] Trial Testimony, W-86 (Identity Protected) (27 Jun. 2008) at (REDACTED)

future criminal police action regarding Grubori, Markač knew that Knin Police appeared to be waiting for international assistance,[346] and that intent to involve UNPROFOR might explain delays in local criminal police action.[347]

169. Markač's 26 August report to the Main Staff confirms that by that day he had learned of the bodies in Grubori and that the LUČKO unit had in fact encountered resistance in the town and found weapons.[348] This corrected report indicates that in addition to keeping Minister Jarnjak apprised of Grubori, Markač also intended to convey the most current information available concerning Grubori to his operational superior at HV Main Staff. No evidence indicates that Markač took any steps to suppress, limit, or quell his own or others' understanding or access to information concerning his forces' activities in Grubori.[349] In fact, at trial a UN official indicated that her teams had unrestrained access to the area throughout their own investigations.[350]

170. Further, as relates to the requisite *mens rea*, no evidence indicates that Markač knew of or had reason to know of information specifically linking any individual member of the Lučko Unit to the deaths in Grubori prior to notification of the criminal police. At most, Markač knew that his units were present and had engaged in combat operations in a village where bodies were later discovered and that civilian police units were aware of the incident and intended to initiate an investigation.[351] Although a UN Human Rights Action Team recorded information on vehicles present in Grubori, it appears this information was conveyed to

[346] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at (REDACTED).
[347] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at (REDACTED).
[348] P576, Special Police Report to HV Main Staff (26 Aug. 1995).
[349] Trial Testimony, W-77 (Josip Celic)(5 Sep. 2008) at T.8089; Trial Testimony, W-91 (Zeljko Zganjer) (12 Nov. 2008) at 11610-11. See also *supra* 232.
[350] Trial Testimony, W-141 (Elizabeth Rehn) (16 Jul. 2008) at 6663.
[351] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at 27647.

Zagrab rather than to Markač.[352] Moreover, and assuming this information reached Markač, if the vehicles were identified as belonging to Special Police, this information would merely have confirmed what Markač already knew – that his units were present in Grubori. Finally Markač knew by the 26th that United Nations Human Rights Action Teams were apprised of Grubori,[353] information that would have confirmed his already reasonable impression that international organizations were apprised of and would be called upon by criminal police to aid in the investigation.[354]

171. Overall, Markač appears to have had an unclear picture of the events at Grubori. Instead of possessing the type of knowledge or information that would clearly establish that his subordinates had committed specific, reportable crimes, Markač appears only to have been aware that one of his units had conducted tactical operations in an area where bodies had been found. As to information from outside sources such as the criminal police, he appears to have known only that civilian police units responsible to other MUP officials were the appropriate investigating agents within the MUP and had in fact committed to investigating the matter further.[355] Thus, just as the limited nature of Markač's authority over the Special Police had the effect of reducing his legal duties to reporting and, where appropriate, investigating their conduct, his limited authority logically restricted the scope of information he in fact possessed or had reason to know of. While not eliminating entirely the possibility of superior responsibility, Markač's limited understanding of Grubori has the legal effect of reducing the scope of "necessary and reasonable" actions he can be expected to have taken.

[352] Trial Testimony, W-114 (Edward Flynn)(4 Sep. 2008) at 1070-71.
[353] Trial Testimony, W-114 (Edward Flynn)(4 Sep. 2008) at 1049.
[354] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at 27645.
[355] (REDACTED).

172. Factors accepted as relevant to determining *mens rea* in superior responsibility cases strongly indicate that Markač did not have information of sufficient detail or certainty to provoke responses beyond those Markač actually implemented. The number and scope of acts at Grubori was not widespread or endemic. The number of troops involved was small considering the overall size of Markač's Special Police Sector.[356] The acts would not have required logistical demands that would have seemed extraordinary or suspicious. The geographic location of the hamlet and tempo of ongoing operations would not have made the reported contact suspicious either. No prior reports or conduct of his units would have suggested these acts as a regular *modus operandi* of his employees. Additionally, Markač was responsible for a broad operational sector and was located far from Grubori at the likely time of the incident.[357] Finally, the events in question were contemporaneous with a high-visibility visit by the President of Croatia through newly liberated territory, for which Markač was responsible for providing security.[358]

173. Ultimately, inaccurate reporting by his subordinates, geographic separation from operations, competing operational events, and criminal police failure to investigate greatly frustrated Markač's ability to gain a clear picture of events in the immediate aftermath of Grubori. By the time he learned of the serious nature of events, it was clear to him that authorities with legitimate criminal jurisdiction and technical competence were informed of the event.

Actus Reas

[356] Trial Testimony, Krajina, B (CW-5), 21 Apr. 2010 at T.28544 Testimony, CW-6 (Branko Balunovic) (19 Apr. 2010) at T.28346.
[357] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at 27628.
[358] See (REDACTED), D739, and P558. See also Janic, Z (P-81) 9 July 2010, T.6123.

174. Superiors are required to take "necessary and reasonable measures" with respect to their subordinates' conduct. Yet it is also clear that superiors are liable only for omissions with respect to measures "materially available" to them. As noted previously, the *actus reas* element is closely linked to and a function of the nature of the superior-subordinate relationship. Given Markač's limited disciplinary authority over his subordinates, analysis of *actus reas* in his case is limited to investigation and reporting on the events at Grubori. Markač's duty with respect to Grubori was to take "necessary and reasonable measures" to report and investigate within his professional and legal competence.

175. From the evidence, it appears that Markač took a number of reasonable measures relating to Grubori. First, when the picture of what happened was unclear, Markač dispatched his Deputy/Chief of Staff to collect information on the incident.[359] Second, Markač confirmed that his administrative superior at the Ministry of Interior, Jarnjak was aware of the deaths.[360] Third, Markač informed General Červenko, his operational superior, of the combat action and his unit's actions related thereto as soon as they became clear to him.[361] Fourth, independent evidence confirms that the Knin Police Station received a report of Grubori from an HV representative on the 26 of August at 2000 hrs.[362] Accordingly, Markač declined to investigate further when he learned that institutionally and jurisdictionally competent authorities within the MUP were seized of the matter.

[359] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) 27628; P671, Office of the Prosecutor, *Witness Statement*, *Josip Celic*, 40-41, 123 (26 Nov. 2002).
[360] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) 27655.
[361] P579, Report, *Special Police to HV*, (26 Aug. 1995).
[362] D1695, Office of the Prosecutor, *Interview with Karolj Dondo* (9 Mar. 2005) (relating that Ivan Cermak called civilian police regarding Grubori in Dondo's presence on 25 August 1995); P764, Report, *Karolj Dondo to Ivan Cermak* (26 Aug. 1995) (relating that Knin Police Station duty officer Damir Vrkic received a report of bodies in Grubori and urgent need for civilian protection clean up).

176. A number of important factors bear on whether Markač's actions in response to Grubori were in fact reasonable or whether they constituted criminally culpable omissions sufficient to impute liability.

177. First, what constituted a necessary and reasonable response to Grubori is a function of the nature of what happened there. By the 26th of August, it was apparent to Markač that human deaths had occurred.[363] The gravity of these events and the possibility of criminal circumstances would have indicated to a reasonable leader that informal or administrative approaches to investigation would not have been appropriate.[364] As a matter of technical competence, criminal rather than administrative investigation was obviously the appropriate response to Grubori.[365]

178. Second, what constituted a necessary and reasonable response to Grubori is a function of professional jurisdiction within the Ministry of Interior. Criminal investigations appear to have been the exclusive purview of the MUP Criminal Police Department. Special Police were never in the practice of investigating serious crimes.[366] If the circumstances led anyone to suspect the deaths were not the result of lawful armed conflict, the Criminal Police appeared to be the appropriate agency to investigate.[367] Markač's decision not to investigate further

[363] P671, Office of the Prosecutor, *Witness Statement*, *Josip Celic* 38 (26 Nov. 2002).
[364] Trial Testimony, W-91 (Zeliko Zganjer) (11 Nov. 2008) at 11582 (relating that in serious crimes, an investigating judge would always attend the crime scene and conduct in investigation personally); Trial Testimony, CW-3 (Identity Protected) (23 Mar. 2010) at 27700-01 (relating that Chief of Crime Police Staff, Ivan Krvavica, would have been responsible for investigation of homicides under Zadar Police Administration headed by Ivica Cetina).
[365] Trial Testimony, CW-3 (Identity Protected) (25 Mar. 2010) at 27878 (relating minimal requirements for crime scene investigation in absence of investigating judge included a "professional forensic technician with a certificate" and "authorised official person" clarified as an officer of the crime police).
[366] Trial Testimony, W-76 (Stjepan Buhin)(6-8 Oct. 2008) at 10173-74; Trial Testimony, W-91 (Zeljko Zganjer) (12 Nov. 2008) at 11609-10. *See also* D528 Ministry of Interior, Special Police Sector, *Annual Report* para. 7 (22 Feb 1996) (noting that when Special Police supported General and Criminal Police operations, support was restricted to executing ambushes and raids).
[367] Trial Testimony, W-91 (Zeljko Zganjer) (10 Nov. 2008) at 11519, 11604 (relating that prior to 1998, the Zadar County Court had jurisdiction to investigate incidents at Grubori).

appears reasonable given that Criminal Police were apprised of the situation.[368]

179. Third, comity and respect for the investigative process would have counseled against further involvement by Markač after he was satisfied that competent authorities were aware of Grubori. It is axiomatic that competent investigations must be free from outside influence or manipulation. Once the Criminal Police became aware of the situation, further steps by Markač might have frustrated or interfered with investigative techniques or the integrity of evidence. Markač's decision not to investigate appears reasonably to comport with widely understood professional practice and courtesy.[369] In fact, by 26 August, two persons typically involved in crime scene investigations were present in Grubori.[370] Additionally, after Markač ordered reports from the unit leaders, it is unclear what use further administrative questioning of his employees would have served. Surely subsequent statements would only have confirmed what initial reports related. This has in fact been borne out by the contradictory statements/testimony given by members of the Special Police charged by the Croatian authorities in December 2009 with crimes related to Grubori, and by their testimonies before the Tribunal.[371]

180. Fourth, attention to appearances of impropriety made Markač's decision not to investigate further reasonable. Although when he first learned of the incident no information other than their presence in the

[368] D1695, Office of the Prosecutor, *Witness Statement*, *Karolj Dondo*, para. 28 (9 Mar. 2005)(relating that Dondo personally witnessed Cermak discussing Grubori with W-86 by phone and Dondo submitted his own report (P764) on the incident to Civilian Police, Cermak, and the HV).
[369] Trial Testimony, AG-5 (Mladen Bajic) (24 Aug. 2009) at 20737, 20780 (relating investigative practice within military units and stating, "Once the commander of the unit has reported the event to the military police . . . he cannot conduct a parallel investigation.").
[370] Generally, Trial Tesimony of (Bilobrk, J.) P-176 and (Vrticevic, I) IC-48. CW-3 (Identity Protected) (25 Mar. 2010) at 27878-79.
[371] See generally, Trial Testimony of CW-4 (Identity Protected) T.28194-95; T.28203-216; T.28220-27; T.28246-61, 65, and 66; T.28286-89; T.28323, 34, and D2038, (REDACTED), and (REDACTED); Krajina, B. (CW-5) T.28542-46 (the witness declined to answer specific questions related to Grubori), and P2728; Balunovic, B. (CW-6) T.28345-59; T.28370-403; T.28410-450; T.28473-81; P2724, and P2725; and Zinic, S. (CW-7) T.28055-57; 28082-102; 28107-26; 28136-44; 28166-67; P2717-2720.

town implicated Markač's forces in the killings, caution would reasonably have counseled Markač not to use his own chain of command to investigate. When a neutral and impartial party such as the MUP Criminal Police became aware of the situation, a reasonable superior would have suspended his command's involvement to avoid the appearance of tampering with evidence and results.[372]

181. Finally, it is important to recall that superiors' omissions are judged not according to hindsight but rather against the circumstances ruling at the time of their decisions.[373] Viewed with the advantages of hindsight and full coordination between participants, events often gain clarity not originally attainable. However, international criminal law has long restricted inquiries to considering the information accused leaders possessed at the time of their decisions. As outlined previously, the events at Grubori were unclear to nearly everyone. Markač had received an initial but ambiguous report concerning Grubori. Additionally, Markač learned of the incident as his units were providing security for a high-visibility visit by the President of the Republic.[374] (REDACTED). Along with the limited information he learned about the events, Markač learned quickly that both the MUP Criminal Police and the UN were apprised of the situation. Although it is tempting to impute to Markač much of the information that time and the Office of the Prosecutor's formidable investigative assets have revealed, most of the evidence of what Markač knew at the time of his decisions relevant to Grubori indicates he made reasonable decisions based on limited knowledge.

---

[372] (REDACTED).

[373] *See Čelebići* AJ, para. 239; United *States v. Wilhelm List and others*, United States Military Tribunal, Nuremberg, *in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1113 (1950).

[374] Trial Testimony, W-90 (Josip Turkalj) (15 Dec. 2008) at T.13724 (relating that the Lučko Anti-Terrorism Unit participated in security operations for the Croatian President's visit to liberated territory). *See also* (REDACTED), D739, and P558.

182. Although evidence indicates that Markač's authority over his subordinates included the power to suspend employment, suspension may not have been necessary or reasonable with respect to what Markač knew about Grubori and accepted practice within the Special Police.[375] In March of 1995, Markač initiated suspension of a Special Policeman in the Lučko Unit.[376] Although the suspension was subject to review by an MUP Disciplinary Review board, the officer in question was stripped of his duties and saw his pay reduced.[377] Yet in contrast to the situation at Grubori, the suspended officer had been specifically named as a suspect in a Criminal Police and Zagreb County Court investigation.[378] Furthermore, competent authorities within the MUP had actually apprehended the officer in question.[379] In fact, it appears from the memo that suspension was required in light of the stage of criminal proceedings against the officer.[380] With respect to Grubori, Markač had few if any indications that formal suspension was appropriate. None of his employees had been named as a suspect, charged, or apprehended. Instead, his apparent decision to await the outcome of criminal investigations to impose administrative discipline appears to have been objectively reasonable and in conformity with established practices in the MUP.

183. The parallels between Markač's actions and the Tribunal's recently affirmed acquittal in the *Boskoski* case are striking.[381] As in *Boskoski*, Markač lacked personal power to punish subordinates. As in *Boskoski*, the OTP submitted no evidence establishing beyond reasonable doubt

---

[375] *See* D1078, Ministry of Interior, *Suspension of Mario Spekuljuk* Document Number 511-01-30-248/95, (29 Mar. 1995).
[376] *Id.*
[377] *Id.*
[378] *Id.*
[379] *Id.*
[380] *Id. See also* D1833, *Witness Statement*, *Zoran Cvrk* (13 May 2009) para. 12 (describing standard Special Police practices regarding suspension and criminal proceedings)
[381] *See Boskoski & Tacrulovski*, TJ, paras. 529-36; *Prosecutor v. Boskoski & Tarculovski*, AJ, para. 231.

that Markač knew criminal police would fail to investigate events at Grubori. To the contrary, evidence included expressions that criminal police intended to investigate and had even requested international assistance.[382] And, as in *Boskoski*, the disciplinary measures that Markač did hold would have been "an entirely inadequate measure for the punishment of any police."[383]

184. If the failure to punish prong of superior responsibility seeks to fix criminal liability for criminal perpetrators' impunity, a number of factors outside Markač's control emerge as reasonable possibilities. First, the Knin region and Sector South had been theaters of active combat operations. After hostilities subsided, the post-conflict situation was one of relative chaos and disorganization.[384] Even the best-trained and equipped armed forces have proved inadequate to the task of restoring post-conflict order.[385] Whether Markač's response to the Grubori incident was reasonable must be evaluated in this context. Additionally, tactical operations for Markač's Special Police continued, including a high profile visit from the Croatian President.[386] Law enforcement tasks appear to have been greatly complicated during the post Operation Storm period, overwhelming police, investigative and prosecutorial efforts.[387] A State Attorney in a neighboring district that eventually included the Knin

[382] *See* Trial Testimony, W-86 (Identity Protected)(27 Jun. 2008) at 5292, 5295-96 (relating that CW-3 called Minister of Interior Jarnjak from Knin and that General Cermak called Minister Jarnjak as well informing him that "police in Knin were working well . . . ."); Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at 27644, 27647. *See also* Trial Testimony, W-76 (Stjepan Buhin)(6-8 Oct. 2008) at 9935; P671, *Witness Statement*, *Josip Celic* 136 (26 Nov. 2002).
[383] *Boskoski & Tarculovski*, AJ, para. 235.
[384] Trial Testimony, W-114 (Edward Flynn)(4 Sep. 2008) at 1104-05; P896, Office of the Prosecutor, *Witness Statement, Ive Kardum*, paras. 56-57 (23 Mar. 2006).
[385] Trial Testimony, W-141 (Elisabeth Rehn) (16 Jul. 2008) at 6642 (observing "a post-conflict time is always difficult to administer"); D692, Organization for Security Cooperation in Europe, *Kosovo/Kosova: As Seen, As Told*, p.vi, xiii (Jun-Oct 1999)(noting lengthy Kosovo and Lebanon post conflict reconciliation periods and citing law enforcement asset deficiency as sources of impunity).

[386] (REDACTED), D739, and P558.
[387] P1046, Office of the Prosecutor, *Witness Interview*, *Zeljko Zganjer*, tape transcript 3276-1-A p. 3-4 (8 Dec. 2005).

district observed that the number of bodies discovered post-Operation Storm prevented investigating judges from visiting all sites.[388] Additionally, the number of bodies discovered appears to have prevented pathologists from completing autopsies in all cases as regular procedures would have dictated.[389] If those responsible for the Grubori killings remain unpunished, the challenging security and law enforcement context must have played a significant role.[390]

185. Second, the Criminal Police who had both technical and legal competence to investigate the incident at Grubori appear to have been severely understaffed. Testimony of a number of witnesses confirms that police were not staffed to manage the large geographic area assigned to them.[391] Criminal Police did not have access to modern DNA testing techniques.[392] Furthermore, evidence indicates the police hailed from other parts of the country, lacking familiarity with the terrain and population.[393] Police frequently had to rely on their own resources.[394] Poor police resourcing undoubtedly contributed to failure to investigate Grubori.

186. Third, deterioration and varied custody of evidence appears to have hampered efforts to investigate the killings at Grubori. The bodies at Grubori appear to have been moved and, owing to summer temperatures, in advanced stages of decay.[395] Sanitation issues clearly concerned officials apprised of Grubori. Further, physical and photographic

[388] P1047, Office of the Prosecutor, *Witness Interview*, *Zeljko Zgnajer*, tape transcript 5443-A p. 22 (12 July 2006).
[389] *Id.* at 29.
[390] *See generally,* D57, Knin District Police Administration, *Daily Log of Incidents*, Book 1, (6 Aug. 1995 – 7 Oct. 1995) (recording 30 reports of human bodies discovered in the Knin district during the period covered by the Amended Indictment).
[391] Trial Testimony, W-91 (Zeljko Zganjer) (11 Nov. 2008) at 11591-92; P896, Office of the Prosecutor, *Witness Statement, Ive Kardum*, para. 56 (23 Mar. 2006).
[392] Trial Testimony, W-91 (Zeljko Zganjer) (11 Nov. 2008) at 11593.
[393] Trial Testimony, W-76 (Stjepan Buhin)(6-8 Oct. 2008) at 9934-35.
[394] *Id.*
[395] Trial Testimony, W-91 (Zeljko Zganjer) (12 Nov. 2008) at 11607.

evidence appears to have been collected by various investigative agencies, including the MUP Criminal Police, the UN Special Rapporteur, UN Human Rights Action Teams, UN Civil Police Forces (UNCIVPOL) and MUP Civil Protection assets.[396] That no single investigative agency acted as the repository of evidence undoubtedly complicated efforts to discern what happened at Grubori. Whatever role premature sanitation efforts had on the ability to investigate Grubori, no evidence whatsoever indicates that Markač ordered sanitation nor did he hold such authority.[397]

187. Finally lack of coordination and communication between investigative agencies frustrated efforts to discern what happened at Grubori. The testimony of UN officials, Special Police, Criminal Police, and MUP Knin region administrators paints a picture of poor or compartmented information flow.[398] In fact, it appears that the Knin civil police informed of Grubori did not relate the events to officials in Zadar.[399] Importantly, a witness in Knin stated, "the [preliminary investigation] would have been for us, the police, to do our work, and we did not."[400] Most remarkable of all, the Chief of Criminal Police maintains that he was never made aware of over thirty police logbook entries indicating the discovery of human bodies in the Knin District.[401] Additionally, although Criminal Police personnel including W-86, Cetina, and Kardum were all appropriate officials to initiate and manage an on-site investigation, none managed to visit Grubori.[402] Although such failures were apparent, neither Markač

396 *Id.* at 11608.
397 Trial Testimony, CW-3 (Identity Protected) (25 Mar. 2010) at 27882.
398 *See e.g.* Testimony, AG-5 (Mladen Bajic) (24 Aug. 2009) at 20767-68.
399 Trial Testimony, W-91 (Zeljko Zganjer) (12 Nov. 2008) at 11605-06; P897, Office of the Prosecutor, *Witness Statement, Ive Kardum*, para 8 (3-4 May. 2007)(asserting that Chief of Crime Police for Knin was never made aware of 30 reports of human bodies discovered in August 1995). *But see* Testimony, W-84 (Identity Protected) (4 Nov. 2008) at 11111 (maintaining that Zadar was informed of Grubori by the local police office).
400 Trial Testimony, W-84 (Identity Protected) (5 Nov. 2008) at 11165.
401 P897, Office of the Prosecutor, *Witness Statement, Ive Kardum*, para. 8 (3-4 May 2007).
402 Trial Testimony, CW-3 (Identity Protected) (25 Mar. 2010) at 27880.

nor any Special Police official held authority to issue orders to Criminal Police or to assume their duties.[403]

188. It is reasonable to conclude that investigative neglect surrounding the events at Grubori was attributable to misunderstanding or misinformed assumptions that coordinate agencies would lead the investigation. Lines of authority, especially within the Criminal Police were confused throughout the relevant period. Indeed, the Knin Police Station Commander, appointed only twenty days before the Grubori incident, observed that his counterpart, the Chief of Police Administration for the Knin District was unable to make any decisions without the approval of MUP coordinators.[404] Yet one of these same coordinators emphasized throughout his testimony that his duties were advisory in nature and did not include authority to make investigative or operational decisions.[405] Thus, it is highly likely that the availability of multi-tiered investigative personnel complicated the issue of responsibility for investigating crimes in the post-conflict Knin District.[406]

189. In light of the preceding, it appears that on the whole, Markač's actions as Assistant Minister for the Special Police with respect to Grubori did not amount to criminally culpable omissions sufficient to satisfy the *actus reas* element of superior responsibility.

Conclusion with Respect to Superior Responsibility

[403] Trial Testimony, CW-3 (Identity Protected) (22 Mar. 2010) at 27633.
[404] (REDACTED).
[405] Trial Testimony, W-76, Stjepan Buhin (6 Oct. 2008) at 9920-21 (stating, "The role of the coordinators, and that's what we were, was advisory. We were high-ranking in the sense of providing advice, providing assistance as to how they would set up their administration and how they would organise their work. But the final executive decision was in the hands of those newly appointed chiefs, if there were differences of opinions in certain matters that always had to be dealt with at the level of the ministry. We didn't have the authority to take the final decision.").
[406] *See e.g.* Trial Testimony, W-91 (Zeljko Zganjer) (11 Nov. 2008) at 11596-97; (REDACTED).

190. Considering the state of superior responsibility doctrine applicable to the case and the trial materials presented to date, a number of reservations emerge concerning Markač's liability. First, because Markač's prescribed disciplinary authority over his subordinates as Assistant Minister for Special Police was limited to administrative measures, his effective control over their punishment was significantly less than that traditionally held by military superiors.[407] As a result, his duties with respect to any crimes committed by his subordinates were limited to preliminary inquiries and reporting to competent authorities.

191. The OTP attempted to impute investigative and disciplinary powers to Markač through the Special Police Department of Inner Control. However, the overwhelming evidence at trial is that the Department of Inner Control within the Special Police has nothing to do with investigating disciplinary matters but dealt primarily with intelligence gathering.[408]

192. Second, although Markač eventually learned of the bodies in Grubori soon after they were discovered, he only became aware of them as he learned that domestic criminal and international investigative agencies were vested with the issue. Moreover, no firm or credible evidence available at the time Markač made decisions with respect to Grubori indicated that any specific member or members of his units were responsible for the deaths. Nothing in the unit's history, prior operations, or make-up would have indicated to Markač that they had committed war

[407] *See* D5277, Government of the Republic of Croatia, *Decree on Internal Organization and Operation of the Ministry of Interior* (23 Feb. 1995); D1833, *Witness Statement*, *Zoran Cvrk* (13 May 2009), paras. 10 – 12.

[408] *See* D527; D529; D1083; Trial Testimony, Cvrk, Z. (MM-4) at T.25464-65 (Internal Control not involved in disciplinary proceedings); Trial Testimony W-81 Zdravko Janic at T.6233-35; T.6248-52; Trial Testimony W-90 Josip Turkalj at T.13610, T.13547, 13522, T.13554-55; Trial Testimony of MM-1 Josko Morić at T.25789-91; T.25793-95; Trial Testimony MM-10 Drazen Vitez at 25981-82; Trial Testimony MM-12 Dragutin Vurnek at 26176-77; Trial Testimony MM-21 Dragutin Repinc at T.28873; Trial Testimony CW-3 (Identity Protected) at T.27603-04; T.27609-10.

crimes. Although he received conflicting reports from people below him in the chain of command about whether armed conflict had occurred, he sought to clarify by sending his second-in-command, thereby satisfying his duty to collect information and remain apprised.

193. Finally, in light of his duties and the information he had available, Markač took all necessary and reasonable measures. Although after dispatching his Deputy to inquire as to Grubori Markač did not investigate further, this decision appears to have been reasonable in light of the news that MUP Criminal Police as well as UN officials were aware of the situation. That a MUP agency with superior claims to formal jurisdiction and technical competence to investigate were involved makes Markač's decision not to investigate or initiate discipline reasonable. That this agency did not timely conduct a complete investigation or identify any likely perpetrators of the killings is not attributable to Markač but rather to the chaotic post-conflict environment, severely limited resources, and poor coordination between domestic and international investigative agencies.

CRIMES ALLEGED IN THE INDICTMENT

Count 1, Persecution

194. The OTP has not met its burden of proof to support a conviction of Markač on the charge of persecution.

Actus Reus

195. In *Kupreškić* a four part test was set forth in which an act of persecution is constituted by:

i) a gross or blatant denial;

ii) on discriminatory grounds;

iii) of a fundamental right, laid down in international customary law,

iv) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.[409]

196. The crime of "persecution" may assume several criminal forms. Although the Statute of the Nuremberg Tribunal and those of the Tribunals for the former Yugoslavia and Rwanda all sanction persecutions on political, racial and religious grounds under crimes against humanity, none defines this sub-characterization or states which forms it may take.

Mens Rea

197. The *intent* to commit the underlying offence combined with *knowledge* of the broader context in which that offence occurs is the requisite *mens rea* for crimes against humanity.[410]

OTP's Case

198. The Indictment in relation to Count 1 states that from at least July 1995 to about 30 September 1995, Gotovina, Čermak, and Markač, acting individually and/or through their participation in the JCE planned, instigated, ordered, committed, and/or aided and abetted the planning, preparation and/or execution of persecutions against the Krajina Serbs population, on political, racial and/or religious grounds, in the southern portion of the Krajina region, including in the following municipalities or

[409] *Kupreškić* TJ, para. 621. See also *Naletilic and Martinovic*, TJ, para. 634.
[410] *Kupreškić* TJ, para. 556.

parts thereof: Benkovac, Civiljane, Donji Lapac, Drnis, Ervenik, Gračac, Kistanje, Knin, Lisane Ostrovicke, Liscic, Nadvoda, Obrovac, Oklaj, and Orlic.

199. According to the OTP's Pre-Trial Brief, these persecutions included:

- Forcible displacement, including deportation and forcible transfer;
- Destruction and burning of Serb homes and businesses;
- Plunder and looting of public/private Serb property;
- Murder
- Other inhumane acts, including the shelling of civilians and cruel treatment;
- Unlawful attacks on civilians and civilian objects;
- Imposition of restrictive and discriminatory measures, including the imposition of discriminatory laws;
- Discriminatory expropriation of property;
- Unlawful detentions;
- Disappearances.

Submissions:

200. The Markač Defence submits there is no evidence to suggest that Markač acted with persecutory intent. Indeed, the only evidence relating to Markač's character which has been adduced at trial portrays him as an honest, caring, professional, law-abiding, and honourable man who did not place any pressure on his subordinates to deviate from the laws of armed conflict.[411] There is no evidence to sustain the claim that Markač

[411] See, for example, Granić, M. (MM-15) at T.24721:5-16; Pavlović, D. (MM-5) at T.25284:7-25286:16; Cvrk, Z. (MM-4) at T.25394:24-25395:22; Morić, J. (MM-1) at T.25584:1-19; Vurnek, D. (MM-12) at T.26195:14-26196:1; Janic, Z (P-81) at T.6383:20-6384:3; Zganjer, Z (P-91)at T.11610:17-11611:3; Sacic, Z. (CW-3), at T.27983:7-18; Zinic, S. (CW-4) at T.28165:13-17; (REDACTED); Balunovic, B. (CW-6) at T.28431:14-25.

had discriminatory intent, an element requisite to conviction on this count.

Counts 2 and 3, Deportation and Forcible Transfer

201. The OTP has not met its burden of proof to support a conviction of Markač on the charges of deportation and forcible transfer.

Submissions

202. The Markač Defence submits that:

a) the evidence shows that Serb civilians left UN Sector South in anticipation of the outbreak of hostilities;
b) the evidence discloses a small number of specific incidents which appear to have fed this fear, but there is no evidence that these incidents were part of any planned campaign.
c) the evidence shows that a significant portion of refugees did not wish to return to the Republic of Croatia.

The Indictment

203. In counts 2 and 3 of the Indictment the OTP alleges that from at least July 1995 to about 30 September 1995, Ante Gotovina, Ivan Čermak, and Markač, acting individually and/or through their participation in the alleged JCE, planned, instigated, ordered, and/or aided and abetted the planning, preparation and/or execution of the forcible transfer and/or deportation of members of the Krajina Serb population from the southern portion of the Krajina region to the SFRY, Bosnia and Herzegovina and/or other parts of Croatia, by threat and/or commission of violent and intimidating acts, the effect of which was to displace transfer or deport the Krajina Serbs from the area (including causing them to flee or to leave

the area) and/or to prevent or discourage them from returning to the area, including in the following municipalities or parts thereof: Benkovac, Civljane, Donji Lapac, Drnis, Ervenik, Gračac, Kistanje, Knin, Lisane Ostrovicke, Lisicic, Nadvoda, Obrovac, Oklaj, and Orlic.

Deportation

The Law

204. The law of deportation consists of two parts and is defined as follows: First, *actus reus*: the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law.[412]

205. Second, *mens rea*: the *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis.[413] The legal standard is intent to transfer persons on a non-provisional basis.[414]

206. The definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature in that the relevant persons have no genuine choice in their displacement. Factors other than force itself may render an act involuntary, such as taking advantage of coercive circumstances.[415]

[412] *Stakić* AJ, para. 278.
[413] *Stakić* AJ, para. 278.
[414] *Stakić* AJ, 278 and 319.
[415] *Stakić* AJ, para. 279.

Forcible Transfer

207. Article 5(i), which makes "other inhumane acts" crimes against humanity, has been interpreted to include forcible transfer.[416]

208. Forcible transfer relates to displacement of persons within national boundaries. The *mens rea* does not require the intent to transfer permanently. The legal standard is intent to transfer persons on a non-provisional basis.[417]

209. Not all transfers and deportations of civilians constitute a criminal offence. Evacuations or transfers motivated by the security of the population or imperative military reasons are not prohibited by Geneva Convention IV or Additional Protocol II.[418] The transfer of people who genuinely want to leave the area is not prohibited.[419] The Trial Chamber in *Naletilic and Martinovic* held that "[t]he determination as to whether a transferred person had a "real choice" has to be made in the context of all relevant circumstances on a case by case basis."[420]

Submissions

210. There is no evidence that Markač was party to an organized campaign of forced expulsion. Rather, the evidence suggests that the exodus of the Serb population from Sector South was triggered by both increased tension in the area, the result of several successful Croatian military campaigns in other sections of the Krajina,[421] and an anti-Croatian

[416] *Prosecutor v. Milošević*, IT-02-54-T, "Trial Chamber Rule 98 *bis* Decision," para. 41; *Krstić* TJ, para. 523; *Kupreškić* TJ, IT-95-16-T-14, January 2000, para. 566.
[417] *Stakić* AJ, paras. 317 and 319.
[418] *Naletilic and Martinovic*, TJ, para. 518 (APII, Article 17).
[419] *Naletilic and Martinovic*, TJ, para. 519.
[420] *Naletilic and Martinovic*, TJ, para. 519.
[421] Operations Flash, Storm, Maslenica, and Southern Sweep, for instance.

propaganda campaign leveled by the RSK. The exodus's principal catalyst was the implementation of an explicitly articulated plan on the part of the RSK leadership to evacuate the Serb population, most of whom did not wish to live in a Croatian state,[422] from Sector South.[423]

211. The RSK leadership had an evacuation plan in place which had been rehearsed by a significant portion of the RSK's population in "a great many"[424] instances, at least one of which was recorded and broadcast by RSK TV in July 1995.[425] On 4 August 1995, RSK President Martić issued an order for evacuation, to be executed by various units of the RSK Government. [426] Though the OTP has sought to call into question the existence of the RSK's evacuation plans, their existence and implementation are indisputable. Martić's order is in evidence,[427] and several witnesses have testified that they knew about the plans for

[422] See, for example, Galbraith, P. (P-116), T.5151:10-15, and P1290, p. 14, on the Hungarian Ambassador to the Republic of Croatia's view that the Serb population's departure from the Krajina was due to four years of anti-Croatian indoctrination and amounted to what he called 'self-ethnic cleansing; Akashi, Y. (AG-2) T.21631:6-22.
[423] In August 1995, the ARSK sought UNCRO's assistance in evacuating 32,000 Serbs from the region (Akashi, Y. (AG-2) T.21722:17-21723:2 on Tony Banbury's Notes of 7 August 1995.
[424] Mrkšić, M. (AG-38), T.18820:4-7.
[425] D136. Indeed, Flynn, E. (P-114), testified that the evacuation was conducted in a fashion which suggested that the participants "had likely already planned where to go and what to do" (T.1308:24). Additionally, a report released by the UN Economic and Social Council's Commission on Human Rights (Situation of Human Rights in the Territory of the former Yugoslavia: Periodic report submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 42 of Commission Resolution 1995/89,) on 5 July 1995 stated that "[t]he 'RSK' authorities had previously held regular evacuation drills, and there are reports that some of the refugees may have been forced into leaving against their will" (D60); (REDACTED)(P-56), testified that at meetings attended by the Commander of the 7th Krajina Corps, Veso Kozomara, and the Civilian Defence, a highly detailed evacuation strategy was discussed (T.3576:22-3577:15). An order indicating that there was a strong possibility that civilians would be evacuating Knin was issued by the RSK's Minister of the Interior, Toso Pajic, at 1700hrs on 4 August 1995, according to P-56 (T.3665:1-8). Indeed, on the morning of 4 August, two-thirds of the government of the RSK had already left Knin, according to (REDACTED)(AG-58) (T.18434:15-24). Vujnovic, J (P-57), observed in his third statement (P414, para.3) that most people left his hamlet, Oton Polje left on 4 August 1995, and that RSK officials were distributing fuel to evacuees. See also T.4566:13-23. Bellerose, C. (P-97) testified that he had learned *ex post* from Sergeant Engleby, who had married a Serbian interpreter, that the RSK-led evacuation was well-organized (T.5910.11-5911:2), see also D514. Mrkšić, M. (AG-38) testified to the authenticity of this broadcast (T.18819:9-18821:4).
[426] D137. See also Galbraith, P. (P-116) T.4941:19-4942:1.
[427] D137.

evacuation and/or heard that others had heard, that the order was broadcast over the radio on 4 August 1995.[428] Additionally, there are eye-witnesses to the evacuation which was so effective that, according to some reports,[429] by 5 August 1995, almost all of Knin's civilian population had vanished. [430] The RSK sought to increase the likelihood of a

[428] Dijkstra, S.W. (P-106) at T.4784:9-4785:1; Liborius, S. (P-127) at T.8381:16-8382:13, referring to P804; Hendriks, E. (P-119), at T.9644:9-14; Marker-Hansen, S. (P-130) at T.15035:3-7, referring to P1290 – Comprehensive Survey Report on Consequences of Operation Storm; Novaković , K. (P-40) in D1516, p. 2.; Mrkšić, M. (AG-38), at T18819:9-18-18821:5 on D136, and at T.19146:23-19150:15. Though Mr. Mrkšić's recollection that he had not announced the evacuation plan publicly is belied by a transcript of Mr. Mrkšić making the announcement via Radio Belgrade on 4 August 1995 at 2130hrs (D106). Gilbert, A. (P-173), testified that the exodus of the Serb population continued from the 28th and 29th of July, though to the eve of Operation Storm (T.6419.14-6420:9). Berikoff, P. (P-98) reported that on 29 July 1995, many local UN employees failed to show up for work, as the evacuation had begun in parallel with an RSK mobilization campaign. A couple of days before Operation Storm, ARSK soldiers told him that people were being told to leave the area (T.7909:9-7910:8, see also P740, para.2(a)). Mirkovic, S. (P-38), testified that some of her friends informed her that teams/groups of people were making their way through Knin's surrounding villages, urging residents to pack and evacuate (T.7485:6-14, and P723, para. 6). (REDACTED)(P-1), testified that at around 1800hrs on 4 August 1995, there was a meeting in the town of Polace to discuss the evacuation at which inhabitants were advised to evacuate by members of the RSK's Civil Authority. According to Andic, the first convoy departed at approximately 2000hrs that evening (T.8718:9-T8719:5, and (REDACTED), para.3). Ognjenovic, M. (P-41) testified that people left the village of Kakanj both on account of shelling and instructions from a local committee (T.10720:8-10721:10, see also STATEMENT). Novaković , K. (P-40), a high-ranking official in the RSK administration, testified that evacuation plans fell within the remit of the RSK's Civil Protection section, and that the evacuation had begun by 0800hrs on 4 August 1995 (T.11790:19-T11792:8). Puhovski, Z. (P-140) wrote that the Serb population in the Krajina was ready not only to flee but to organize the escape of the entire population of their self-declared state. Further, he wrote, Knin propaganda over the years – that Serbs could never safely live within Croatia – ultimately contributed to their flight that a very high percentage of the people from the area had planned routes to leave their homes (P2320). Mr. Puhovski also testified that one week before Operation Storm's execution extraction points were organized by the RSK (T.15982:1-6), and that a very high percentage of the people from the area had planned routes to leave their homes in advance of Operation Storm (T.15982:20-23). Finally, he testified that the evacuation of the Serb population was both organized and ordered (T.1660:13-1661:1). Sinobad, D. (P-47), Director of Auto Transport Benkovac, testified that he was engaged by the RSK to assist in the evacuation of the population by providing buses (T.16970:13-16971:13). (REDACTED)(MM-25) testified that roads in the Krajina were being repaired by the RSK prior to Operation Storm, and that a colleague of his had told him that the repairs were being made in preparation for the evacuation (REDACTED); (REDACTED)(MM-24) testified that Mr. Kerestedžijanc said that he knew that the Krajina leadership had ordered the evacuation ((REDACTED)); Granić, M. (MM-15), testified that those who left had been indoctrinated by the RSK leadership (T.24669:23-24570:4).

[429] (REDACTED)(P-69) at T.2761:4-9. Rincic, Z. (IC-39) stated that he "was convinced that there were no civilians around Knin, that the only people who might have been there were some soldiers who had stayed behind" (T.22367:5-10).

[430] According to an UNMO Daily SitRep of 4 August 1995, released by Ermolaev, M. (P-111), RSK authorities requested the UN to assist in the evacuation of approximately 32,000 members of the civilian population from the Northern Dalmatian Corps AOR (P102, para.1.). An UNMO SitRep of 5 August 1995 reports that on 4 August 1995 at 2235hrs, hundreds of vehicles were heading to BiH,

successful evacuation by instilling ill-founded fear in the civilian population with anti-Croatian propaganda.[431] One of the objectives of the RSK's evacuation strategy was to generate a more Serb-favourable demography in Eastern Slavonia, Serb-occupied parts of Bosnia, and Kosovo.[432]

Return

212. The Republic of Croatia, operating under highly exacting post-conflict conditions,[433] endeavoured in good faith[434] to accommodate the return of

---

most of them coming from Gračac, Knin, and Udbina (P104, p. 2). Dangerfield, R. (P-102) stated that, after the mobilization of 27 July 1995, only a handful of combat-aged men remained in Knin, and on 29 July 1995, Mr. Dangerfield witnessed a "large amount of the civilian population" packing up their worldly possessions and leaving (T.7135:10-7136:16. See also, P695, para.23). Widen, E.L. (P-153) testified that approximately 80 percent of the Knin's population left on the night of 4 August, and throughout 5 August 1995 (T.7314:3-10). Gusa, R (P-23), testified that the evacuation from Knin began on 2 August 1995, and that he evacuated from his village, Zemunic Gornji, on 4 August 1995 (T.9855:8-9857:10). (REDACTED);Galbraith, P. (P-116) stated that when the Croatian forces arrived, the Serbs were already gone (T.4940:17-22).

[431] Lazarevic, S. (AG-30), an RSK Intelligence Officer, testified that the RSK Police, under instruction from Belgrade, were responsible for circulating inaccurate portrayals of Croats throughout the civilian population with a view to ensuring a successful evacuation (T.17958:7-17959:8, and D1461, p. 28). (REDACTED);Pejkovic, L. (MM-17) testified that Serb propaganda was an impediment to return (T.25226:18-25227:7). Of the hugely persuasive effect of the RSK's efforts to evacuate its own people from the Krajina, Granić, M. (MM-15) testified that "even if we had wanted to, we could not keep them from leaving" (T.24778:5-6).

[432] Puhovski, Z. (P-140), member of the Croatian Helsinki Committee for Human Rights, testified that RSK evacuation efforts were largely driven by two objectives: countering the predominant image of Croatia as victim, and altering Kosovo's ethnic composition (T.1667:5-17). Akashi, Y. (AG-2) agreed that the FRY made instrumental use of many of the refugees, repatriating them in Eastern Slavonia, Serb-occupied sections of Bosnia, and Kosovo (T.21743:11-22 – FIND ORIGINAL ARGUMENT).

[433] Marker-Hansen, S. (P-130), T.15088:9-15091:8; Sterc, S. (AG-56) T.20297:4-14; Rehn, E. (P-141) T.6642 (observing "a post-conflict time is always difficult to administer"); D692, Organization for Security Cooperation in Europe, *Kosovo/Kosova: As Seen, As Told*, p.vi, xiii (Jun-Oct 1999)(noting lengthy Kosovo and Lebanon post conflict reconciliation periods and citing law enforcement asset deficiency as sources of impunity).

[434] Radin, G. (IC-11), Chief of President Tuđman's Cabinet from January 1995 to January 1996, stated that if there had been a plan to expel Serbs, he would have known about it (T.22148:22-22149:11). Dodig, G. (IC-22), Chief of the Croatian Government's Office of Inter-Ethnic Relations during the time of the Indictment, made the same claim (T.22631:2-18); Pasic, P. (IC-37), the Commissioner of Knin at the time of the Indictment through March 1996, testified that he knew of no obstacles to the Serbs' return (T.22742:18-22743:7). Cipci, I. (IC-43), Chief of the Knin Police Administration, testified that neither he nor any of his contacts were ever subject to any pressure to engage in the alleged joint criminal enterprise (23149:4-24). Pejkovic, L. (MM-17), who began to work for the Office of Expelled

Serb refugees and internally displaced persons to the Krajina. Those who did not wish to return, a large proportion of the whole,[435] were duly compensated for the property which they had left behind.[436] Indeed, the Republic of Croatia established the Law on Temporary Takeover of Property[437] and an agency was formed for those who wished to sell their houses.[438]

213. The law was implemented, in part, in answer to security concerns raised by the proliferation of unoccupied housing units.[439] Property rights were further protected by the simultaneous implementation of the Law on General Administrative Procedure.[440]

214. The Law on Temporary Takeover, drawn up and implemented as it was under the extraordinary circumstances of the post-conflict environment, was later upheld but revised by a 26 September 1997

Persons and Refugees of the Republic of Croatia (ODPR) in 1991, and headed the organization from 1997 until 2005, testified that the only pressures to which he had been subject while carrying out his duties as quickly and as well as possible, so as to enable as many people to return to their homes as possible. (T.25103:2-10).

[435] "According to data from the population census of refugees in the Federal Republic of Yugoslavia, of some 337,000 Croatian refugees now in the Federal Republic of Yugoslavia, roughly 35,000 (roughly 10 per cent) have expressed an interest in returning immediately to Croatia," (D682, "UN Security Council Further Report on the Situation of Human Rights in Crotia Pursuant to Security Council Resolution 1019, 5 March 1997 (S/1997/195), para. 16). See also, Sterc, S. (AG-56) T.20318:11-18.

[436] D412, and D428.

[437] P476.

[438] Ozbolt, S. (AG-39) T.18154:20-18155:7.

[439] Indeed, the European Court of Human Rights, in the case of *Saratlic v. Croatia,* 35670/03, ECtHR, 24 October 2006, affirmed the State's "legitimate interest in housing displaced persons in the property left behind by persons who left Croatia during the war." It further held that "the system which allows such persons to remain in the occupied property before they have been provided with adequate housing is not in itself in contRadićtion with the guarantees contained in Article 1 of Protocol 1, providing that it ensures sufficient safeguards for the protection of the applicant's property rights." See also *Kunic v. Croatia*, 22344/02, ECtHR, 11 Januaryy 2007, and *Radanovic v. Croatia*, 9059/02, ECtHR, 21 December 2006.

[440] Bagic, S. (MM-28), T.26510:18-26511:3.

decision of the Republic of Croatia's Constitutional Court.[441] According to a 12 November 1996 Report on the Situation of Human Rights in the Territory of the former Yugoslavia, submitted by Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, the stituation in relation to returns was ever-improving.[442]

215. Contra the OTP's allegations, the *ratio legis* behind the promulgation and implementation of the Law on Temporary Takeover was the protection of the properties themselves, as well as the interests of their owners and potential creditors, irrespective of ethnicity. The law was passed largely in answer to the fact that the Republic of Croatia was not equal to the task of protecting many of the relevant properties from theft and vandalism.[443]

216. Efforts at repatriation were hindered by the fact that the Serbian Government took possession of many documents which were integral to the repatriation process.[444] Indeed, plans for repatriation, drawn up with the assistance of UNHCR and ICRC, as well as representatives of the EU and the US, did not take shape until the Erdut Agreement had been reached, and with it many of the logistical hurdles to repatriation removed. In light of the difficulties arising from its tense relationship

[441] D425. Bagic, S. (MM-28) provided an explanation of the Court's decision at T.26539:15-26543:16. On 28 July 1998, the Law on Temporary Takeover was repealed by the Republic of Croatia's State Assembly (D424).
[442] See P640, esp. para. 50. Also, the testimony of Rehn, E. (P-141) at T.6686:5-15.
[443] D427, "Explanation of the final proposal regarding the Law on Temporary Takeover and Administration of Specific Properties," 7 September 1995, pp. 9-10. The Law's *ratio legis* was further articulated by Croatia's Minister of Justice, Bosiljko Mišetić,at the 262nd Closed Session of the Government of the Republic of Croatia, held on 31 August 1995. See D1832, pp. 2-3. See also the testimony of Granić, M. (MM-15), T.24961:5-24964:11.
[444] For instance, it was not until 2003 that Croatia and Serbia reached an agreement whereby Serbia officially returned many personal documents to Croatia. See T.12090:19-21.

with the Federal Republic of Yugoslavia, the Republic of Croatia prioritized the matter of internal returns.[445]

217. An example of a witness who was repatriated can be found in the testimony of MM-25 (Identity Protected) who discussed the process of return to Croatia, based on family reunification.[446] He described the financial assistance received by his family from Sector East.[447]

218. In an effort to facilitate a smooth and effective process of repatriation, the Republic of Croatia issued a general amnesty on 25 September with retroactive effect beginning on 17 August 1990.[448]

219. Beyond the moral and legal imperatives not to engage in acts of forcible displacement and deportation, the political imperative was immense. The Republic of Croatia was highly reliant upon the manifold support of the international community, and the implementation of a joint criminal enterprise as alleged by the OTP would have incurred great reputational cost which the nascent Republic of Croatia could ill-afford.[449] Indeed, the Republic of Croatia went to great but unavailing lengths to

[445] Granić, M. (MM-15), T.24804:14-24805:23.
[446] (REDACTED).
[447] T.26321-26327, and (REDACTED).
[448] Law on Amnesty from Criminal Prosecution and Criminal Proceedings for Criminal Acts Committed in Armed Conflicts and in War against the Republic of Croatia D1938 and Granić, M. (MM-15), T.24812:2-16. See also, Witness Statement of MM-16 (D1935), President Franjo Tuđman's Pardon of Convicted Persons and Partial Remission of Sentence (D1936), President Franjo Tuđman's Decision to Pardon (D1937), Law Amending the Law on Amnesty from Criminal OTP and Criminal Proceedings for Criminal Acts Committed in Armed Conflicts and in War against the Republic of Croatia (D1939), Law on Pardons for Perpetrators of Crimes from the Temporarily Occupied Parts of Vukovar-Srijem and Osijek-Baranja Counties (D1940), President Franjo Tuđman's Pardon of Convicted Persons and Partial Remission of Sentence (D1942), President Franjo Tuđman's Pardon of Convicted Persons and Partial Remission of Sentence (D1943), Decision on Pardon by Suspension of OTP and Enforcement of Sentence for the Crime of Armed Rebellion (D1944). See also Penic, D. (MM-21), T.26943:7-26943:21 and T.26645:22 - 26946:12.
[449] (REDACTED)(MM-24) (REDACTED). In the words of Granić, M. (MM-15), "everyone will have as much respect for us as we have respect for international convictions [sic] and the international humanitarian law" (T.24985:7-9).

reintegrate the Krajina peacefully, resorting to military force only when all else had failed.

220. In an effort to facilitate the return of those who had fled the Krajina on the eve of Operation Storm, the Republic of Croatia established Operation Povratak (Return).[450] In consequence of the many difficulties arising out of the post-conflict environment,[451] an immediate mass return was neither possible nor desirable.[452] Safe and effective orchestration of large-scale returns demanded formal cooperation between the Republic of Croatia and the Federal Republic of Yugoslavia, not realized until the Agreement on Normalization of Relations between the Republic of Croatia and the Federal Republic of Yugoslavia was struck on 23 August 1996.[453]It was not until 1998, when the Republic of Croatia struck an agreement with the UN High Commissioner for Refugees, that a mass return became possible.[454]

221. In addition to Operation Povratak, the Republic of Croatia was engaged in a humanitarian operation whose objective was to ensure the well-being of individuals who had not left the Krajina.[455]

222. An important part of Operation Povratak was facilitating the return to the Krajina of Croats who had been expelled from the region during the

[450] Cipci, I. (IC-43), T.23146:20-T.23147:13.
[451] On this point, Granić, M. (MM-15), testified that during the period in question, according to Croatian intelligence data, the Republic of Croatia was subject to daily provocations from the RSK (T.24782:8-17). According to Radić, J. (CW-1), in advance of large-scale returns, assessments of damage and demining campaigns had to be effected (T.27326:8-18)
[452] See, for example, the statement given by Sadako Ogata, the United Nations High Commissioner for Refugees, delivered in Geneva on 10 October 1995 (D690), p. 2.
[453] See D412.
[454] Granić, M. (MM-15) T.24677:17-25, referring to D1609.
[455] Granić, M. (MM-15) T.24712:23-24713:11.

1991 RSK-led incursion. This part of the operation was only partially successful, as most of the expellees remained in Zagreb.[456]

223. Individuals who had fled during and after Operation Storm and who were born in Croatia but had never sought proof of citizenship were entitled to apply for Croatian citizenship.[457] In the absence of identifying documentation, individuals could demonstrate their right to Croatian citizenship by, among other things, showing a copy of their birth documents which were kept in the Knin registers.[458] In the event that the relevant register had gone missing, as many did during Operation Storm,[459] persons who had remained were simply granted Croatian citizenship.[460]

224. Following the emergence of the Republic of Croatia as an independent state in 1991, all Croatian citizens, irrespective of ethnicity, were supposed to seek new documentation from the state. Unfortunately, inhabitants of the RSK were prevented from applying for such documentation.[461] 140,000 people left the Krajina leading up to, and during, Operation Storm.[462]

225. According to the Republic of Croatia's Report on the Implementation of the Program of Return and Care of Expelled Persons, Refugees and Displaced Persons, from autumn 1995 to 5 January 2000, 122,517 of

[456] Granić, M. (MM-15) T.24773:8-24774:1
[457] Cetina, I. (IC-05), T.23481:2-8. See also REHN, referred to at T.23484:1-7.
[458] Cetina, I. (IC-05), T.23484:16-23
[459] Granić, M. (IC-05), T.24717:9-14
[460] Granić, M. (MM-15), T.24712:23-12.
[461] Granić, M. (MM-15), T.24716:15-24717:8.
[462] Granić, M. (MM-15) T.24681:4-7.

130,000 refugees from the areas of Flash and Storm had returned to Croatia.[463]

Collection vs. Reception Centres/Treatment of Residual Civilian Population

226. Reception centres were humanitarian installations established for the welfare of civilians who had remained in the aftermath of Operation Storm, whereas collection centres were processing units for suspected war criminals.[464]

227. According to Mr. Zidovec, the civilian occupants of reception centres were granted a qualified freedom to leave when they wished. Indeed, Mr. Zidovec issued an explicit and official instruction to this effect.[465] Civilians who were in reception centres were interviewed. Over the course of these interviews, information requisite to the production of official documentation was sought.[466] Individuals who were incapable of living alone were brought to the reception centres either by the Croatian Police, or the Civil Protection.[467]

228. Paragraph withdrawn.[468]

229. Collection centres played the important roles of assisting people to obtain personal identification and addressing their security concerns.[469]

[463] D420, at p. 3D06-0605.
[464] Zidovec, Z. (AG-64), T.19990:15-24.
[465] Zidovec, Z. (AG-64), T.20007:7-20009:1.
[466] Zidovec, Z. (AG-64), T.20010:25-20011:7.
[467] Zidovec, Z. (AG-64), T.19990:15-24
[468] T.120 (unrevised), 31 August 2010.
[469] See D57, P897, and T.9292.

230. Mr. Zidovec testified that he had no knowledge of even a single instance in which people were brought by force to the reception centres.[470] Further, Mr. Zidovec testified that, during the course of his duties in relation to the reception centres he never heard any comments from representatives of the EUMM, ICRC, or any other humanitarian organizations, which called the legality of the Republic of Croatia's actions into question.[471]

231. Contrary to the OTP's allegation that reception centres were merely a vehicle for the removal of the Serb population from Krajina, they were in fact humanitarian installations, established to provide the necessities of life, during a time when Knin was without electricity and water. Following a brief period of *normalization*, the residents of the reception centres were free to go.[472]

232. According to Mr. Zidovec, approximately 4,100 civilians passed through reception centres, and according to the final data of the Civilian Protection, as part of Operation Povratak, in 1995, Knin's reception centre accounted for roughly 1,000 of these 4,000 individuals.[473]

Count 4, Plunder

233. The OTP has not met its burden of proof to support a conviction of Markač on the charge of Plunder.

The Alleged Crimes:

[470] Zidovec, Z. (AG-64), T.20011:25-20012:7.
[471] Zidovec, Z. (AG-64), T.20018:4-24.
[472] Cipci, I. (IC-43), T.23113:8-23114:22; 23115:25-23116:17.
[473] Zidovec, Z. (AG-64) T.20019:6-11.

234. Count 4 charges the accused Markač with violation of the laws or customs of war in connection with the plunder of Krajina Serb property from at least July until 30 September 1995 in Benkovac, Donji Lapac, Drnis, Ervenik, Gračac, Kistanje, Knin, Lisane Ostrovicke, Nadvoda, Obrovac, Oklaj, and Orlic.[474]

Applicable Law

235. Pursuant to Article 3(e), the International Tribunal has jurisdiction over violations of the laws or customs of war, which: "*shall include, but not be limited to… (e) plunder of public or private property*." [475]

236. The *Čelebići* Trial Chamber defined plunder as: "*all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as 'pillage.'*"[476]

237. The *mens rea* requirement will be satisfied when the perpetrator of the offence acts with knowledge and intent to acquire property unlawfully, or when the consequences of his actions are foreseeable.[477]

Evaluation of the Evidence[478]

238. The OTP alleges that units of the Special Police engaged in plunder in Donji Lapac, Gračac, Knin, and Orlic.[479] Evidence for each town will herein be examined in turn.

[474] The Indictment, 12 March 2008, para. 50
[475] ICTY Statute, Article 3(e)
[476] Čelebići TJ, para. 591
[477] Hadžihasanović TJ, para. 50
[478] The evidence was provided by the OTP in their Pre-Trial Brief and during the Trial

Donji Lapac:

- The ECMM reports[480] that allegedly report units of the Special Police looting as alleged in the OTP's Pre-Trial Brief are not in evidence.

- Witness John Hill (P-123) allegedly witnessed Special Police units looting in Donji Lapac.[481] Hill's statement, P292,[482] does not state that units of the Special Police were looting in Donji Lapac. Instead reference is made to civilian police looting in Pecane and also that Hill went there on 10 August. The Markač Defence respectfully submits that on 7 August 1995 units of the Special Police were stationed in the Kulen Vakuf area, in Bosnia and Herzegovina[483] and as such it could not have been Special Police that he allegedly observed looting.
- During his testimony, P-82 stated that he saw members of the Special Police and the Croatian Army driving tractors, agricultural machines and vans with the registration plates of the so-called Krajina while he traveled towards Donji Lapac.[484] The Markač Defence submits that the testimony of Witness 82 is unreliable in its entirety due to the witness' severe mental health problems.[485] The witness was hospitalized on several occasions due to post-traumatic stress disorder as of 1995[486] and his condition has worsened over the years.[487] In 2002 he was diagnosed with exogenous psychosis and made multiple suicide attempts; his condition was termed severe by his doctors.[488] P-82 also admitted to having

[479] OTP's Pre-Trial Brief and the Indictment
[480] OTP's Pre-Trial Brief, 23 March 2007, footnote 276: R026-6087 and R026-6101
[481] OTP's Pre-Trial Brief, 23 March 2007, footnote 276, p. 37
[482] p. 0057-7703
[483] P614
[484] T.16782:4 to 16782:11
[485] (REDACTED), (REDACTED).
[486] T.16827:13 to 16827:16
[487] T.16831:10 to 16831:15
[488] (REDACTED).

memory related difficulties.[489] Moreover, the fact that P-82 saw members of the Special Police driving agricultural machinery is not supported by any other witnesses and it does not prove that members of the Special Police were engaged in criminal activities. The OTP has adduced no evidence of any theft reports documenting this allegation. Earlier in his testimony the witness testified that the Special Police were not involved in plunder in Donji Lapac and that in fact they tried to prevent it.[490]

- Entry number 332 (2120hrs on 7 August) in the War Diary of the HV Main Staff for the period between 3 August and 11 August 1995,[491] as interpreted by Witness Pavlović reads: "[u]pon our return to Gračac, we received information about the further actions of the army or unknown units towards Lapac, and Markač from Gračac rang up the Main Staff on the phone, because that was the only point where we did have a telephone, and he established contact through an encrypted telephone line with the Main Staff, and … he protested."[492]
- Further, in the Special Police Report from Janic to Sačić re: Donji Lapac[493] Janic states that between 1700 and 180hrs on 7 August 1995, HV units, including the 9th and 118th Guards Brigades, entered Donji Lapac from Udbina. According to Janic:

> When the above forces entered the town, all-around firing erupted with infantry weapons, anti-aircraft machineguns and grenades. In the following hours houses and other buildings in Donji Lapac were burned. The burning of houses and other buildings continued during the night between 7 and 8 August 1995.[494]

[489] T.16831:20 to 16831:22
[490] T.16773:13 to 16775:20
[491] D555.
[492] Pavlović, D. (MM-5), T.25272:19-25273:4
[493] D556
[494] *Id.*, p. 1. Janic goes on to write that he talked with Colonel Brajkovic and other HV officers about calming down the situation in Donji Lapac. He was told not to worry, that everything would be alright. This evidence is corroborated by the Report on the Takeover of Donji Lapac on 7 August 1995, sent by Branislav Bole (Acting Chief of the Logistics Section of the Special Police, to Željko Sačić

Gračac

- Additional documents cited by the OTP in their Pre-trial Brief[495] were never in evidence in this case.
- Edmond Vanderostyne (P-152) stated in P321 and during his testimony[496] that on 8 August 1995 he witnessed units of the Special Police looting in the centre of Gračac. More specifically he saw members of the Special Police carrying TV's, shoes, bags, and suitcases onto a truck.[497] Vanderostyne also testified that he observed members of the Delta Unit hotwiring a private vehicle.[498]

239. The Markač Defence submits that what the witness observed in the centre of Gračac was not an act of looting but the Special Police's logistics unit preparing to depart from the area after completing their assignment. This was confirmed by the "Lieutenant" that Vanderostyne spoke to at the time.[499] The yellow bus which can be seen in P325 was used by the Special Police to transport them to their original units. Zdravko Janic confirmed that the yellow bus was used to transport members of the Special Police.[500] Lastly, the witness only spent 15 minutes in Gračac.[501]

- Herman Steenbergen (P-147) said in his statement that he saw members of the Special Police looting in Gračac.[502] However, during his testimony

(P586) in which it is stated that in the evening of 7 August 1995, from the direction of Udbine, HV units came into town (the 9th Home Guards Brigade and the 118th Home Guards Regiment among them). Upon entering Donji Lapac, the HV are, over the course of the entire night, said to have engaged in the shooting of infantry weapons, the throwing of bombs, and the setting of houses on fire (pp. 1-2).

[495] WS: 0107-6892, 0107-6903, 0107-6897
[496] T.4034:22 to 4035:9
[497] T.4077:7
[498] T.4030:7 to 4030:11, P324
[499] T.4035:9
[500] T.6354:15 to 6356:7
[501] T.4032:14
[502] P518

he corrected his 1996 statement, saying that, in fact, he could not remember seeing Special Police looting in the area.[503]

Knin

- A reference was given by the OTP in its Pre-Trial Brief to a number of ECMM reports from 7 August 1995.[504] These documents do not cast any light on the alleged Special Police looting in Knin. Furthermore, P614 shows that the Special Police were not in Knin on 7 August 1995.
- The Special Police was not on the territory of Sector South from 9 August, after it was ordered to withdraw by the HV Chief of the General Staff, General Červenko.[505] The Special Police did not return to Sector South until 21 August 1995, when General Červenko ordered it to engage in specific mop-up operations.[506] In the interim timeframe, the Special Police was in Sector North, specifically Petrova Gora.[507]
- While the Special Police were in Sector North, the HV, pursuant to General Červenko's order of August 14 1995,[508] was engaged in specific mop-up operations in Sector South.
- Jan Elleby (P-110) stated that he saw "Croat police forces" looting in Knin.[509] The Markač Defence submits that the Special Police were not stationed in Knin at any point.[510] Elleby's testimony is unreliable not only due to his unfamiliarity with the uniforms that the Special Police wore[511] but also as to the date he allegedly observed Special Police looting in Knin.[512]

[503] T.5411:13 to 5411:25
[504] OTP's Pre-Trial Brief, footnote 279.
[505] D557. See also D1103.
[506] D561.
[507] D1103
[508] D559.
[509] P215, p.3
[510] P614
[511] T.3455:10 to 3455:25
[512] T.3454:24 to 3455:5

- Philip Berikoff (P-98) testified that Special Police units were looting in Knin on 8 August.[513] P614 shows that Special Police were not in the area at the time.
- Erik Hendriks (P-119) testified that on about 6 August the HV and Special Police wanted him and others to stay at the UN camp so that the HV and Special Police could conduct looting.[514] According to P614 the Special Police were not in Knin on or about 6 August. Hendriks confirmed that he is not in possession of any evidence to support the allegations that Special Police were involved in the alleged plunder. He also admitted that he would not be able to identify members of the Special Police.[515]
- William Hayden (P-118) heard from a UN representative that the Special Police were looting.[516] Hayden did not witness the alleged looting himself and admitted that he failed to investigate these claims.[517] Furthermore, Hayden's testimonies appear to be inconsistent. In P988 in section 1.1.1 and T.10687:25-10688:5 the witness testified that there was systematic looting carried out by the HV, the Civilian Police and the Special Police 31 hours after Operation Storm ended. However, in P119 the witness only mentioned civilians carrying out looting and not people in uniform partaking.

Orlic

- The OTP never adduced any evidence with regard to Orlic.[518]

Markač Defence's Submissions

[513] T.7620:24 to 7621:9
[514] P925 at page 7 and at T.9643:16 to 9643: 19
[515] T.9641:6 and T.9644:7 to 9644:10
[516] T.10685:2 to 10685:7
[517] T.10685:16 to 10686:6
[518] OTP's Pre-Trial Brief, footnote 289: Romassev.

240. The above evaluation reveals that the OTP's allegations are unsubstantiated. The Special Police is an elite task force where high moral standards and professionalism are prerequisites for selection. During Operation Storm the units carried out specific tasks[519] at an exceptionally demanding tempo.[520] This is in line with the testimony of several witnesses who testified to Special Police units' law-abiding behavior. Ivan Herman (MM-9) testified that he had never witnessed any looting being conducted by members of the Special Police. He emphasized that the pace of their advancement was too fast for looting to be carried out by the units.[521] Dragutin Vurnek (MM-21) confirmed that he never saw any member of the Special Police looting.[522] The Markač Defence further submits that Markač ordered the units to adhere to international and national laws of war throughout the conflict. Witnesses Cvrk[523], Pavlović[524], Vurnek[525], Vitez[526], Herman[527] and Sačić[528] all testified to this fact.

Conclusion

241. The crime of plunder would have to be carried out by Special Police in an armed conflict for Markač to be criminally responsible. There is no evidence that units of the Special Police engaged in plunder during the period of the Indictment. Count 4 does not stand and should be dismissed due to lack of evidence.

---

[519] D543
[520] See D1932, para. 87.
[521] T.26438: 7 to 26438: 12
[522] D1895; T.26216:1 to 26216:5
[523] T.25395:6 through 25395:19
[524] T.25285:12 through 25285:16
[525] T.26209:24 through 26210:13
[526] T.25974:5 through 25974:8, 25974:23 through 25975:3, 25978, 2 through 25978, 19
[527] T.26441:10 through 26441:17
[528] T.26:17 through 26:23

Count 5, Wanton Destruction

242. The OTP has not met its burden of proof to support a conviction of Markač on the charge of Wanton Destruction.

The Alleged Crimes

243. Count 5 charges Markač with violations of the laws or customs of war in connection with wanton destruction of homes and buildings owned by Krajina Serbs from at least July until 30 September 1995[529] in Benkovac, Civljane, Donji Lapac, Drnis, Ervenik, Gračac, Kistanje, Knin, Lisane Ostrovicke, Lisicic, Nadvoda, Obrovac, Oklaj, and Orlic.[530]

Applicable Law

244. The crime of wanton destruction falls under Article 3(b) of the Statute. Article 3(b) is based on Article 23(g) of the Hague Regulations, which forbids the unnecessary destruction or seizure of enemy property, unless it is '*imperatively demanded by the necessities of war*.'[531] The crimes envisaged by Article 3(b) of the Statute are part of international customary law.[532] Although Article 3(b) codifies two crimes: (i) wanton destruction of cities, towns or villages; and (ii) devastation not justified by military necessity, the Strugar Trial Chamber has considered it appropriate to equate devastation and destruction and the offences are usually treated together.[533]

[529] Indictment, 12 March 2008, para. 50, p. 14.
[530] Indictment, 12 March 2008, para. 50, p. 14.
[531] *Brđanin*, TJ para. 591.
[532] *Kordić and Čerkez,* AJ, para. 76.
[533] *Strugar*, TJ, para. 291.

245. The elements of the offence as stated by the Appeals Chamber are: (i) the destruction of property on a large scale; (ii) not justified by military necessity; and (iii) the intent to destroy the property in question or the reckless disregard of the likelihood of its destruction.[534] However, an alternative *mens rea* was adopted more recently by the Trial Chamber providing for a slightly higher standard of proof: it required that the perpetrator act '*with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.*'[535]

246. The first element of the offence requires showing that a considerable number of objects were damaged or destroyed. However, this need not amount to the destruction of a city, town or village in its entirety.[536] The second element is a question of proportionality to be decided on a case-by-case basis. Military necessity has been defined variously with reference to the definition of military objectives in Article 52 of Additional Protocol I as, taken from the perspective of the person making the attacks, '*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*'[537]; and Article 14 of the Lieber Code of 24 April 1863 as *'the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.*'[538] Therefore, on a showing that a belligerent applied a disproportionate amount or kind of force in excess of what was believed to be necessary to defeat the enemy the second element of the offence will be satisfied.

[534] *Kordić and Čerkez,* AJ, para. 74
[535] *Strugar* TJ, para. 297.
[536] *Strugar* TJ, para. 294.
[537] *Strugar* TJ, para. 295.
[538] *Kordić and Čerkez* AJ, para. 686.

247. The case-law of the Tribunal with regard to the third element of the offence, the *mens rea*, appears to have two branches. The first requires knowledge on the part of the perpetrator that devastation was a probable consequence of his acts,[539] while the second branch provides a wider basis for liability where acts may be carried out with reckless disregard of the consequences.[540] The Appeals Chamber adopted the wider basis of liability in *Kordić and Čerkez*, but the Trial Chamber has adopted the narrower test more recently in the *Strugar* case.

Evaluation of the Evidence

248. The OTP's evidence addresses several towns in which the units of the Special Police allegedly took part in destruction of Krajina Serb property: Civljane, Cetina, Donji Lapac, Gračac, Kistanje, Knin, the road between Drnis and Knin, Orlic, Pecane, Srb or Donji Srb. Each location will herein be evaluated based on the evidence presented by the OTP in their Pre-Trial Brief and during the trial.

249. While indiscriminate shelling is the pillar of the OTP's JCE theory, it is also applicable to the charge of Wanton Destruction. As for the shelling claim made with respect to the Special Police in its area of operations, there is absolutely no evidence to support any claim that the Special Police indiscriminately used artillery in its axis of attack, specifically Gračac and Donji Lapac.

250. The OTP has produced no evidence nor any witness who has testified that there were any civilian casualties in Gračac as a result of artillery fire,

[539] *Strugar* TJ para. 296
[540] *Brđanin*, TJ, para. 593

or that there was any civilian collateral damage documented as a result of the shelling in Gračac and Donji Lapac, or that civilian buildings or civilians themselves were targets in either of those locations.

251. To the contrary, Josip Turkalj testified on artillery and targeting for Gračac. He had instructions to ensure that civilians would not be in harm's way as far as artillery was concerned; there were at least three military targets in Gračac town itself, that only 130mm canons were used, that multiple rocket launchers were not used, and that roughly fifteen rounds of artillery were used.[541]

252. With respect to Donji Lapac, Turkalj stated that the Special Police did not use artillery in the fighting to liberate Donji Lapac.[542]

253. The only shelling that occurred in Donji Lapac was the result of ARSK shelling from Bosnia, and from friendly fire in the direction of Udbina, both of which occurred on 7 August.[543]

254. The OTP's own artillery expert, Lt. Col. Harry Konings, had no opinions critical of, or even a discussion of, the Special Police and its use of artillery in Operation Storm. The OTP, according Col. Konings, did not even speak to him about any specific issues relating to the use of artillery in Operation Storm by the Special Police, including targeting issues.[544]

---

[541] T. Turkalj, P. (P-90) T.13697, 13703-707.
[542] *Id.* at T.13713-16.
[543] See P614 (Special Police War Diary showing that Donji Lapac was liberated at 1300hrs, and at 1410hrs the Special Police suffered a heavy HV artillery attack from firing positions in the Udbina area, which stopped after intervention at 1440hrs; the Special Police were already gone from Donji Lapac by 1630hrs into BH toward Kulen Vakuf; and ARSK artillery opened fire on Donji Lapac from BH at 1945hrs).
[544] See T.14775-14776. When asked "[w]ere you even aware that the Ministry of Interior Special Police had artillery at its disposal in its axis of attack?" He replied that he did not (See T.14775:25-14776:3).

255. Professor Geoffrey Corn, another expert who testified in this case, on behalf of the Gotovina Defence, was highly critical of Konings' reported opinions regarding the use of artillery, uncorrected fire, and forward observers.[545]

256. Josip Turkalj testified that there were no forward observers for artillery in a classic sense. Each commander in the field had a map with military targets which would allow him to call in artillery fire at preset coordinates if necessary.[546]

257. Dragutin Vurnek also testified regarding artillery operations for the Special Police on the first day of Operation Storm. He also described specific commanders who had the role of directing artillery fire, although not forward observers in the classic sense, they nonetheless had maps, targets and grids for directing artillery.[547]

Civljane

- P36 is a HRAT report from 2-4 September 1995.[548] This report[549] states that a Special Police car was seen close to burning houses "in the neighborhood near Knin" and not Civljane. Civljane is more than a half an hour's drive from Knin. Moreover, the fact that Special Police were seen driving a car close to burning houses does not mean that the Special Police were responsible for burning houses. There is no evidence that the Special Police were responsible for this fire, nor is there any explanation

[545] See, T.21178:12-21179:8, and T.21185:2-21187:13.
[546] See, T.13695:5-23. In response to the question, "why didn't the area allow for forward observers," put by OTP, Turkalj answered, "I suppose you didn't see the area. It's a mountain."
[547] See T.26253:4-26254:17.
[548] OTP's Pre-Trial Brief, 23 March 2007, footnote 293, p. 39. See also D1932, Expert Report of General Repinc, at para. 152, which cites D1923, the War Diary of the 9th Guards Brigade. See also *id.* at para. 153, which describes Gospić Military District Units entering Lapac at around 1800hrs and being "involved in the clearing, battlefield sanitations and collection of war spoils." See also D1924.
[549] Page number 0054-8147 was specifically referenced

as to what caused the alleged fire. Moreover, P614 and D932 demonstrate that units of the Special Police were not in the area at the time this report was made.

- Stig Marker-Hansen's report, P1290,[550] does not state that Special Police were responsible for destruction in Civljane. Although destruction in Civljane is mentioned in this report, no reference to the Special Police is provided by the author.
- Philip Berikoff did not identify the Special Police as perpetrators of burnings in Civljane.[551]

258. Cetina

- Philip Berikoff testified that he observed Special Police, HV and warlords causing destruction.[552] P614 shows that Special Police were not in the area.
- Roland Dangerfield stated that Special Police prevented him from accessing areas where he observed fire[553] from 9 August onwards.[554] The witness had difficulties specifying the areas which he was prevented from entering[555] but ultimately settled for Cetina.[556] The Markač Defence submits that the Special Police were never in the area.[557] Furthermore, the witness did not mention the Special Police in his 1995.[558] The fact that Dangerfield did not know what the role of the Special Police was during Operation Storm[559] and that he was not able to identify them by their uniform or weapons[560] significantly affects his credibility.

[550] Page number 0034-1798
[551] T.7621:10 to 7621: 18
[552] T.7606: 4 to 7606: 9
[553] P696 paragraph 8 & T.7162:13 to 7163:25
[554] T.7277:3 to 7277:4
[555] T.7277: 9 to 7277: 11
[556] T.7279:23
[557] P614.
[558] T.7279:16 to 7281:20
[559] T.7282:10 to 7282:12
[560] T.7280:19 to 7281:20

Donji Lapac

- ECMM reports[561] were identified in the OTP's Pre-Trial Brief in support of the allegation that Special Police units were responsible for wanton destruction in Donji Lapac. None of these reports are in evidence.
- Philip Berikoff testified that "grey overalls" were setting fire to houses on 11 August. The Markač Defence submits that the Special Police were not in the area on 11 August.[562] P614 shows that Special Police were out of Donji Lapac as of 7 August 1995. Moreover, the witness admitted that he did not know with certainty if the Special Police were involved in the burning of property in Donji Lapac.[563]

Gračac

- None of the ECMM reports identified by the OTP in its Pre-Trial Brief relating to Gračac are in evidence.[564]
- Claude Bellerose testified that Special Police forces after Operation Storm often stopped him from entering villages due to mop up operations and for his own safety.[565] According to the witness he later observed one or two houses on fire in the area.[566] This may have happened three or four times on his way to Gračac but he was not certain. Bellerose's conclusion that it was Special Police that refused him entry was based on the type of uniform that the Special Police wore.[567] Bellerose testified that the uniforms were very dark grey or black and he could not remember the

[561] R026-6087, R026-6101, and R026-6087
[562] General Červenko's Withdrawal Order to Special Police D557, and Orders from General Červenko dated 10 August 1995 to the Ministry of the Interior Special Police forces under the Command of Markač to conduct mop-up operations in Petrova Gora, D1103.
[563] Berikoff, (P.98), T.7852:7-7852:10.
[564] R026-6087, R026-6101, R026-6097. In addition, the following are not in evidence: WS: 0041-3839, 0041-3859, 0041-3843
[565] T.5875:9 to 5875:11
[566] T.5874: 21 to 5875:14
[567] T.5955:1 to 5955:4

type of weapon that the Special Police carried.[568] Moreover, he was not able to testify as to the type of insignia worn by the units.[569] He could not specify any dates or indicate how many times he was refused entry, or how many people were involved in these incidents.[570] Finally, in his 1999 statement he did not mention any specific towns to which he was refused entry but in his supplemental statement in 1998 he mentioned Gračac.[571] The Markač Defence submits that the witness had not observed Special Police committing any crimes. The witness lacked knowledge as to the kind of uniform the Special Police wore. Thus, he cannot know beyond reasonable doubt that he in fact encountered the Special Police.

Kistanje

- John Hill's statement[572] does not identify the Special Police being involved in Wanton Destruction. The ECMM reports[573] identified in the OTP's Pre-Trial Brief are not in evidence.
- Philip Berikoff made a correction to his statement that he did not observe Special Police in Kistanje on 9 August.[574] P614 indicates that Special Police were not in Kistanje on that day.

Knin

- The ECMM report from 9 August 1995, P933, does not mention Special Police carrying out any destruction in Knin. The report mentions "*small special units*" but fails to identify the Special Police. Document 0055-9674[575] could not be found. P614 indicates that units of the Special Police were leaving Kulen Vakuf in BH at the time.

[568] T.5950:23 to 5951:23
[569] T.5954:21 to 5954:25
[570] T.5952:19 to 5953:1
[571] T.5951:24 to 5952:15
[572] P292.
[573] OTP's Pre-Trial Brief, 23 March 2007, footnote 299, p. 39: 0040-4418, 0040-4423, 0040-4420
[574] T.7590:22 to 7591:3
[575] OTP's Pre-Trial Brief, 23 March 2007, footnote 300, p. 39.

- The HRAT report dated 17 August 1995, P40, does not mention Special Police committing the crime of wanton destruction. Other documents cited in the OTP's Pre-trial Brief are not in evidence.[576]
- Erik Hendriks testified that on about 6 August he noted that HV and Special Police wanted him and other observers to stay at the UN camp so that HV and Special Police could carry out destruction.[577] P614 indicates that Special Police could not have been in the area on that day. Furthermore, Hendriks admitted that he was not in possession of any evidence indicative of Special Police involvement in criminal activities.[578] He had no knowledge about the type of uniforms worn by Special Police.[579]
- Stig Marker-Hansen testified that he observed Special Police in Knin on 5 August.[580] P614 shows that Special Police were not in Knin on 5 August. Marker-Hansen admitted that he was not aware that "HV-SP" did not exist[581] and also that he lacked knowledge of the structure and command of the Special Police.[582] Furthermore, he confirmed that he would not be able to identify members of the Special Police[583] and he was not aware of the difference between the army and the police.[584]

Road between Drnis and Knin

- Stig Marker-Hansen testified that the UNMO were turned back by the Special Police on the road between Drnis-Knin Road where the UNMO observed fire in the vicinity.[585] P614 shows that Special Police were not in

[576] 0060-4841 and 0060-4840, cited in Pre-Trial Brief, 23 March 2007, footnote 300, p. 39
[577] P925 page 7 & T.9643: 16 to 9644: 4
[578] T.9644:5 to 9644:10
[579] T.9645:20 to 9645:24
[580] P1283 & T.14970: 19 to 14970: 20
[581] T.14971:6 to 14971:8
[582] T.14973: 11 to 14974: 19
[583] T.14971: 12 to 14971: 13
[584] T.14973: 7 to 14973: 10
[585] P1290 page 9 & T.14977:12 to 14978: 1

the area at the time. In addition, Marker-Hansen did not witness the alleged incident himself.[586]

- Philip Berikoff corrected his statement, saying that in fact it was the civilian police marking the houses, not Special Police.[587]

Orlic

- Several documents[588] cited in the OTP's Pre-trial Brief are not in evidence.
- Marker-Hansen's ECMM Report, P1290, is silent on Special Police responsibility for the alleged burning houses in Orlic. The report noted, based on observations from 12 August, that Orlic was burnt. No reference was made to Special Police.

Pecane

- John Hill testified that he saw Special Police near burning houses in Pecane, on the way to Benkovac. Although the Special Police was allegedly in the vicinity, he testified that it was the civilian police that were setting houses on fire in Pecane.[589]

Srb or Donji Srb

- In Soren Liborious' 2005 statement he claims to have seen Special Police vehicles in the vicinity of Srb or Donji Srb.[590] Liborious never identified or accused the Special Police of any misconduct in any of his previous statements. Furthermore, he was not able to provide dates for when the Special Police were seen in the area[591] and he admitted that he did not see the Special Police committing crimes of Wanton Destruction.[592] Further,

[586] T.14978: 4 to 14978:6
[587] T.7594:21 to 7595:1
[588] 0034-1869, 0034-1803, 0051-1334, and 0051-1341, as well as 0051-1339 – OTP's Pre-Trial Brief, 23 March 2007, footnote 306, p. 39
[589] T.3772:17 to 3774:1
[590] T.11294-8 (describing the Special Police uniforms as blueish fatigues); and P801, at p. 5.
[591] T.11296: 8 to 11296: 17
[592] T.11295: 23 to 11296: 5

his difficulties with describing uniform colors[593] point to the fact that he would have had difficulty identifying the Special Police even if he had seen them.

General allegations

- The OTP has made allegations related to the Special Police blocking the freedom of movement of internationals and manning check-points. Neither of these allegations rise to the level of criminal conduct. Several witnesses testified that the Special Police did not hold or form check-points.[594] As another example, in P109, an UNMO SitRep of 6 August 1995, UNMO Team Gracac reported that "UNMO Team met with COMD of HV Special Forces and allowed to carry out PTL in Gracac."[595] Moreover, as was observed in the testimony of Edmond Vanderostyne, he fairly able to walk Gracac to speak whomever he wished, and to take photographs without any repercussions.[596]
- General Lausic testified that, as far as he was aware, the Special Police were never referred to in meetings or in reports as having committed crimes in Sector South during the relevant time period.[597]
- Alain Forand stated that HV and Special Police were burning houses that had already been destroyed in 'some towns' within the weeks the war ended.[598] However, the witness did not see the commission of the crimes himself,[599] and his lack of knowledge about Special Police[600] and the type

[593] T.11283: 1 to 11283: 20
[594] Vitez, D. (MM-10), T.25986; Pavlovic, D. (MM-5) T.25276-77; Janic, Z (P-81) T.6208-10; Vurnek, D. (MM-12) T.26178-80. Repinc Expert Report, D1932, at para. 97.
[595] P109, p. 9.
[596] See generally, Trial Testimony of Vanderostyne, E. (P-152).
[597] T.15687.
[598] P330 page 10 & 4414:12 to 4416:14
[599] T.4414:20 to 4415:1
[600] T.4415:10 to 4415:12

of uniforms they wore[601], raises serious questions as to the credibility of his testimony regarding Special Police.

- Alain Gilbert testified that Forand's house was vandalized by the Special Police, Croatian Army, and Military Police between 5 and 8 August.[602] Gilbert admitted that he did not see the crime being committed himself.[603] Gilbert failed to identify any members of the Special Police[604] Moreover, the Special Police were not in Knin in that timeframe.[605]
- William Hayden (W-118) heard from a UN representative that the Special Police were burning houses.[606] Hayden did not witness the alleged destruction himself and admitted that he failed to investigate these claims.[607] Furthermore, Hayden's testimonies appear to be incongruent. In P988 in section 1.1.1 and at T.10687:25 to 10688:5 the witness testified that there was systematic destruction carried out by the Croatian Army, the Civilian Police and the Special Police, 31 hours after Operation Storm ended. However, in P119 the witness only mentioned civilians carrying out looting.
- W-82 allegedly observed Special Police throwing hand grenades into houses. He associated this with mop up operations.[608] As already pointed out by the Defence above W-82's testimony should be discredited due to his severe mental health problems.[609]
- Finally, General Leslie in D329, his infamous interview on Canadian public radio, accused the Special Police of committing crimes, accusations which were completely false: "there were Special Police teams, wearing

[601] T.4415:20 to 4416:1.
[602] P589, para. 29 & T.6488:14 to 6488:20
[603] T.6489: 6 to 6489: 7
[604] T.6488:23 to 6488: 25
[605] P614
[606] T.10685:2 to 10685:7
[607] T.10685:16 to 10686:6
[608] T.16799:21 to 16800:4
[609] (REDACTED).

their very distinctive blue uniforms, who were engaged in hunting and killing in the mountains of Serbian civilians."[610]

- There have been a variety of witnesses who have testified on behalf of the OTP who have identified the Special Police in the proximity of or committing crime. In every case, these witnesses have been wrong. For example, Christopher Hill testified that in Pecane he identified perpetrators in "light blue with grey pants" and "the dark blue of the Special Police…"[611] Robert Williams could not confirm whether the Special Police were in Knin on 5 or 6 August. He identified the Special Police uniforms as "sort of an off-greyish/steel colour." He also stated that they wore black berets and wore a sidearm.[612] Witness Maria Teresa Mauro was unaware that the Croatian Special Police never wore camouflage uniforms.[613] In addition, the HRAT reported "a group of ten camouflage-clad Croatian Special Police moving up the road to Grubori mid-morning on 25 August."[614] Witness Al-Alfi identified Special Police as wearing "a special uniform." "It can be blue, it can be dark grey, something like that. But I knew that."[615] When asked where he saw the Special Police, he stated "of course, in the streets." Question: in Knin? Answer: in Knin.[616] Witness Bellerose, in describing the Croatian Special Police, stated that they were wearing one or two-piece uniforms, either dark grey, or black. They were also wearing a black load-bearing vest. A vest where you could put ammunition."[617] Bellerose further stated that "the soldiers were usually wearing fatigue uniform with camouflage pattern and those persons stopping us, I call them the Special Police, were wearing a one-colour uniform, either dark grey or black and had load

[610] T.4433.
[611] T.3773.
[612] T.9642, T.9645, T9646.
[613] T.1264.
[614] P27.
[615] T.13940-41.
[616] T.13941.
[617] T.5875.

bearing vests, and looked a lot more professional than normal police."[618] Witness Edmond Vanderostyne in his 9 August 1995 newspaper article, P322, wrote the following:"as is evident from the MUP armbands they are wearing, they come under the Croatian Interior Ministry. They constitute part of the Police Force, but are dressed in khaki uniforms."[619]

- The only witness called by the OTP who correctly identified the Special Police uniform was Herman Steenbergen. He stated that "they were wearing olive-green military suits."[620] He also stated that they were wearing mountain shoes, not the regular army boots.[621]

Conclusion

259. Based upon a review of the evidence, the OTP's claims in relation to Count 5 must fail. There is no evidence beyond reasonable doubt that units of the Special Police were involved in destruction of property in Sector South.

Counts 6 and 7, Murder

260. The OTP has not met its burden of proof to support a conviction of Markač on the charge of Murder.

Allegations

261. In counts 6 and 7 it is alleged that during the period of the Indictment, Ante Gotovina, Ivan Čermak, and Markač, acting individually and/or through their participation in the alleged JCE, planned, instigated,

[618] T.5951.
[619] P322, p. 2.
[620] T.5425.
[621] T.5425.

ordered, committed, and/or aided and abetted the planning, preparation and/or execution of the infliction of inhumane acts and cruel treatment against Krajina Serb civilians and persons taking no part in hostilities, including members of Serb forces who had laid down their arms and those placed *hors de combat*, including their humiliation and/or degradation, by firing upon (including by aerial attack), assaulting, beating, stabbing, threatening and burning them, including in the following municipalities or parts thereof: Benkovac, Donji Lapac, Drnis, Gračac, Kistanje, Knin and Orlic.

The Law

262. The OTP has not met its burden of proof to support a conviction of Markač for Murder as a violation of the laws and customs of war and/or Murder as a Crime Against Humanity.

Legal Elements of Murder

263. The elements of the offence of murder as a crime against humanity and as a violation of the laws or customs of war have consistently been held to be the same in the jurisprudence of this Tribunal.[622]

264. The *Brđanin* Trial Chamber held that save for some insignificant variations in expressing the constituent elements of the crime of murder and willful killing, which are irrelevant for this case, the jurisprudence of this Tribunal has consistently defined the essential elements of these offences as follows:

1. The victim is dead;

[622] *Blagojević and Jokić* TJ, January 17 2005, para. 556. See also *Stakić* TJ, IT-97-24-T, 31 July 2003, para. 631, *Krnojelac* TJ, IT-97-25-T, March 15 2002, paras. 323-324.

2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and

265. The act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions the accused bears criminal responsibility, with an intention:

a. to kill, or
b. to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[623]

Markač's Alleged Responsibility

266. Markač is not charged with having personally committed any murders, rather his criminal liability stems from his alleged role in the JCE, of ordering, planning, instigating, or aiding and abetting under Article 7(1) or otherwise as superior responsibility under Article 7(3) of the Statute. Therefore, even if the OTP has proved that the murders alleged in the Indictment were, in fact, committed, the OTP must also prove that Markač was either part of a *JCE*, that he *planned, ordered, instigated or aided and abetted* these murders, or that these acts were committed by subordinates under his control *and* that he *knew or had reason to know* these murders were about to be committed and that he failed to prevent or to punish the perpetrators. The OTP has failed to establish that Markač is criminally liable for any of the murders alleged in the Indictment.

[623] *Brđanin* TJ, para. 381. See also *Kvocka et al* AJ, para. 35.

Counts 8 and 9, Inhumane Acts and Cruel Treatment

267. The OTP has not met its burden of proof to support a conviction of Markač on the charges of Inhumane Acts and Cruel Treatment.

Introduction

268. In Counts 8 and 9 it is alleged that from at least July 1995 to about 30 September 1995, the accused, acting individually and/or through their participation in the joint criminal enterprise, planned, instigated, ordered, committed, and/or aided and abetted the planning, preparation and/or execution of the infliction of inhumane acts and cruel treatment against Krajina Serb civilians and persons taking no part in hostilities, including members of Serb forces who had laid down their arms and those placed *hors de combat*, including their humiliation and/or degradation, by firing upon (including by aerial attack), assaulting, beating, stabbing, threatening and burning them, including in the following municipalities or parts thereof: Benkovac, Donji Lapac, Drnis, Gračac, Kistanje, Knin and Orlic.

269. The OTP allege that the inhumane acts and cruel treatment included: serious injuring of civilians during shelling attacks; inhumane conditions of detention and ill treatment in detention; wounding; disappearances; and other serious violations of human dignity.

Legal Elements

Article 5(i): Other Inhumane Acts

270. Inhumane Acts must be of similar severity to other enumerated acts under the Article and the OTP must prove serious mental or bodily harm to the victim, resulting from an act or omission of the accused or his subordinate, motivated with intent to cause that harm[624]. In the case of *Vasiljevic*[625], an 'attack on human dignity' was listed in addition to serious mental or bodily harm to the victim as the *actus reus*. In addition to the elements of the crime the acts must be part of a widespread or systematic attack against a civilian population[626]. The relevant factors in assessing the seriousness of an act may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim[627]. While there is no requirement that the suffering have long-term effects, that may be a factor relevant to the determination of the seriousness of the acts[628].

271. It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act[629].

272. Mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance also fall under this sub-category of Other Inhuman Acts[630],

[624] *Kordić & Čerkez,* AJ, para. 117.
[625] *Vasiljevic,* AJ, para. 165.
[626] *Kordić & Čerkez,* TJ, para. 271.
[627] *Vasiljevic,* AJ, para. 165.
[628] *Vasiljevic,* AJ, para. 165.
[629] *Blagojević & Jokić*, TJ, para. 628,
[630] *Kvocka et al.,* TJ, para. 208.

as does serious physical and mental injury[631]. The removal of individuals to detention facilities, however, is excluded[632].

Common Article 3(1)(a) of the Geneva Conventions

273. Cruel treatment, a violation of the laws or customs of war, is an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, committed against a person taking no active part in the hostilities[633]. The elements of the offence are the same as those for inhuman treatment[634]. The mental suffering requirement is lower than that required for torture[635] and a prohibited purpose is not required in the offence of cruel treatment[636]. As regards *mens rea*, the perpetrator must have acted with direct intent to commit cruel treatment or with indirect intent, i.e. in the knowledge that cruel treatment was a probable consequence of his act or omission.[637]

The Evidence

274. Claim: in August and September 1995, elderly Serb civilians who were given special passes to go back to their homes returned to the UN compound and reported that they had been beaten by Croatian military.

[631] *Blaškić*, TJ, para. 239.
[632] *Blaskic*, TJ, para. 723.
[633] *Blaškić*, AJ, para. 595.
[634] *Naletilic & Martinovic*, TJ, para. 246.
[635] *Kvocka et al.*, TJ, para. 161.
[636] *Kvocka et al.*, TJ, para. 226.
[637] *Limaj et al.*, TJ, para. 231.

Some had broken bones as a result of the beatings. The OTP have failed to call any witnesses to testify to this allegation.

275. Claim: Serb civilian men and women fleeing at the beginning of Operation Storm were arrested at gun point by Croatian soldiers and detained in the basement of a house overnight before forcibly transferring them to collection centres. Soldiers constantly threatened the detainees.

276. Witness 53 testified that the perpetrators wore green camouflage uniforms[638] and had their faces masked with black paint.[639] Further, the witness explained that these soldiers insulted and cursed the passengers in the car, and threatened to kill them[640] before transporting them to the basement of a nearby house. The following day, the witness alleged that they were transported to a school in Knin which was guarded by policemen. While there are alleged to have been instances of provocation, the witness explained that the policemen guarding the school and the collection centre in Zadar offered people the chance to leave if they wished to remain in Croatia.[641] The witness suggested that most people chose not to, and some that did later returned to the collection centre for security reasons.[642]

Conclusion

277. There is no evidence that the Special Police were involved in any of the crimes of Inhumane Acts and/or Cruel Treatment alleged in the Indictment. As such, these charges against Markač must be dismissed.

[638] P652, para. 12
[639] T.6729:14-6729:24; T.6730:14-6730:15
[640] T.6721:17-6721:19
[641] T.6741:18-6741:24
[642] T. 6719:9-6719:24

MARKAČ'S CHARACTER, AND SENTENCING

Applicable Law

278. Article 23(1) of the Statute provides that "*[t]he Trial Chambers shall pronounce Judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law*."

279. Article 24 of the ICTY Statute and Rule 101 of the Rules of Procedure and Evidence are the provisions to be considered when determining sentencing.

280. Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practise regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

281. Rule 101

Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

282. The above provisions direct the Trial Chamber to consider practises of the courts of the former Yugoslavia, gravity of the offence(s), individual circumstances of the accused, as well as aggravating and mitigating circumstances.

283. Cumulative convictions based on the same conduct are permitted only where each crime involves a materially distinct element.[643]

[643] See, for example, *Kordic & Cerkez* AJ, para. 1032.

284. The Markač Defence objects to the Tribunal's practice of requiring argument on sentencing from the Parties in advance of judgement on the ground that it is fundamentally detrimental to the due process rights of the accused.[644]

285. The Markač Defence will now take a position regarding each of the factors enumerated in paragraph 273.

Factors to be considered by the Trial Chamber

Recourse to practice of the courts of the former Yugoslavia per Article 24(1), and Rule 101(iii)

286. The Socialist Federal Republic of Yugoslavia (SFRY) was dissolved in 1992[645] and with it its courts. Although the Tribunal's Statute recommends the consideration of the practices of the SFRY the Markač Defence will submit, throughout this sentencing chapter, relevant parts of the criminal codes of the above-mentioned jurisdictions. It is the Defence's submission that as the SFRY's criminal code is no longer in use practices of other jurisdictions might be of assistance to this Trial Chamber in its determinations of sentence.

287. Although the Trial Chamber is not bound by these practices,[646] recourse to these provisions is recommended as they can aid the Trial Chamber in determination of a sentence.[647]

---

[644] For further argument on this matter, see, for example, Sloane, Robert, "Sentencing for the Crime of Crimes," *Journal of International Criminal Law* 5-2007,p. 734, and Gaynor and Harmon, "Ordinary Sentences for Extraordinary Crimes," *Journal of International Criminal Justice* 5-2007, p. 708.
[645] Security Council Resolution No. 777
[646] Delalić TJ, para. 813
[647] Delalić TJ, para. 820

288. Article 41(1) of the SFRY Criminal Code appears to reflect Article 24(2) of the Tribunal's Statute. Article 41(1) provides that."… all the circumstances bearing on the magnitude of the punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal responsibility, the motives from which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender."[648]

289. Article 42(2) of the SFRY Code is similar to Rule 101(B)(ii). This provision states that the Chamber may consider whether: "there are mitigating circumstances which are such that they indicate that the objective of the sentence may be achieved equally well by a reduced sentence."[649]

290. Under the SFRY Criminal Code prison sentences are addressed in Article 38:

(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.

(2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.

(3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave

[648] Article 41(1) of the SFRY Criminal Code adopted on 28 September 1976 and enforced on 1 July 1977

[649] Krstić TJ, para. 713

> consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by the statute […][650]

291. Punishment for war crimes is specified in Article 142(1) of the SFRY Code. The SFRY Code does not appear to provide punishment for crimes against humanity addressed under Article 5 of the Statute. Article 142(1) states that "[w]hoever in violation of the rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhumane treatment … immense suffering or violation of bodily integrity or health […], forcible prostitution or rape; application of measures of intimidation and terror, … other illegal arrests and detention … forcible labour … or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty." The death penalty was abolished in 1977 and is now covered by life imprisonment.

292. The Trial Chamber in Banović Sentencing Judgement held that: "[t]he Trial Chamber considers that both Article 142 and Article 41(1) of the SFRY Criminal Code offer useful guidance in determining sentence."[651]

293. Article 157(a) of the Croatian Criminal Code reflects Article 5 of the ICTY Statute. It provides that whoever commits any of the enumerated offences shall be punished by imprisonment for not less than five years or by a life sentence. The Serbian Criminal Code, at Article 371, states that imprisonment for crimes against humanity starts at a minimum of five years to thirty or forty years. Slovenia's Criminal Code addresses this

[650] Delalić TJ, para. 1206
[651] Banović Sentencing Judgement, para. 89

criminal offence under Article 374 and the punishment varies between 10 and 30 years.

294. War crimes per Article 3 of the Statute can also be found in the respective Criminal Codes of Croatia, Serbia and Slovenia. In Croatia, the specifications of imprisonment are provided for in Article 158 and the imprisonment will be "for not less than five years or by long-term imprisonment." The Serbian Code in War Crimes Against Civilian Population at Article 372 punishes by imprisonment of minimum five years. The Slovenian Criminal Code does not appear to address war crimes.

Gravity of the offence(s) and degree of participation of Markač

295. The gravity of an offence is the primary factor to be considered when determining a sentence.[652] A sentence must reflect the inherent gravity of the criminal conduct of the accused together with particular circumstances of the case, the form and degree of participation of the accused in the crime.[653]

Aggravating circumstances

296. Pursuant to Article 24(2) and Rule 101(1)(B) the Trial Chamber has discretion[654] to consider aggravating circumstances.

[652] Galić AJ, para. 442; Blaškić AJ, para. 683; Čelebići AJ, para. 731; Kupreškić et al AJ, para. 442; Aleksovski AJ, para. 182
[653] Blaškić AJ, para. 683; Stakić AJ, para. 380
[654] Blaškić AJ, para. 696

297. Aggravating circumstances must directly correspond to the commission of the offence charged.[655] Only matters which are proved beyond reasonable doubt against an accused may be taken into account in aggravation of a sentence.[656] Neither the Statute nor the Rules define what factors may be considered in aggravation of a sentence. In the past the scale and planning of the offence, the number of victims, vulnerability of the victims and depravity of the crimes, the length of time over which crimes were committed, the violence of the crimes, the fact that crimes were repeated and systematic[657] were regarded as aggravating factors.

298. The Criminal Codes of Croatia, Serbia and Slovenia appear to suggest that the degree of culpability, motives for committing the criminal offence, the degree of peril or injury to the protected good and the conduct of the accused after the perpetration of the criminal offence[658] might aggravate a sentence.

299. The Markač Defence submits that there are no aggravating factors in this case. The OTP have not provided the Trial Chamber with any evidence demonstrating that Markač planned or participated in the commission of the alleged crimes.

300. The fact that Markač occupied a position of authority does not demand the imposition of a harsher sentence.[659] It is well established in this Tribunal that it is the abuse of authority that can constitute an

[655] *Kunarac et al* TJ, para. 850
[656] *Čelebići* AJ, para. 763.
[657] *Blaškić* TJ, paras. 783-784; Babić AJ, para. 43
[658] The Criminal Code of the Republic of Croatia, para. 56; The Criminal Code of the Republic of Serbia, para. 54; The Criminal Code of the Republic of Slovenia, para. 41(2)
[659] *Hadžihasanović & Kabura* AJ, para. 320

aggravating factor.[660] The Appeal Judgement in *Blagojević and Jokić* held that a position of authority must be looked at together with how this position was exercised. There is no evidence that Markač abused his position of authority, as the head of the MUP. In fact, there is abundant evidence that Markač did everything in his power to make sure that his subordinates adhered to national and international laws of war. Witnesses testified that he worked hard to ascertain that his subordinates obeyed the laws.[661]

Mitigating circumstances

301. When determining a sentence the Trial Chamber per Rule 101(B)(ii) is invited to take into account a number of factors including the existence of any mitigating circumstances.

302. Mitigating circumstances need only be proven on the balance of probabilities[662] and need not directly relate to the offence charged.[663] The Trial Chamber has broad discretion to decide which factors may mitigate the sentence of the accused.[664] The *Babić* Judgement on Sentencing Appeal provided a number of examples as to what kind of situations may mitigate the sentence. These are: voluntary surrender, good character with no prior criminal convictions, comportment in detention, personal and family circumstances, the character of the

[660] *Hadžihasanović & Kabura* AJ, para. 320; Stakić AJ, para. 411; Babić Sentencing AJ, para. 80
[661] Witness Zoran Cvrk (MM-4) T.25395:6 to 25395:19; Witness Davorin Pavlović (MM-5) T.25285:12 to 25285:16; Witness Dragutin Vurnek (MM-12) T.26209:24 to 26210:13; Witness Dražen Vitez (MM-10) T.25974:5 to 25974:8, 25974:23 to 25975:3, 25978, 2 to 25978, 19; Witness Ivan Herman (MM-9) T.26441:10 to 26441:17; Witness Željko Sačić (CW-3) T.26:17 to 26:23
[662] *Sikirica* Sentencing Judgement, para. 110
[663] *Kunarac et al* TJ, para. 850; Martić TJ, para. 494
[664] *Kambanda*, 4 September 1998 para. 30; *Akayesu*, 2 October 1998, para. 21; *Kayishema*, 21 May 1999, para. 3

accused subsequent to the conflict, or assistance to the detainees of victims.[665]

303. The Croatian, Serbian and Slovenian Criminal Codes state that the punishment may be mitigated in view of the existence of particularly obvious mitigating circumstances; and in cases where mitigating circumstances exist the purpose of the punishment may also be served by a more lenient punishment.[666] These codes largely agree on which factors may mitigate sentences. These factors will be enumerated below.

304. The Markač Defence respectfully requests that the Trial Chamber take into account the following factors in mitigation of Markač's sentence, if a conviction and sentence is to be imposed: good character with no prior criminal convictions, poor health, assistance to victims of war, and voluntary surrender. Applicable law and factors for each of these circumstances will be evaluated next.

Evaluation of the Factors

Markač's Good Character

305. Character of the accused is one of the many factors that the Trial Chamber has broad discretion to consider in mitigation of the Defendant's sentence.[667] Article 24(2) of the ICTY Statute states that in addition to examining the gravity of the offence, individual circumstances of the accused should also be considered.

[665] *Babić* Judgement on Sentencing Appeal, para. 43
[666] The Criminal Code of the Republic of Croatia, paras. 56 and 57(1); The Criminal Code of the Republic of Serbia, para. 56(3); The Criminal Code of the Republic of Slovenia, para. 42(2)
[667] *Kambanda*, 4 September 1998, para. 30; *Akayesu*, 2 October 1998, para. 21; *Kayishema*, 21 May 1999, para. 3

306. The ICTY and ICTR Chambers have consistently considered character evidence when imposing penalty.[668] The *Blaskic* Trial Judgement held that: "[a]s a human being, the accused has a conscience, a personal history and a character…"[669] The *Mučić et al* Appeals Judgement reveals that the judge must be in "possession of the fullest information possible concerning the Defendant's life and characteristics."[670] The *Semanza* Trial Chamber held that prior character of the accused was considered in mitigation of sentence.[671]

307. The following character traits were considered by previous Trial Chambers in their determinations: high moral standards, lack of convictions, duty as a soldier, exemplary behaviour throughout the trial, man of duty, authority and conviction[672] as well as leading assistance to some of the victims.[673]

308. A number of national jurisdictions also take into account the character of an accused. Article 41(1) of the SFRY Penal Code 1990 compels the courts to consider all the circumstances of the case, especially the past conduct of the offender, his personal situation and his conduct after commission of the criminal act, as well as other circumstances relating to his personality. The Croatian, Serbian and Slovenian Criminal Codes appear to reflect the SFRY Penal Code's factors.[674]

---

[668] *Mucic* et al AJ, para. 788; Semanza TJ, para. 577
[669] *Blaškić* TJ, para. 771
[670] *Mucic* et al AJ, para. 787
[671] *Semanza* TJ, para. 577
[672] *Blaškić* TJ, para. 780
[673] *Blaškić* TJ, para. 781
[674] The Criminal Code of the Republic of Croatia, Article 56; The Criminal Code of the Republic of Serbia, Article 54(1); The Criminal Code of the Republic of Slovenia, Article 41(2)

309. In England and Wales, in the case of *Vye* it was held that the accused is entitled to adduce evidence of his good character.[675] Moreover, in *Aziz* Lord Steyn said: "[i]t has long been recognized that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question."[676]

310. In the United States, the reasonableness of a sentence depends on its conformity to the sentencing factors set forth in 18 U.S.C. § 3553(a).[677] The court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant."[678] In addition, the court is to "impose a sentence sufficient, but not greater than necessary" in light of the purposes of sentencing.[679] Those purposes include the need: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[680] The court must consider the kinds of sentences available, the sentencing range established federal sentencing guidelines, any pertinent policy statement, the need to avoid unwarranted sentence disparities, and the need to provide restitution to any victims of the offense. [681]

311. "Before [the United States Supreme Court's decision in [*United States v.*] *Booker*, [543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)], the §3553(a) factors could be considered only in limited circumstances; now

[675] *Vye* 1993 1WLR471 page 474
[676] *Aziz* 1996 AC 41, page 50
[677] *United States v. Cunningham*, 429 F.3d 673, 675 (7th Cir. 2005).
[678] 18 U.S.C. § 3553(a)(1)
[679] 18 U.S.C. § 3553(a)(2)
[680] *Id.*
[681] 18 U.S.C. § 3553(a)(3) – (a)(7)

the district courts must always consider these factors to determine if the advisory Guidelines range is appropriate."[682]

312. The Canadian Criminal Code[683] as well as the Danish Criminal Code[684] also advise their respective courts to gather and contemplate information concerning the alleged offender's character.

Evidence of Markač's Good Character

313. During this trial, the OTP has not provided the Trial Chamber with any evidence that would suggest Markač is a man of bad character. Witnesses throughout the proceedings have testified that Markač has at every opportunity shown due care and diligence as a professional policeman in maintaining the highest standards of ethics in assisting civilians in need, regardless of their ethnicity, religion or nationality. Davorin Pavlović testified that Markač is a highly moral man without any prejudice.[685] Pavlović personally witnessed, on several occasions, Markač lending assistance to victims when he ordered water, food and cigarettes to be provided to civilians that he came across in the occupied territory.[686] Another witness, Ivan Herman testified that Markač ordered that assistance be provided to anyone in need.[687] Mate Granić has known Markač since 1991 and has never observed him to express any animosity

[682] *United States v. Newsom*, 428 F. 3d 685, 687 (7th Cir. 2005)
[683] Section 726.1 of the Canadian Criminal Code states: "In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender."

[684] Section 80(1) of the Danish Criminal Code states that in determining the penalty account should be taken of…information concerning the offender's character, including his general personal and social circumstances."
[685] T.25284:13
[686] T.25284:15 to 25284:20
[687] T.26431:7 to 26431:12

towards "citizens" of the occupied the so-called Serbian Krajina.[688] Witness Josko Morić pointed out that discrimination on the basis of ethnicity was irrelevant to Markač in carrying out his work as the head of the MUP.[689]

314. Markač is a man of duty. He was brought up to become a professional soldier. As many witnesses in this trial testified he is highly respected.[690] He left his family behind to serve his country in its hour of need. For Markač, the purpose of Operation Storm was to overcome civil unrest and to unite the country and not to expel citizens based on ethnicity or political views, as the Indictment[691] before this Trial Chamber alleges. Željko Sačić testified to Markač's sadness over the conflict that was causing the loss of a generation and many lives.[692] Markač took on the task as a professional policeman and carried out his duties in full accordance with international laws of war. Throughout the conflict he made sure that his subordinates were trained to that effect and he took every step possible to make sure they obeyed the laws of war. Witnesses Cvrk[693], Pavlović[694], Vurnek[695] Vitez[696], Herman[697] and Sačić[698] testified under oath that they were trained, ordered and reminded to adhere to laws of war, whether they be international or national.

[688] T.24721:5 to 24721:15
[689] T.25584:12 to 25584:17
[690] The fact that he was respected by many was confirmed by Mate Granić, Željko Sačić, Davorin Pavlović, Dragutin Vurnek.
[691] The Indictment, 12 March 2008
[692] T.26:17 to 26:23
[693] T.25395:6 to 25395:19
[694] T.25285:12 to 25285:16
[695] T.26209:24 to 26210:13
[696] T.25974:5 to 25974:8, 25974:23 to 25975:3, 25978, 2 to 25978, 19
[697] T.26441:10-26441:17.
[698] T.26:17-26:23.

315. His past experiences both as a policeman and as a family man show that Markač's career achievements were reached through his dedication to his country, Croatia, and by being a man of authority and conviction. Markač's resume shows swift promotion throughout his career until becoming the head of the MUP. This would not have been possible to achieve without high morals, good character and an exemplary life.

316. The Trial Chamber will have seen that Markač's conduct during trial has been exemplary. He exercised respect for the court and witnesses in the proceedings. He took an active part both in his defence and throughout the trial, which can be witnessed by Markač taking notes and comparing evidence in his own time.

Markač's Poor Health.

317. The jurisprudence of this Tribunal states that poor health of an accused can be considered in exceptional circumstances.[699] However, in Strugar the Appeals Chamber considered the accused's post trial health deterioration as a mitigating circumstance.[700]

318. Markač's medical files demonstrate that he is not in good medical condition and his health has been deteriorating over the years. From the attached medical records Your Honours will see that Markač is suffering from serious metabolic disorders. During his incarceration he has received invasive treatment as well as treatment for related cardiovascular diseases and diabetes type II. At the moment Markač is on medication both to alleviate the symptoms of his cardiovascular

[699] *Blaškić* AJ, para. 696; Milan Simić Sentencing Judgement, para. 98.
[700] *Strugar* AJ, para. 392.

disorders as well as long-term treatment for his diabetes. Although the medical opinion from January 26, 2010 states that the some of the symptoms of his diseases are under control, his overall health is poor and his condition will not improve unless Markač's living conditions change. The Markač Defence respectfully requests the Trial Chamber to consider these facts in mitigation of a sentence if in this case a conviction and sentence is imposed.

Markač's Voluntary surrender

319. Voluntary surrender is considered to be a mitigating factor as well.[701]

320. The jurisprudence of the Tribunal states that voluntary surrender is a mitigating factor because it sets an example to other indictees to turn themselves in. It also enhances the effectiveness of the Tribunal.[702]

321. Although voluntary surrender is not seen as cooperation with the OTP *per se* it is cooperation with International Tribunal and the Trial Chamber can therefore consider it a mitigating circumstance.[703]

322. The Markač Defence respectfully requests the Trial Chamber to consider Markač's voluntary surrender during sentencing considerations, if a conviction and sentence is imposed.

323. Markač voluntarily surrendered and was transferred to the UNDU on 11 March 2004. On 2 December 2004 Markač was granted provisional

[701] *Simić* Sentencing Judgement, para. 107
[702] *Kunarac* TJ, para 868.
[703] *Blagojević and Jokić* AJ, para. 344.

release by the Appeals Chamber. He returned to the Detention Unit on 30 December 2007 where he has been permanently detained since.

324. Markač has never attempted to escape the allegations against him before this Tribunal.

325. The fact that Markač cooperated with the Tribunal through voluntary surrender shows his desire to submit himself to this Trial Chamber in the firm belief that justice will be carried out and prove that he was not personally responsible for the alleged crimes.

Credit for Time Served Should be Awarded to Markač if a Conviction and Sentence is Imposed

326. Rule 101(C) states the following: "credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

327. The Croatian and Serbian Criminal Codes in Articles 63(1) reiterate the above Rule but add that "any other deprivation of liberty" should me included in the pronounced sentence of imprisonment.

328. Markač has been detained at the UNDU on and off since early 2004 although the final Indictment against him was issued in 2008.

329. The Markač Defence submits that should the Trial Chamber find the accused guilty of any of the counts, the time spent in the UNDU prior to trial must be deducted from the imposed sentence.

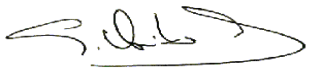
CONCLUSION

330. From the consistent misidentification of alleged perpetrators of crime as members of the Special Police, to the lack of evidence of superior responsibility on behalf of Markač for the Grubori Incident, the OTP has failed to meet its stringent burden of proof to demonstrate Markač's guilt beyond reasonable doubt. As could be readily observed from the ongoing investigation of the Grubori incident in Croatia, and the resulting testimonies of witnesses in this trial, even the Croatian Criminal Police/justice authorities are no closer today to determining who was individually and legally responsible for the Grubori incident than they were fifteen years ago, nor are the parties or the Chamber similarly situated. While the deaths in Grubori are tragic, the Chamber must not and cannot, under the evidence, hold Markač responsible for something which he did not order, had no legal authority to investigate, prosecute, or punish under the Rules of the Ministry of Interior-Special Police or Croatian Criminal Procedure Law. For all of the reasons stated in this submission, the Markač Defence respectfully requests the Trial Chamber to enter a judgement of acquittal on all the charges against him in the Indictment.

Word Count: 31,190

Dated: 16 July 2010

Respectfully submitted,



Mr. Goran Mikuličić
Counsel for Mladen Markač

Mr. Tomislav Kuzmanović
Counsel for Mladen Markač