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Ante Gotovina case: an error of law which led to innocence?

Sprawa Ante Gotoviny: błąd prawny, który zdecydował o niewinności?

Abstract: The breakup of the Socialist Federal Republic of Yugoslavia 30 years ago still has a substantial impact on the post-Yugoslav countries which proclaimed independence. Bearing in mind that the breakup also generated a military conflict, e.g. in Croatia, the restoration of Serbian-Croatian relations remains problematic. One of the challenges is passing a fair judgment on people responsible for war crimes or crimes against humanity. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established for this reason in particular. Ante Gotovina – a Croatian general, was one of those indicted by the International Criminal Tribunal for the former Yugoslavia in connection with the military operation "Oluja" during which some heinous acts of crime took place. Gotovina played a clear and primary role in this operation, and therefore his actions were the main count of the indictment, firstly, for the prosecution and then for the Trial Chamber of ICTY. However, the sentence of 24 years imprisonment was never carried out following a successful appeal. The Appeals Chamber did not uphold the verdict of the Trial Chamber owing to a serious legal error and, consequently, it acquitted Gotovina of all the charges. This issue became yet another source of Serbian-Croatian conflict in connection with the most important people held responsible for the crimes committed in 1991-1995.
Keywords: Ante Gotovina, International Criminal Tribunal for the former Yugoslavia, war crimes, crimes against humanity, Croatia, Oluja

Streszczenie: Rozpad Socjalistycznej Federacyjnej Republiki Jugosławii sprzed trzech dekad wciąż ma istotne przełożenie na funkcjonowanie państw powstałych w miejsce jugosłowiańskiej federacji. Mając na uwadze, że rozpadowi towarzyszył kilkuletni konflikt zbrojny m.in. w Chorwacji, tym bardziej odbudowanie zwłaszcza stosunków serbsko-chorwackich jawi się jako kwestia wciąż wysoce problematyczna. Poważnym wyzwaniem w tym aspekcie jest osądzenie osób odpowiedzialnych za zbrodnie wojenne czy też zbrodnie przeciwko ludzkości. W tym też względzie został powołany Międzynarodowy

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Trybunał Karny dla byłej Jugosławii. Jedną z najgłośniejszych spraw karnych toczących się przed obliczem haskiego Trybunału była sprawa Ante Gotoviny – chorwackiego generała, dowodzącego w operacji militarnej „Oluja", w trakcie której miały miejsce akty najcięższych zbrodni. Rola Gotoviny w tym wydarzeniu *prima facie* była oczywista, co też stało się przedmiotem aktu oskarżenia Prokuratury, a później wyroku Izby Orzekającej MTKJ. Niemniej jednak wymierzona kara 24 lat nie została wykonana w następstwie skutecznej apelacji Gotoviny. Co więcej, Izba Apelacyjna nie tylko nie podtrzymała wyroku Izby Orzekającej ze względu na poważny błąd prawny, ale też wydała wyrok uniewinniający. Kwestia ta stała się kolejnym zarzewiem sporu serbsko-chorwackiego w kontekście odpowiedzialności najważniejszych person za zbrodnie dokonane w latach 1991-1995.
Słowa kluczowe: Ante Gotovina, Międzynarodowy Trybunał Karny dla byłej Jugosławii, zbrodnie wojenne, zbrodnie przeciwko ludzkości, Chorwacja, Oluja

Introduction

The war crimes and crimes against humanity which occurred during the civil war in the Socialist Federal Republic of Yugoslavia (SFRY) have been a significant issue for the post-Yugoslav states for almost three decades. The continuous tension between the countries is undoubtedly caused by the question of war crimes and the need to pass judgment on those responsible. Unfortunately, interpreting events such as war crimes or crimes against humanity can be highly inconclusive. What one side of the conflict considers a war crime, the other one treats as "acceptable" defensive actions and vice versa. The social response to this, supported by the approval of political leaders, may lead to a situation in which people who were indirectly (or directly) involved in the crimes are treated as "national heroes" instead of being condemned. According to the motto *exitus acta probat*, the outcome justifies the deed. Therefore, the role and steps taken by the Croatian general Ante Gotovina, who commanded the military operation "Oluja" in August 1995, are still the topic of heated debate, and not only in Croatia and Serbia. Clearly, the evidence for Gotovina's participation in the crimes was various, often even contradictory. The trial that took place in the International Criminal Tribunal for the former Yugoslavia (ICTY) was supposed to clear up all the doubts. However, it turned out it had the opposite effect to the one intended – the ICTY ruling cast even graver doubts on the case.

The aim of this paper is to analyse the verdict of the ICTY in Ante Gotovina's case regarding war crimes and crimes against humanity and to point out the error of law which led to Gotovina's being acquit-

ted by the Appeals Chamber of the ICTY. Another issue raised in the paper is the question of the quality of international criminal justice on offer. This provokes discussion on the international prosecution of people suspected of committing the most serious crimes.

1. War crimes and crimes against humanity in the light of ICTY and ICC statutes

The legal definition of war crimes and crimes against humanity has been a matter under discussion for many decades, and there still is no international agreement on how to define them. In fact, a legal and international definition of war crimes and – frequently committed alongside them – crimes against humanity appeared in the 19th century but was adapted to the changes that civilization had to undergo along the way following subsequent conflicts. Surely, the tragic events of World War I and II along with other conflicts from previous decades have significantly contributed to in-depth research into the issue. At this point, it is worth mentioning the International Military Tribunal (IMT) in Nuremberg, which was established to convict the main war criminals of the German Reich.[1] Three types of crimes were defined in the IMT statute: crimes against peace, war crimes, and crimes against humanity. The planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances as well as participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned below is considered an offence against peace. The concept of a war crime has been broadly defined as any violation of the laws and customs of war (an example catalogue of such crimes is included in the IMT Statute). Crimes against humanity are defined as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the IMT.[2]

1 B. D. Beltzer, *"War Crimes": The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, "Valparaiso University Law Review", 1996, vol. 30, no. 3, p. 896.

2 Art. 6, *Charter of the International Military Tribunal*, United Nations – Treaty Series, no. 251, 1951, p. 288.

Unfortunately, in the second half of the 20th century, the world experienced many conflicts during which war crimes or crimes against humanity escalated. One of such conflicts was most definitely the war which broke out in SFRY between 1991 and 1995 in which more than one hundred thousand people were killed. The International Criminal Tribunal for the former Yugoslavia was established with the aim to prosecute people who were responsible for breaking international humanitarian law.[3] The Tribunal was active in 1993-2017, and its rulings were based on Resolution 827 of the United Nations Council, passed on 25 May 1993. The document included key regulations regarding the definition of war crimes and crimes against humanity. Article 2 of the ICTY statute defined acts which were considered a grave breach of the Geneva Conventions of 1949: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[4] The statute lists violations of the laws or customs of war pointing to, e.g. wanton destruction of cities, towns or villages, or devastation not justified by military necessity, attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings, plunder of public or private property.[5] One of the articles in the statute is particularly crucial. It refers to genocide, which was defined as acts committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious groups. The acts defining genocide are as follows: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group. The statute also pointed out the fact that not only is genocide punishable but so too is conspiracy to commit genocide, direct and public incitement to commit geno-

3 Art. 1, *Statute of the International Tribunal for the former Yugoslavia*, adopted by the Security Council at its 3217th meeting on 25 may 1993 (Resolution 827).
4 Ibidem, Art. 2.
5 Ibidem, Art. 3.

cide, attempt to commit genocide or complicity in genocide.[6] Another article defines crimes against humanity: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhumane acts.[7] It is also worth mentioning that the Geneva Conventions of 1949 were supplemented by additional protocols relating to the protection of victims of international armed conflicts (Protocol I of 1977). Protocol I reaffirms the international laws of the original Geneva Conventions of 1949 but also adds clarifications and new provisions to accommodate developments in modern international warfare that have taken place since the Second World War. For example Articles 51 and 54 outlaw indiscriminate attacks on civilian populations, and the destruction of food, water, and other materials needed for survival. Indiscriminate attacks include directly attacking civilian (non-military) targets, but also using technology such as biological weapons, nuclear weapons and land mines, whose scope of destruction cannot be limited. A total war that does not distinguish between civilian and military targets is considered a war crime.[8]

The list of crimes in the ICTY statute relates in the most part to the Rome Statute of the International Criminal Court of 17 July 1998 which established the independent International Criminal Court (ICC) connected with the United Nations. The court has jurisdiction over the gravest crimes committed internationally.[9] The Rome Statute clarifies crimes against humanity by defining deportation or forcible transfer of a population as forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.[10] Persecution was defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity

6 Ibidem, Art. 4.
7 Ibidem, Art. 5.
8 Art. 51, 54, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.
9 Preamble, *The Rome Statute of the International Criminal Court*, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, 17 July 1998, Rome, Italy.
10 Ibidem, Art. 7, pt. 2d.

of the group or collective.[11] The Rome Statute also defines, as crimes against humanity, the enforced disappearance of persons – the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.[12] According to the Rome Statute, the Court has jurisdiction over crimes committed after the entry into force of this Statute and only if they are committed on the territory of a State Party[13] (which actually excluded crimes in SFRY). However, the regulations can be used as a benchmark for the interpretation of the crimes committed in 1991-1995 on the territory of SFRY.

2. The military operation "Oluja" and the role of A. Gotovina in the Serbian-Croatian conflict in 1991-1995

The military operation "Oluja" (Storm) was carried out by the Croatian army in August 1995 on the territory of the quasi-state Republic of Serbian Krajina (RSK). The operation still stirs up a lot of controversy, which surrounds Serbian-Croatian relations (especially the process of reconciliation[14]). The question as to whether there was a breach of international law during the operation remains unanswered. What is more, the operation itself is assessed completely differently by the Serbs and the Croatians. The Serbs perceive "Oluja" as a war crime against the Serbian nation while for the Croatians it remains a "heroic battle" for independence.[15] The military operation "Oluja" lasted between 4 and 7 August 1995 and ended up with a decisive and strate-

11 Ibidem, Art. 7, pt. 2g.
12 Ibidem, Art. 7, pt. 2i.
13 Ibidem, art. 11-13.
14 R. Nakarada, *Acquittal of Gotovina and Markač: A Blow to the Serbian and Croatian Reconciliation Process*, "Merkourios – International and European Law: General Issue", 2013, vol. 29, is. 76, p. 105; V. Pavlaković, *Memory politics in the Former Yugoslavia*, "Rocznik Instytutu Europy Środkowo-Wschodniej", 2020, vol. 18, is. 2, p. 24.
15 J. N. Clark, *Giving Peace a Chance: Croatia's Branitelji and the Imperative of Reintegration*, "Europe-Asia Studies", 2013, vol. 65, no. 10, pp. 1939-1942; M. Korzeniewska-Wiszniewska, *Operacja „Oluja" i spory wokół jej interpretacji*, [in:] *Bałkany Zachodnie w systemie bezpieczeństwa euroatlantyckiego*, A. Głowacki, S. L. Szczesio (eds.), Łódź 2015, p. 362.

gic victory for the Croatians. It was the largest battle in Europe since World War II – the Croatian army attacked across a 630-kilometre front with the aim of restoring control over the Republic of Serbian Krajina. The mission was accomplished at a very high cost – Serbian civilians were killed.

According to the statistics issued by the International Criminal Tribunal for the former Yugoslavia, more than 300 people were murdered, mostly near Knin and Gračac. In the town of Gračac and its surrounding areas 33 Serbian civilians were killed. Another 50 victims were found dead in the areas of Donji Lapac, Kistanje, Biskupija, Ervenik while in the capital of RSK and nearby villages 14 people were killed; however, the exact number of victims in Knin was never disclosed. The in-depth research conducted in 2001 by the Croatian branch of the International Helsinki Federation for Human Rights confirmed 677 victims among Serbian civilians.[16] Contrary to that, in 2014 a Serbian institution "Veritas" announced that there were 1078 dead Serbian civilians (out of 1719 of all victims).[17] Depending on the source, the number of victims differs substantially; however, it does not change the fact that the operation "Oluja" resulted in civilians' deaths, and therefore those who were in charge should have been prosecuted. One of the outcomes of "Oluja" was the mass displacement of the Serbs who used to live in Croatia – according to various data, the number reached two hundred thousand people.[18] Having been pressurised by Croatian soldiers, Serbian civilians were forced to leave their houses and look for shelter in either Bosnia or Serbia. Most of them never came back to Croatia.

The person who was directly responsible for the criminal aftermath of the "Oluja" operation is undoubtedly Ante Gotovina – the Croatian general who commanded the whole attack. He made a distinguished career in the military and within just a few years rose to the rank of major general. Earlier, he had joined French Foreign Legion and then in the 1980s he provided training to a number of paramilitary organi-

16 W. Hebda, *Serbsko-chorwackie stosunki polityczne na przełomie XX i XXI wieku*, Warszawa 2018, p. 247.
17 *Žrtve akcije „Oluja" na srpskoj strani*, http://www.veritas.org.rs/srpske-zrtve-rata-i-poraca-na-podrucju-hrvatske-i-bivse-rsk-1990-1998-godine/zrtve-akcije-oluja-na-srpskoj-strani-2014/ [04.04.2021].
18 D. Marijan, *Oluja*, Zagreb 2007, p. 13.

sations in Latin America.[19] Right before the outbreak of the civil war in SFRY, he returned to Croatia and joined the Croatian National Guard.[20] In 1991 he was commissioned an officer and was later known for being an efficient and well-organised commander on the front in western Slavonia (in the First Mechanized Guard Brigade called "The Tigers"). After establishing the Croatian army, Gotovina was promoted to the rank of colonel general.[21] His biggest achievement was organising and executing the operation "Maslenica" in January 1993.[22] Then, as a general, he was in charge of the military district of Split, and it was his task to defend northern Dalmatia and to fight Serbian units out of Krajina. In the following months, the Croatian army Gotovina was in charge of gradually t control over the RSK area. The encirclement of Knin, the capital of RSK, during Operation "Ljeto '95" was a strategic move which was supposed to force Serbian troops to withdraw from Croatian territory.[23] The plan was completed as a result of the successful operation "Oluja" under Ante Gotovina's command. On the 6 August 1995 the troops commanded by Gotovina took control of Knin and consequently RSK's existence came to an end.[24] Gotovina's last task was to carry out an attack on the main city of the Republic of Srpska – Banja Luka (operation "Mistral 2").[25] Gotovina was in charge of the combined forces of the Croatian army and the Croatian Defence Council. The attack was finally stopped by NATO, which commenced a military operation codenamed Deliberate Force (air strikes targeting the positions held by the Bosnian Serbs). Being the General of the Croatian army, in August 1995 Ante Gotovina forced the Serbs out of Croatia and therefore became a national hero.[26] After the war he became the chief of the Army Inspectorate and held this position until the year 2000.

19 N. Ivanković, *Ratnik, pustolov i genreal (jedna biografija)*, Zagreb 2001, pp. 19, 99.
20 Ibidem, p. 122.
21 V. Pavlaković, *Croatia, the International Criminal Tribunal for the former Yugoslavia, and General Gotovina as a Political Symbol*, "Europe-Asia Studies", 2010, vol. 62, no. 10, p. 1712.
22 O. Žunec, *Rat u Hrvatskoj 1991.-1995. 2. dio: Od sarajevskog primirja do završnih operacija*, "Polemos", 1998, no. 1(2), pp. 115-116.
23 D. Marijan, *Oluja*, p. 54.
24 Ibidem, p. 73.
25 O. Žunec, *Rat u Hrvatskoj…*, p. 131.
26 See more: V. Pavlaković, *Croatia…*, pp. 1718-1732.

In the second half of the 1990s the ICTY started its investigation into the crimes committed during the operation "Oluja". In 1998 the Tribunal called for an official statement in Gotovina's case; however, it was never delivered. After the fall of the Franjo Tuđman regime and when the pro-European party entered the government, Croatia started cooperating with the ICTY regarding crimes committed in Croatia in 1991-1995.[27] At the end of September 2000, Ante Gotovina was forced to retire by President Stjepan Mesić, and this significantly weakened Gotovina's position in the country. On 21 May 2001, ICTY brought an indictment against Gotovina on the counts of war crimes and crimes against humanity.[28] Following the charges and potential arrest, Ante Gotovina fled the country and remained at large for the next few years. Officially, the Croatian authorities (first Ivica Račan's and then Ivo Sanader's cabinets) called for the general to cooperate with the ICTY but to no avail. This turned out to be a serious problem for the Croatian government, especially taking into consideration its integration with the EU (in March 2005 the Council of Europe put off the start of accession negotiations due to unsatisfactory cooperation between Croatia and the ICTY in Gotovina's case[29]). The hunt for Gotovina ended on 7 December 2005 when he was finally captured on Tenerife.[30] A few days later the Croatian general was flown to the Hague and kept in custody there. Gotovina had managed to hide for such a long period of time because he had been using fake identities (Croatian passports using the names Stjepan Seničić and Kristian Horvat), and he also had been changing the places where he stayed

27 V. Peskin, M. Boduszyński, *International justice and domestic politics: post-Tudjman Croatia and the international criminal tribunal for the former Yugoslavia*, "Europe-Asia Studies", 2003, vol. 55, no. 7, p. 1125.

28 *Indictment*, The Prosecutor of the Tribunal Against Ante Gotovina, Case No: IT-01-45-I, The International Criminal Tribunal for the former Yugoslavia, 21 May 2001, https://www.icty.org/x/cases/gotovina/ind/en/got-iio10608e.htm [06.04.2021].

29 M. Vlašić Feketija, A. Łazowski, *The Seventh EU Enlargement and Beyond: Pre-Accession Policy vis-à-vis the Western Balkans Revisited*, "Croatian Yearbook of European Law and Policy", 2014, no. 10, p. 11.

30 *Transfer of Ante Gotovina to the Tribunal*, Press Release, CVO/MO/1034e, The Hague, 10 December 2005, https://www.icty.org/en/sid/8497 [06.04.2021].

(the Dominican Republic, French Polynesia, Spain, Italy, Chile, Brazil, Argentina, Singapore, Malaysia, Japan).[31]

3. Gotovina's case – the first act: a 24-year prison sentence

Having captured Ante Gotovina, the trial in front of the ICTY could finally begin. In the indictment of 21 May 2001, the ICTY prosecutor Carla Del Ponte charged Gotovina with the gravest crimes – war crimes and crimes against humanity. The indictment also included charges under individual responsibility for war crimes and crimes against humanity committed by Gotovina. The Croatian general was also charged on the count of persecution, murder, plunder of property, wanton destruction of cities, towns and villages and deportation and forced displacement, all of which occurred between 4 August and 15 November in 1995 in Krajina. The ICTY statue (articles 2-5, 7) and the Geneva Conventions of 1949 (Article 3) provided the legal grounds for the above-mentioned charges. It was stated that Ante Gotovina acting individually and/or in concert with others (including President Franjo Tuđman) planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of persecutions of the Krajina Serb population. The persecutions included the unlawful killing of at least 150 Krajina Serbs (by shooting, burning and beating or torturing them) and the disappearance of many hundreds of others. The indictment included charges of mass murders in Golubić (18 victims), Gošić (8 victims), Komić (8 victims), Uzdolje (10 victims), Varivode (9 victims) and Grubori (6 victims). At the same time, around two hundred thousand Krajina Serbs were forced to flee Krajina. This was not strictly connected with just the "Oluja" operation but also further actions. The Croatian army stopped refugees from coming back to their households by terrorizing them. Following deportation and displacement, the gradual destruction and looting of Serb properties took place in homes, outbuildings, barns

31 *Appendix 2 Copies of Gotovina's False Passports*, Prosecution Response Opposing Gotovina's Request for Provisional Release, Case No. IT-06-90-PT, 22 August 2007, https://www.icty.org/x/cases/gotovina/pros/en/pros_resp.pdf [06.04.2021].

and livestock. According to the data provided by ICTY, more than twelve thousand properties in 287 locations were destroyed. According to the indictment, Ante Gotovina had reasons to know that the Croatian military under his control were committing war crimes and crimes against humanity. Additionally, he was informed of such acts by representatives of international organisations. Despite that, Ante Gotovina failed to take necessary and reasonable measures to prevent such serious violations or to punish the perpetrators (subordinates).[32]

The indictment issued against Ante Gotovina in 2001 laid the grounds for the joinder indictment of 2006 which charged not only Gotovina but also other Croatian generals – Ivan Čermak and Mladen Markač.[33] During the hearing on 5 December 2006 in the Hague, all of them pleaded not guilty.[34] There was nothing surprising about that since Gotovina had claimed his innocence upon being arrested and never agreed with the charges brought by the prosecutors of the ICTY. A few months later during the pre-trial brief, Gotovina's attorneys rejected the accusations made by the prosecution and claimed that Gotovina did not have any real power over the perpetrators and did not take part in committing the crimes himself. Quite to the contrary, the lawyers instead claimed that Gotovina's actions led to ending the war in Croatia and Bosnia (which international organisations did not manage to enforce) and therefore treating him as a war criminal was unjust and unfounded.[35] Gotovina's attorneys filed a motion for his provisional release. The motion requested electronic supervision of the defendant during his stay in Pakoštane (next to Zadar in Croatia) pending the trial. The motion for provisional release was denied

32 *Indictment*, The Prosecutor…

33 *Appeals Chamber Affirms Decision To Join Cases Against Ante Gotovina, Ivan Cermak And Mladen Markac*, Press Release, OK/MO/1124e, The Hague, 26 October 2006, https://www.icty.org/en/sid/8684 [08.04.2021].

34 *Status Conference*, Tuesday, 5 December 2006, International Criminal Tribunal for the former Yugoslavia, Transcript, p. 22, https://www.icty.org/x/cases/gotovina/trans/en/061205SC.htm [08.04.2021].

35 *Pre-Trial Brief of General Ante Gotovina*, The Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac, Case No. IT-06-90-PT, 5 April 2007, International Criminal Tribunal for the former Yugoslavia, p. 52, https://www.icty.org/x/cases/gotovina/custom3/en/got-ptb.pdf [08.04.2021].

by the Trial Chamber ICTY, which forced Gotovina to stay in custody at least until the beginning of the trial.[36]

Finally, the trial of Gotovina and other defendants began on 11 March 2008.[37] The delay was caused by the need to amend the indictment in February 2007. Additionally, being on provisional release, Markač and Čermak had to be transferred to custody in the Hague. The prosecution sent the final indictment to the Trial Chamber on 14 February 2008. The amended indictment did not vary significantly from the original version (the number of the murdered had been raised to 324 while the number of displaced or deported Serbs had been lowered to ninety thousand).[38] The trial lasted for several months. Despite its gravity and weight as well as a significant number of witness testimonies along with loads of evidence, the trial was going smoothly, and on 1 September 2010 both the prosecution and the defence were ready to present their final briefs. Gotovina's attorneys (Luka Mišetić, Gregory Kehoe, Payam Akhavan) once again claimed his innocence.[39] The ICTY prosecution (represented by Alan Tieger and Stefan Waespi) wanted the judges to sentence Gotovina to 27 years of imprisonment.[40]

On 15 April 2011 the Trial Chamber found that during operation "Oluja" between 4 and 7 August 1995, Croatian military forces and the Special Police committed acts of murder, cruel treatment, inhumane acts, destruction, plunder, persecution and deportation against the Serb population of the Krajina region. Regarding Ante Gotovina, the Chamber stated that he was part of a joint criminal enterprise[41] aim-

36 *Decision on Defendant Ante Gotovina's Motion for Provisional Release and on Defendant Ante Gotovina's Motion to Strike Appendices 11, 12, 13, 14, 15, 16, 17, 18 from the Prosecution's Response Opposing Gotovina's Motion for Provisional Release*, In Trial Chamber I, Case No. IT-06-90-PT, 28 November 2007, International Criminal Tribunal for the former Yugoslavia, p. 11, https://www.icty.org/x/cases/gotovina/tdec/en/071128.pdf [09.04.2021].

37 *Gotovina and Others Trial to Begin on 11 March 2008*, Press Advisory, NI/MOW/PA329e, The Hague, 6 March 2008, https://www.icty.org/en/sid/10384 [09.04.2020].

38 L. A. Lascu, *Gotovina Case – an unjust charge or deliberately erroneous judgment of the International Criminal Tribunal for the former Yugoslavia?*, "Law Review", 2014, vol. IV, is. 2, pp. 86-87.

39 *Gotovina Defence Final Trial Brief, The Prosecutor v. Ante Gotovina, Ivan Čermak. Mladen Markač*, Case No. IT-06-90-T, 27 July 2010, paragraphs 1094-1095, https://www.icty.org/x/cases/gotovina/custom5/en/100727.pdf [10.04.2021].

40 *Prosecution's Public Redacted Final Trial Brief, The Prosecutor v. Ante Gotovina, Ivan Čermak. Mladen Markač*, Case No. IT-06-90-T, 2 August 2010, paragraph 705, https://www.icty.org/x/cases/gotovina/custom5/en/100802.pdf [10.04.2021].

41 More about the concept of joint criminal enterprise see: E. Kirs, *Ante Gotovina and the joint criminal enterprise concept at the ICTY*, "International Relations Quarterly", 2011, vol. 2, no. 1, pp. 2-4.

ing at the permanent removal of the Serb population from the Krajina region.[42] Here, the Chamber referred to the Brioni meeting of 31 July 1995, during which Croatian political and military elites decided that the main aim of the "Oluja" operation was forcing the Krajina Serbs to leave Croatian territory. The Chamber emphasised that this aim was supposed to be achieved using measures of violence, such as deportations, persecutions and unlawful attacks on civilians and civilian objects.[43] The Tribunal based its ruling on evidence proving that Gotovina played a primary role in planning and executing operation "Oluja". Being a commander, he failed to prevent or punish his subordinates who committed acts of crimes against Serbian civilians.[44] The Chamber found this negligence deliberate and stated that it had an impact on the general attitude towards crimes, making them tolerable, and in this way Gotovina's conduct amounted to a significant contribution to the joint criminal enterprise.[45] Consequently, the Trial Chamber stated that Ante Gotovina bears responsibility for committing war crimes and crimes against humanity.[46]

On 15 April 2011, in accordance with Article 7, paragraph 1 of the ICTY Statue (individual criminal responsibility), the Trial Chamber of three judges unanimously found Ante Gotovina guilty of committing crimes against humanity on the following counts: persecution, deportation, murder and other inhumane acts (Article 5, ICTY Statute). He was also found guilty of committing war crimes on the following counts: plunder and wanton destruction of public and private property, murder and cruel treatment (Article 3, ICTY Statute). For having committed these crimes, the Chamber sentenced Ante Gotovina to 24 years of imprisonment.[47] At this point, it must be stated that the criminal case against the Croatian general was mostly based on charges of ordering unlawful artillery attacks and missile strikes on the terri-

42 *Judgement*, *The Prosecutor v. Ante Gotovina, Ivan Čermak. Mladen Markač*, Case No. IT-06-90-T, Trial Chamber I, 15 April 2011, paragraphs 2369, https://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf [10.04.2021].

43 L. A. Lascu, *Gotovina Case…*, p. 88.

44 *Judgement*, *The Prosecutor…*, Trial Chamber I, paragraphs 2329-2367.

45 L. A. Lascu, *Gotovina Case…*, p. 89.

46 See more: *Judgement*, *The Prosecutor…*, Trial Chamber I, paragraphs 2322-2375.

47 *Judgement Summary for Gotovina et al.*, Chambers, The Hague, 15 April 2011, https://www.icty.org/x/cases/gotovina/tjug/en/110415_summary.pdf [11.04.2021].

tory of Serbian Krajina during military action against Serbian military forces.[48] This laid the foundation for Gotovina's successful appeal.

4. Gotovina case – the second act: acquittal

The ICTY sentence of 24 years of imprisonment for Ante Gotovina came as a shock to both Croatian politicians and society in general, which considered him to be a national hero. In fact, a survey conducted right after the ICTY ruling showed that 95.4% of Croatian respondents thought it was unfair.[49] Nor can the fact be ignored that at the same time, Croatia's accession negotiations with the European Union were in their final phase. For this reason, recognising Ante Gotovina as a war criminal could have thwarted plans for EU enlargement, especially in the context of the ratification of the accession treaty by the EU Member States (Croatian-Slovenian border dispute[50], Croatian justice reform and the fight against corruption criticised by Great Britain, Finland and Belgium[51]). It is also worth emphasising that some of the EU countries (Germany[52], Austria[53]) strongly supported successive Croatian governments in the accession negotiations and pointed to the need to include Croatia in the EU structures as soon as possible.

The only chance Gotovina had was to appeal and hope to overturn the verdict. On 16 May 2011 Gotovina's attorneys filed a notice of appeal to the Appeals Chamber of ICTY. About three months later the Tribunal received a suitable document. In the appeal, the line of the defence was to overturn the verdict based on "unlawful attacks"

48 W. B. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in the Prosecutor v. Ante Gotovina*, "Military Law Review", 2012, vol. 211, p. 2.

49 W. Hebda, *Croatian and Serbian war crimes, the International Criminal Tribunal for the former Yugoslavia, and the judicial systems of Serbia and Croatia*, "Sprawy Narodowościowe: Seria Nowa", 2020, no. 52, p. 8.

50 N. Mujagić, *The European Union as a Spectacle: The Case of the Slovenian-Croatian Dispute over the Sea Border*, [in:] *Mirroring Europe. Ideas of Europe and Europeanization in Balkan Societies*, T. Petrović (ed.), Balkan Studies Library, vol. 13, 2014, p. 187.

51 J. Muś, M. Szpala, *Chorwacja w Unii Europejskiej*, Łódź 2011, p. 34.

52 *Croatia's accession to the European Union*, Interview, 01.07.2013, https://www.auswaertiges-amt.de/en/newsroom/news/130701-stm-l-dlf/256506 [08.04.2021].

53 *Lopatka: A fresh breeze for economic relations between Austria and Croatia. Benefit from Croatia's accession to the EU to boost growth*, Vienna, 16 September 2013, https://www.bmeia.gv.at/en/the-ministry/press/news/2013/lopatka-a-fresh-breeze-for-economic-relations-between-austria-and-croatia/ [11.04.2021].

through showing the Trial Chamber's error in defining 200 metres as a standard range of error of the Croatian artillery attack against four Serbian towns (Benkovac, Gračac, Knin[54], and Obrovac).[55] The verdict of the Trial Chamber followed the prosecution charges according to which Croatian military forces deliberately targeted these towns, civilians and civil buildings and not only previously identified military targets. Based on the target list of the Croatian Army and the eyewitness testimony of Colonel Marko Rajčić (the chief of the artillery corps, Gotovina's subordinate), the Trial Chamber worked out a 200-metre margin of error of the Croatian artillery.[56] Therefore, all projectiles which were fired at territories located further than 200 metres from the military target were considered an assault on a non-military (civil) object. The evidence was delivered by the ICTY prosecution. They identified at least 50 projectiles which were fired and struck territories at a distance further than 300-700 metres from the military targets.[57] The prosecution also identified at least 900 shots fired at the town of Knin while most of the military forces of RSK had left the place before Croatian assault on 4 August 1995.[58]

The Appeals Chamber consisting of five judges unanimously upheld Gotovina's appeal stating that the Trial Chamber had erred in deriving "the 200-metre rule" for Croatian artillery projectiles. The Appeals Chamber also stated that a 200-metre margin of error was not based on any reliable grounds and, most importantly, there was no specific reasoning as to how the Trial Chamber derived this margin of error.[59] With the majority of votes 3-2, the Appeals Chamber found irrelevant the evidence that some of the artillery projectiles located further than 400 metres from the military target were unlawfully aimed at civil targets. In fact, the Trial Chamber did not take into account the possibility

54 About artillery attacks on Knin see more: C. Redaelli, S. Casey-Maslen, *Protecting Civilians in Populated Areas During the Conduct of Hostilities after Gotovina Case*, "SSRN papers", 2017, pp. 461-467.

55 *Judgement*, *The Prosecutor v. Ante Gotovina, Ivan Čermak. Mladen Markač*, Case No. IT-06-90-T, Appeals Chamber, 16 November 2012, paragraphs 41-76, https://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf [11.04.2021].

56 Ibidem, paragraph 10.

57 *Judgement*, *The Prosecutor*…, Trial Chamber I, paragraph 1906.

58 Ibidem, paragraph 1374.

59 *Appeals Judgement Summary for Ante Gotovina et and Mladen Markač,* Appeals Chamber, The Hague, 16 November 2012, pp. 2-5, https://www.icty.org/x/cases/gotovina/acjug/en/121116_summary.pdf [12.04.2021].

of attacking moving targets, such as military vehicles.[60] Finally, taking into consideration all the above-mentioned factors, on 16 November 2012 the Appeals Chamber held, two judges dissenting, that the Trial Chamber's evidence to support a finding that the artillery attacks were unlawful was insufficient, and therefore it was impossible to prove beyond reasonable doubt that Ante Gotovina was part of a joint criminal enterprise. Consequently, there was no clear evidence proving the counts of committing war crimes and crimes against humanity. The Appeals Chamber, two judges dissenting, acquitted Ante Gotovina (and Markač) of the charges and ordered an immediate release from prison.[61] After almost seven years the Croatian general was released and cleared of the charges of war crimes and crimes against humanity.

Nevertheless, there were two judges of the Appeals Chamber (Carmel Agius and Fausto Pocar) who had a different view on Gotovina's innocence. In his dissenting opinion Judge Carmel Agius agreed that the 200-metre rule accepted by the Trial Chamber was an error of law. However, he also pointed out that the remaining three judges of the Appeals Chamber (the majority) did not set any other standards or deliver arguments proving that Croatian military used its force lawfully.[62] In a separate dissenting opinion Judge Fausto Pocar presented a similar view. He noted that the Trial Chambers deemed the 200-metre rule legitimate during the examination of evidence of the artillery attack to prove the lawfulness of the military attack. The Appeals Chamber also failed to refer to the international humanitarian law.[63] Judge Pocar also pointed out the fact that the Appeals Chamber ruling focused only on the crimes committed by Croatian soldiers on Serbian civilians during operation "Oluja" but did not refer to the later crimes (e.g. not letting the refugees come back to their households).[64] Judge Agius also emphasised that the majority did not take into account the fact that over several hours, Croatian soldiers fired at least 900 shots at Knin, which remained undefended by any Serbian forc-

60 L. A. Lascu, *Gotovina Case…*, p. 91.
61 *Judgement*, *The Prosecutor…*, Appeals Chamber, paragraph 158.
62 *Judgement*, *The Prosecutor…*, Appeals Chamber, *VIII. Dissenting opinion of Judge Carmel Agius*, paragraphs 25-27.
63 *Judgement*, *The Prosecutor…*, Appeals Chamber, *X. Dissenting opinion of Judge Fausto Pocar*, paragraph 13.
64 Ibidem, paragraph 25.

es.[65] In the summary, Judge Agius stated that the evidence gathered by the Trial Chamber was sufficient to sentence Gotovina on the grounds of superior responsibility, and therefore he should have been held accountable on the grounds of alternate modes of liability.[66] Judge Agius therefore disapproved of the Appeals Chamber verdict which had excluded such an option.[67]

Conclusions

There is no doubt that the verdict of the Trial Chamber sentencing Ante Gotovina to 24 years of imprisonment was based on an error of law built on the erroneous 200-metre rule. As W. Huffman accurately points out, in the light of international legal norms and operational reality, the 200-metre rule remains a legal and technical challenge. Furthermore, neither the evidence revealed in the Gotovina trial nor field artillery doctrine and practice confirm using the standard of 200 metres. None of the military experts who testified during the trial was asked to comment on the 200-metre norm or what the standard could be. In fact, the Trial Chamber never explained the grounds for using its own finding – the 200-metre rule. Military experts, the prosecution and the defence examined this standard only during the appeal trial and finally agreed that such a range was operationally and technically impossible to achieve, even in ideal conditions[68]. The question is why this issue was not addressed upon the first trial, taking into account the fact that the whole verdict was based on the 200-metre principle. According to W. Huffman, this judgment should have been found void and overruled by the Appeals Chamber.[69] Due to this serious error of law, the Appeals Chamber could not uphold the verdict of the Trial Chamber. It reviewed the verdict and issued an alter decision (*iudicium rescissorium*) which acquitted Ante Gotovina, despite different opinions within the adjudicating panel. The

65 *Judgement*, *The Prosecutor…*, Appeals Chamber, *VIII. Dissenting opinion of Judge Carmel Agius*, paragraph 18.
66 Ibidem, paragraphs 68-71.
67 *Judgement*, *The Prosecutor…*, Appeals Chamber, paragraph 136.
68 W. B. Huffman, *Margin of Error…*, p. 5.
69 Ibidem.

verdict of the Appeals Chamber most definitely stirred up emotional disputes about the quality of international administration of justice.[70] Taking into account the legal doctrine *ne bis in idem,* the ICTY verdict closed the possibility and reasonability of conducting criminal proceedings against Ante Gotovina in the national (Croatian) judiciary system. Therefore, the Croatian general was (finally?) acquitted of the charges of committing war crimes and crimes against humanity despite the fact that the evidence presented by the ICTY prosecution proved contrary. It is therefore right to say that an error of law led to the acquittal of Ante Gotovina.

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70 M. A. Summers, *The Surprising Acquittals in the Gotovina and Perisic Cases: Is the ICTY Appeals Chamber a Trial Chamber in Sheep's Clothing?*, "Richmond Journal of Global Law & Business", 2015, vol. 13, is. 4, pp. 679-680; S. Jayawardane, C. Divin, *The Gotovina, Perišić and Šainović Appeal Judgments: Implications for International Criminal Justice Mechanisms*, "Policy Brief", 2014, no. 13, The Hague Institute for Global Justice, pp. 7-10; D. J. Luban et al., *International and Transnational Criminal Law*, Aspen Casebook Series, Wolters Kluwer, 2019, pp. 99-100; D. Vallentgoed, *The Last Round? A Post-Gotovina Reassessment of the Legality of Using Artillery Against Built-up Areas*, "Journal of Conflict & Security Law", 2013, vol. 18. no. 1, pp. 49-52.

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