

**EXPERT REPORT OF
PROFESSOR GEOFFREY CORN**

The Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac

Case IT-06-90

Date: June 28, 2009

1. Explain generally the symmetry between the law of armed conflict and military logic.

The law of armed conflict (“LOAC”) evolved from codes of conduct imposed on belligerents by their commanders. They have always reflected the core logic of military operations. While it is axiomatic that the law serves important humanitarian objectives, it is equally axiomatic that the law does so while facilitating the ability of belligerents to accomplish their strategic, operational, and tactical objectives. As a result, the contemporary law of armed conflict reflects a carefully evolved balance between these two interests; a balance informed by the realities of armed conflict.

This balance is manifest in numerous provisions of the customary and conventional law of armed conflict. Examples include the principle of military necessity, military objective, proportionality, and the authority to preventively detain enemy belligerents. Even humanitarian obligations serve an underlying military utilitarian purpose. These protections are derived from the reasoned judgment of the profession of arms that unnecessary violence, destruction, and suffering will ultimately undermine the strategic purpose of armed conflict: restoration of peace.

The fact that the law serves the interests of not only non-combatants but also of belligerents is often overlooked in contemporary scholarship and commentary. However, this purpose is clearly central to the law. The following extract from one of the most important precursors to the twentieth century evolution of the conventional laws of war – the *Oxford Manual of the Laws of War on Land*¹ – emphasizes this aspect of the law:

By [codifying the rules of war derived from State practice], it believes it is rendering a service to military men themselves . . . A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts – which battle always awakens, as much as it awakens courage and many virtues – it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.²

The compelling logic reflected in this extract finds contemporary manifestation in the policy mandates imposed on U.S. and other armed forces that extend application of these principles to all military operations. These mandates indicate that the application of combat power must always be subject to a logical and effective regulatory framework. That framework is provided by the LOAC.

The LOAC is replete with examples of the symmetry between regulation and operational logic. A quintessential example is the prohibition against the infliction of superfluous or unnecessary suffering. This prohibition is a “foundational” principle of the law, tracing its roots back to the St. Petersburg Declaration of 1868. By prohibiting

¹ *The Laws of War on Land* (Oxford, 9 Sept. 1880), available at: <http://www.icrc.org/IHL.nsf/INTRO/140?OpenDocument>

² *Ibid.*, Preface.

the calculated infliction of superfluous suffering or injury, the principle advances not only a humanitarian purpose, but also the military logic reflected in the concept of economy of force. There is no military value in wasting resources for the purpose of exacerbating the suffering of an opponent already rendered combat ineffective, and this principle of law is consistent with this logic.

Another example is the law of military objective. While there may be definitional uncertainty on the fringes of the rule when it is operationally applied, the underlying premise is militarily sound: limiting the application of combat power only to those persons, places, or things that contribute to achieving operational objectives. A resource conscience commander should instinctively avoid wasting resources on targets of no strategic, operational or tactical significance, and this rule is consistent with that logic.

This general symmetry is unsurprising considering that the contemporary law of armed conflict has been historically informed by the reasoned judgments of battlefield veterans. It is also a critical component in enhancing compliance with the law. Because armed forces will be primarily responsible for effective implementation of the law, implementation will invariably be facilitated where the dictates of the law comport with the logic of the profession of arms.

2. Explain generally the difference between the law of armed conflict and rules of engagement.

Rules of Engagement (“ROE”) and the law of armed conflict are two distinct sources of operational regulation. While ROE will often incorporate LOAC obligations and authorities, they are not synonymous. As defined in U.S. military doctrine, ROE are “Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”³ In other words, ROE are intended to give operational and tactical military leaders greater control over the execution of combat operations by subordinate forces. Though not historically designated in contemporary terms, the history of warfare is replete with examples of what have essentially been ROE. The Battle of Bunker Hill provides what is perhaps a quintessential example of such use. Captain William Prescott imposed a limitation on the use of combat power by his forces in the form of the directive “don’t shoot until you see the whites of their eyes”⁴ in order to accomplish a tactical objective. Given his limited resources against a much larger and better equipped foe, he used this tactical control measure to maximize the effect of his firepower. This example of what was in effect ROE is remembered to this day for one primary reason – it enabled the American rebels to maximize enemy casualties.

³ The Joint Chiefs of Staff, Joint Pub 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (14 Apr 2001, as amended through 14 Sep 2007), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jpl_02.pdf.

⁴ See JOHN BARTLETT, FAMILIAR QUOTATIONS 446 and n.1 (Emily M. Beck, ed., 14th ed., Little Brown and Co. 1968 *quoted in* Major Mark S. Martins, Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering, 143 MIL. L. REV. 1, 34 (Winter, 1994).

Another modern example of tactical controls on the use of force is the Battle of Naco in the Fall of 1914. The actual battle was between two Mexican factions, but it occurred on the border with the United States.⁵ In response to the threat of cross-border incursions, the 9th and 10th Cavalry Regiments, stationed at Fort Huachuca, Arizona, were deployed to the U.S. side of the border to ensure the U.S. neutrality was strictly maintained. As part of the Cavalry mission, “The men were under orders not to return fire,”⁶ despite the fact that the U.S. forces were routinely fired upon and “[T]he provocation to return the fire was very great.”⁷ Because of the soldiers’ tactical restraint and correct application of their orders – what today would be characterized as ROE - the strategic objective of maintaining US neutrality was accomplished without provoking a conflict between the Mexican factions and the United States. The level of discipline reflected by the actions of these U.S. forces elicited a special letter of commendation from the President and the Chief of Staff of the Army.⁸

Despite these and numerous other historical examples of soldiers applying ROE, the actual term “rules of engagement” was not used in the U.S. until 1958 by the military’s Joint Chiefs of Staff (JCS).⁹ As the Cold War began to heat up and the U.S. had military forces spread across the globe, military leaders were anxious to control the application of force and ensure it complied with national strategic policies.¹⁰ With U.S. and Soviet bloc forces looking at each other across fences and walls in Europe and over small areas of air and water in the skies and oceans, it was important to prevent a local commander’s overreaction a situation that began as a minor insult or a probe to result in the outbreak of a conflict that could quickly escalate into World War III. Accordingly, in 1981 the JCS produced a document titled the JCS Peacetime ROE for Seaborne Forces, which was subsequently expanded in 1986 into the JCS Peacetime ROE for all U.S. Forces.¹¹ Then, at the end of the Cold War, the JCS reconsidered their peacetime ROE and determined that the document should be amended to apply to all situations, including war and military operations other than war.¹² In 1994, they promulgated the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement¹³ which was subsequently updated in 2000 and again in 2005. As will be discussed below in detail, it is this 2005 edition that governs the actions of U.S. military members today.

⁵ For more information regarding the Fall of Naco See Elizabeth A. Palmer, *Democratic Intervention: U.S. Involvement in Small Wars*, 22 Penn St. Int’l L. Rev. 313, (2003).

⁶ See <http://net.lib.byu.edu/estu/wwi/comment/huachuca/H11-10.htm>.

⁷ See <http://net.lib.byu.edu/estu/wwi/comment/huachuca/H11-10.htm>.

⁸ The commendation letter stated, “These troops were constantly under fire and one was killed and 18 were wounded without a single case of return fire or retaliation. This is the hardest kind of service and only troops in the highest state of discipline would stand such a test.” <http://net.lib.byu.edu/estu/wwi/comment/huachuca/H11-10.htm>.

⁹ See generally Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. Rev. 245, (1997).

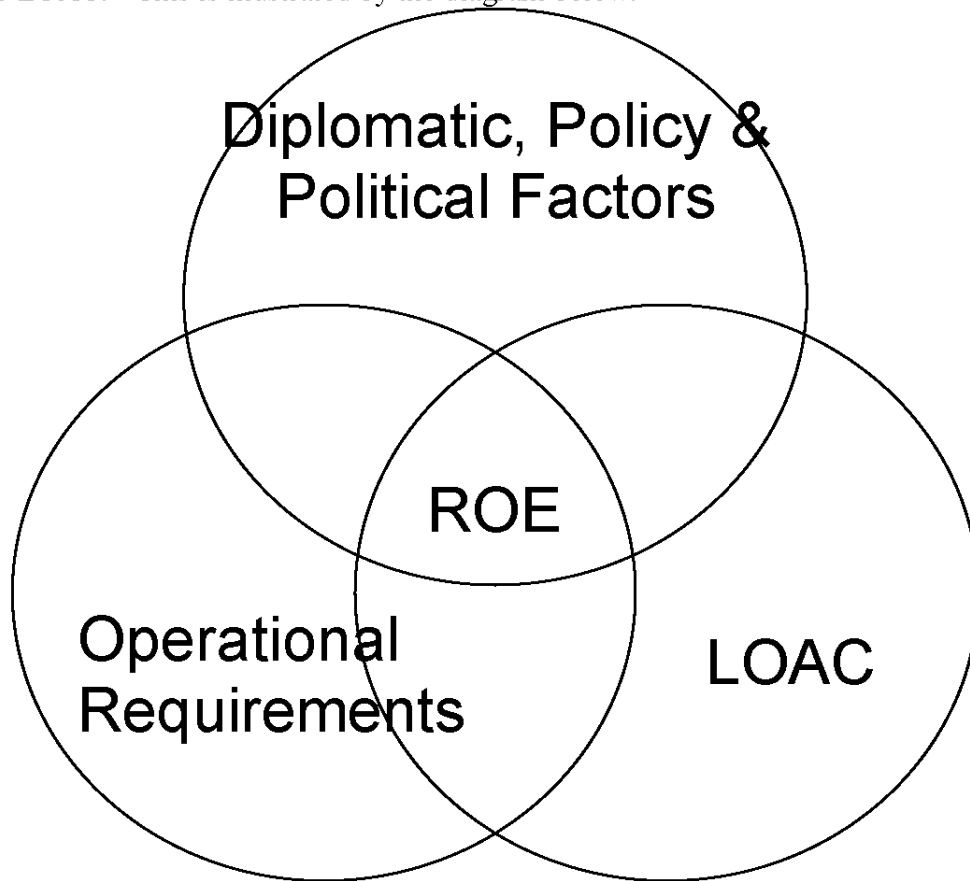
¹⁰ See generally Robert K. Fricke, *Dereliction of Duty: Lyndon Johnson, Robert McNamara, the Joint Chiefs of Staff, and the Lies that Led to Vietnam*, 160 Mil. L. Rev. 248, (1990) (book review).

¹¹ See Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 23-25, 42 (Winter, 1994).

¹² The Judge Advocate General’s School, *International Law Notes*, 1993 Army Law. 48.

¹³ CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.02, *STANDING RULES OF ENGAGEMENT FOR UNITED STATES FORCES*, (1994).

ROE have become a key issue in modern warfare¹⁴ and a key component of mission planning for U.S. and many other armed forces.¹⁵ In preparation for military operations, the President and/or Secretary of Defense personally review and approve the ROE, ensuring they meet the military and political objectives.¹⁶ Ideally, ROE represent the confluence of three important factors: Operational Requirements, National Policy, and the LOAC.¹⁷ This is illustrated by the diagram below.



It is particularly important to note while ROE are not coterminous with the LOAC, they must be completely consistent with this law. In other words, while there are provisions of the LOAC that do not affect a mission's ROE, all ROE must comply with the LOAC. This is illustrated by the diagram above, which reflects the common situation where the authority provided by the ROE is more limited than would be consistent with the LOAC. For example, in order to provide greater protection against collateral injury to

¹⁴ See *State Department Conducts Daily Press Briefing*, Oct. 3, US FED NEWS, (Oct. 3, 2007) available in LEXIS Nexis Library, CURNWS File.

¹⁵ See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK, at 84 (2007); CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT HANDBOOK, at 1-1 – 1-32 (1 May 2000).

¹⁶ Lieutenant Commander Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 126 (1998).

¹⁷ Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. Rev. 245, 247 (1997).

civilians, the ROE may require that the engagement of a clearly defined military objective in a populated area is authorized only when the target is under direct observation. This is a fundamental principle and key to the proper formation and application of ROE. In fact, the preeminent U.S. ROE order explicitly directs US forces that they “will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all other operations.”¹⁸ Note that this directive applies to “armed conflict,” not international armed conflict.

To illustrate this interaction between ROE and the LOAC, consider an ROE provision that allows a soldier to kill an enemy. While this provision is completely appropriate, it does not give the soldier the authority to kill an enemy who is surrendering because such conduct would violate the LOAC.¹⁹ Similarly, if the ROE allow a pilot to destroy a bridge with a bomb, that does not relieve the pilot of the responsibility to do a proportionality analysis and be certain that any incidental civilians deaths or damage to civilian property is not “excessive in relation to the concrete and direct military advantage”²⁰ to be gained by the destruction of the bridge. ROE will also often contain provisions that remind soldiers that they can only engage the enemy or other individuals that engage in defined conduct endangering soldiers or others. In this way, ROE ensures compliance with the laws of war by reinforcing the requirement to abide by the LOAC.

Appreciating this interrelationship is therefore essential to understanding why violation of a constraint imposed by a specific ROE, or even customarily imposed by ROE, does not *ipso facto* establish violation of the LOAC. To assess that question, it is necessary to determine whether the ROE constraint was co-terminus with the LOAC, or more restrictive than the scope of permissible authority established by the LOAC. In contemporary military operations, it is common for ROE to be more restrictive than the LOAC in order to satisfy policy considerations related to the application of combat power. This is particularly true with regard to the employment of indirect fires.

3. Explain generally the importance of evidence of good faith when attempting to impute improper motives to a Commander in a given decision making process.

The LOAC rests ultimately on a foundation of good faith. Virtually any LOAC rule can be circumvented by a commander who is not committed to good faith compliance with the law. When assessing criminal responsibility for LOAC violations, it therefore should be axiomatic that an overall record of good faith application is probative

¹⁸ CHAIRMAN, JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES, encl. A, para. 1d (13 Jun 2005).

¹⁹ Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply?*, 73 Tex. L. Rev. 139, (1994).

²⁰ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 57.2b *available at* <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>

circumstantial evidence in relation to determining whether the decision under judicial scrutiny violates the law.

Transforming the obligations related to the application of combat power to criminal sanction is a complex process. The law regulating such application was developed to operate prospectively, providing operational leaders (I will use commanders to denote such leaders, although the proscriptions of the law could also reach decision makers in a non-command position) a framework to guide their decision making process. Reliance on these rules as the source of criminal sanction requires a retrospective critique of this decision making process. This involves the classic “subjective/objective” test: an objective standard of assessment is applied by analyzing decisions through the subjective perspective of the defendant. This is essential to ensure that commanders are not held liable based on a retrospective assessment of facts and circumstances. It is also an established principle of war crimes liability, often referred to as the “Redulic Rule,” in reference to the war crimes prosecution of a German commander for engaging in “scorched earth” campaign in Norway during a tactical retreat at the end of World War II. Lothar Rendulic was ultimately acquitted by the Nürnberg war crimes tribunal of the charge of wanton devastation for this “scorched earth” campaign. This precedent stands for the proposition that when subjecting a commander’s judgment to criminal critique it is necessary to consider the situation through the perspective of that commander at the time the judgment was made.

Assessing criminal responsibility for operational decisions also invariably involves assessing the state of mind of the defendant. Because direct evidence of state of mind is rarely available, it becomes essential to rely on circumstantial evidence to infer a defendant’s state of mind related to a given decision. For decisions to employ combat power, this evidence often takes the form of the effects from such employment. These effects are relied on to infer the defendant acted with a criminal state of mind. However, because operational effects can often support the alternate inference that a commander acted in good faith even if the assessment of potential consequences was erroneous, prior decisions by the commander should also be considered in the assessment process. In this regard, while not dispositive, a pattern of good faith decision making by a commander could undermine the inference that an illicit effect was the result of an illicit motive of criminal state of mind.

This evidence is particularly useful in determining if a targeting decision violates the proportionality rule. That rule, which is a component on the prohibition against indiscriminate attack, prohibits any attack in which the anticipated incidental injury or collateral damage is excessive in relation to the concrete and direct military advantage anticipated. Using this rule as a basis for criminal responsibility requires the finder of fact to critique a command judgment based on the effects of an attack and assessment of information available to the commander at the time of the attack. As will be discussed in more detail below, the essence of this inquiry is determining whether bad faith can be imputed to the commander as the result of what is in essence a reckless judgment producing harm to civilians and civilian property. In this regard, the criminal application of the proportionality rule mirrors the common law concept of implied malice murder, where the law permits a finder of fact to rely on the effects of a defendant’s conduct to

impute malice to the defendant. Accordingly, in both situations evidence of improper motive for creation of the risk should be highly probative in the imputation analysis, and therefore evidence of overall good faith application of the law becomes probative to this motive analysis.

4. Explain the operational meaning of “target”, including the relationship between targets and “effects”, and the relationship between targets and the definition of military objective by nature, location, purpose, or use.

Targets are simply those persons, places, or things made the object of attack by a military force. The target selection and engagement process begins with the military mission. Operational planners then determine how to best leverage the capabilities of the military unit to achieve the effects deemed necessary to accomplish the mission. These effects generally include destruction, neutralization, denial, harassment, and disruption. The targeting cycle involves the selection of targets, the selection of means to engage those targets, target engagement, assessment of effects, and reconsideration of targets.

Targets can include virtually any person, object or place in the battle space. While pursuant to the LOAC many persons, places, or things are presumed not to be targets, virtually no presumption of immunity is conclusive. Even civilians can become lawful targets by virtue of their direct participation in hostilities. Likewise, the LOAC permits the targeting of presumptively immune places such as hospitals when the enemy is using those places for hostile (unlawful) purposes.

The principle of distinction, which requires belligerents to distinguish between lawful objects of attack and civilians and civilian property, is a basic principle of the LOAC. This principle is derived from the concept of military necessity, which permits the infliction of death and destruction only to the extent necessary to bring about the prompt submission of enemy forces. Because the law presumes that the deliberate infliction of death or destruction to civilians or civilian property does not contribute to this objective, belligerents are obligated to refrain from making civilians or civilian property objects of attack.

The LOAC defines those targets that may be lawfully attacked through the rule of military objective and the prohibition on indiscriminate attacks. Commanders are obligated to select only lawful targets and engage targets only in a manner that comports with the prohibition against indiscriminate attacks. This does not, however, mean that the knowing infliction of harm on civilians or civilian property renders an attack on a target unlawful. Instead, it is the rule of military objective that provides the *prima facie* standard for determining when a target is lawful. The knowing but unavoidable harm to civilians or civilian property is considered as a second level of analysis to determine whether the attack will be indiscriminate and therefore unlawful. This assessment process occurs within the targeting process.

In order to facilitate compliance with this basic principle of distinction, the 1977 Additional Protocol I to the Geneva Conventions of 1949 (AP I) explicitly defined what

qualify as military objectives (those people, places, and things that may be made the lawful objects of attack). The first component of this definition is derived from Article 51, which provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack.” Because individuals entitled to status as prisoners of war upon capture are excluded from the definition of “civilian” (with the exception of civilians who accompany the armed forces in the field to provide support), these “combatants” are by implication always lawful objects of attack. With regard to places and things, however, in recognition of the inevitable variables of the operational environment, the drafters of AP I chose not to provide an exhaustive list of military objectives. Instead, they adopted a rule that provides a framework for assessing each proposed target to determine if it so qualifies. That rule is Article 52, which provides “military objectives are limited to 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”.

Accordingly, determining whether places or things are or are not lawful objects of attack requires a case by case analysis based on the mission, enemy, troops available, terrain, time, and presence of civilians. A central component of this analysis is the complimentary rule established in Article 51 which provides that “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.” Pursuant to this rule, the presence of civilians in or around what qualifies as a military objective does not “immunize” the thing or area from attack. Instead, the operational decision-maker is obligated to analyze the legality of the attack pursuant to the complimentary prohibition against engaging in indiscriminate attacks, and assess whether the anticipated harm to civilians or civilian property will be excessive in relation to the concrete and direct military advantage anticipated (commonly referred to as proportionality analysis and discussed in greater detail below).

Perhaps the three most important aspects of the military objective “test” are contained in the prong of the rule that provides “whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. First, it is clear that the law recognizes that the desired effect of an attack need not be total destruction. This is consistent with principles of military operations. Commanders employ combat power to achieve desired effects, and these effects often do not require total destruction or capture of an enemy capability. For example, a doctrinal mission of indirect fire assets includes not only target destruction, but to also disruption, harassment, and degradation. Another example is the use of a minefield to deny access or egress to an enemy. If the use of the mines never results in the destruction of an enemy asset, the effect may nonetheless be achieved by depriving the enemy of a certain area.

Second, operational judgments must be made (and ultimately critiqued) based on the situation prevailing at the time of the decision. The purpose of this qualification was to prevent the “slippery slope” that would exist if commanders could speculate on potential

future value of proposed targets. This does not, of course, mean anticipated value is not permissible. However, a commander must have some basis in fact to support the conclusion that a future use of a potential place or thing renders it a military objective.

Third, the advantage gained by targeting a place or thing must be “definite.” Again, the purpose of this qualifier was to prevent unfounded speculation or conjecture on the value targeting a place or thing would produce. However, no commander can know with absolute certainty the value to be gained from attacking a target. What the “definite” qualifier is intended to prevent general speculation on some attenuated value of target engagement. So long as the commander acts with a good faith basis that the target engagement will produce a tangible operational or tactical advantage for his force, the qualifier is satisfied.

These second two components of the military objective test are further examples of the symmetry between the LOAC and military logic. No commander should waste resources on targets with purely speculative value. Accordingly, sound operational judgments should be consistent with these aspects of the military objective test.

5. Explain the relationship between the principle of distinction, the law of military objective, and whether an opponent can immunize a target by placing it among or in proximity with civilians or civilian objects.

It is axiomatic that military objectives are lawful targets, and that civilians are unlawful targets. The principle of distinction establishes this axiom. That principle, which is at the core of the regulation of methods and means of warfare, requires that belligerents at all times distinguish between the lawful objects of attack and all other persons, places, and things that do not qualify as such. As discussed above, the principle is implemented by the rule of military objective.

Compliance with the principle of distinction becomes most difficult when lawful military objectives are co-mingled with civilians and/or civilian property. While the LOAC imposes an obligation on belligerents to take “constant care . . . to spare the civilian population, civilians and civilian objects” (Article 51, AP I), it is clear from both historical practice and from the structure of AP I that such co-mingling is virtually inevitable. Extending the obligation to mitigate risk to civilians by prohibiting attacks against military objectives whenever civilians or civilian objects were in close proximity to these objectives would be unworkable for a number of reasons. First, the rule would invite violation due to the reality that belligerents have historically refused to consider military objectives immune from attack due to the proximity of civilians or civilian property. Second, belligerents would be provided an incentive to exacerbate the risk to civilians or civilian objects by deliberately co-mingling them with military objectives in an effort to immunize those objectives.

In response to the reality of a co-mingled battle-space, the drafters of AP I adopted a compromise approach. Belligerents bear a constant obligation to endeavor to mitigate risk of harm to civilians and civilian property. However, Article 51 explicitly

provides that the presence of civilians or civilian objects in the proximity of military objectives does not immunize those objectives from attack. Of course, this does not permit the deliberate targeting of civilians or civilian objects. It does, however, permit the attacks on lawful military objectives with knowledge that the attacks will likely cause harm to civilians or civilian property. Thus, the commander does not violate the LOAC when he orders an attack with knowledge that civilians will likely become casualties of the attack, so long as he does not act with the purpose (conscious objective) to cause such casualties.

An equally critical aspect of this balance is that the obligation to “take constant care” to spare civilians and civilian objects from the harmful effects of hostilities requires belligerents to make *prima facie* good faith efforts *not* to co-mingle military objectives with civilians or civilian property. This obligation is obviously an “endeavor” obligation, and is therefore not absolute. However, a belligerent who deliberately locates military objectives in proximity to civilians or civilian objects shares responsibility for harm to those civilians resulting from an enemy attacking those military objectives.

The final aspect of this equation is the relationship between co-mingled civilians and the proportionality rule. Just as a belligerent is not permitted to immunize a military objective by deliberately co-mingling that objective with civilians or civilian property, even when the co-mingling is deliberate, it does not release the attacking commander from the obligation to consider whether the harm to the civilians or civilian property would violate the proportionality prong of the prohibition against indiscriminate attacks. Because of this, the deliberate co-mingling of civilians with military objectives does provide a potential residual immunization effect, for if the harm to civilians was anticipated to be excessive in relation to the concrete and direct military advantage anticipated the attack would be unlawful. However, excluding such situations from the scope of the proportionality rule would be both unworkable (due to an attacking commanders inability to determine whether the co-mingling was deliberate, reckless, or negligent, or innocent), and would subject civilians to the manipulation of commanders acting in bad faith.

In summary, when a commander identifies a lawful military objective co-mingled with civilians or civilian property, the commander is permitted to attack that objective even with knowledge that the attack will cause collateral damage or incidental injury to civilians or civilian property. The only limitation on this permission is that the commander must refrain from the attack if he determines that the collateral damage or incidental injury will be excessive in relation to the concrete and direct advantage anticipated from the attack.

6. Explain generally the principle of proportionality with respect to the protection of civilians from the effects of attacks during offensive military operations.

As noted above, the inevitable presence of civilians and civilian property in areas of armed hostilities has produced an ever increasing risk that the effects of combat

operations will extend beyond lawful military objectives and impact these civilians and their property. Because of this reality, it is universally recognized that the principle of military objective is insufficient to provide adequate protection for civilians from the harmful effects of hostilities. During the twentieth century, hundreds of thousands of civilians became victims of war not as the result of a decision to deliberately target them, but as the result of the collateral effects of attacks on lawful military objectives.

Responding to this reality, the drafters of AP I provided the first express prohibition against launching indiscriminate attacks. Article 51 provides a three part definition of indiscriminate attacks: those that employ methods or means of warfare that cannot be controlled; those that treat a number of military objectives in an area of civilian population as one general objective; and those in which the collateral damage or incidental injury will be *excessive* in relation to the concrete and direct military advantage anticipated from attacking a lawful military objective.

This last prong of the indiscriminate attack definition is routinely referred to as the “proportionality” rule, or the “principle of proportionality.” It is universally accepted as a customary norm of the *jus in bello*, applicable to all armed conflicts. However, the term “proportionality” is somewhat misleading, for an attack does not become indiscriminate when the collateral damage or incidental injury is slightly greater than the military advantage anticipated (what is suggested by the term “disproportionate”), but only when those effects are *excessive*.

My understanding of this rule has always been facilitated by analogy to the common law concept of malice in relation to the crime of murder. The crime of murder is contingent on proof that a defendant killed with malice. Malice was originally understood as a willful or deliberate act. However, the common law evolved to define malice as either express or implied. Express malice is established when a defendant acts deliberately (the conscious objective to kill), or with knowledge of substantial certainty that his act will cause a death. Implied malice, however, is established when the defendant acts without intent to kill, but creates a risk to human life that is so unjustified that it manifests a wanton disregard for the value of human life. This wanton disregard is sufficient to impute malice to the defendant.

While this equation is not totally apposite to targeting decisions, it is a useful analogy. Violation of the principle of military objective is analogous to acting with express malice, for the commander is deliberately (intentionally) causing harm to civilians or civilian property. A commander is not prohibited from attacking a lawful military objective with knowledge of substantial certainty that the attack will cause civilian casualties so long as there is no conscious objective to do so, so in this regard the analogy fails. However, just as the common law allows for the imputation of malice to a defendant who acts with no intent to kill when the defendant’s actions manifest a wanton disregard for others as the result of the risk created, the proportionality rule imputes an improper purpose to an otherwise lawful attack based not on the commanders intent, but instead on the commanders disregard for the consequences of the risk created by the attack. When a commander launches such an attack with awareness that the unintended harm to civilians

will be excessive in relation to the benefit of creating the risk (achieving the military objective), the law essentially imputes to the commander the intent to engage in an indiscriminate attack.

Because this rule is primarily regulatory and not punitive, it necessarily requires commanders to balance anticipated effects of an attack. The two critical components of this balance are the anticipated military advantage to be gained by attacking a lawful target, and the anticipated collateral damage and incidental injury to civilians and civilian property. There are no established numerical equations or ratios for applying this rule, which is by its very nature METT-T-C²¹ dependant on a case by case basis. Any critique of application of this rule must be based on this reality, and must therefore be made through the subjective perspective of the commander at the time the targeting decision was made. All facts and circumstances available to the commander, including the pressures of time and the proverbial “fog of war,” must be considered when rendering an objective assessment of the validity of a targeting decision.

Ultimately, like virtually all other regulatory provision of the LOAC, this rule is intended to reinforce the obligation of commanders to make decisions in good faith. No commander should endanger civilians when the military advantage gained by doing so is so insignificant as to render the harm to civilians excessive. Doing so is both act of bad faith and operationally illogical (for it presupposes a conclusion that the advantage anticipated by the attack is negligible). What a violation of this rule reveals, and accordingly requires, is the conclusion that although a commander did not act with the purpose to harm civilians, his disregard for the effects of his attack in relation to the advantage he anticipates justifies an imputation of invalidity in his decision making process. Thus, while commanders need not always be correct in their judgments, they must always act reasonably under all the circumstances.

7. Explain generally a Commander’s obligation to select a method or means of warfare that poses the least risk to the civilian population and how a Commander must evaluate that in light of the risk to his own forces.

AP I’s effort to mitigate the risk to civilians in areas of hostilities includes a rule that imposes on commanders planning an attack the obligation to place a high priority on this mitigation when selecting how they will conduct attacks. This rule, contained in Article 57, applies whenever a commander has the option to select from more than one military objective or more than one method or means of attack to achieve a tactical objective. When this is the case, the law requires a commander to select the objective or the method or means of warfare that poses the least risk to the civilian population. However, this rule includes an important and pragmatic qualifier: the alternate options must be equally effective for achieving the commander’s purpose. In essence, the rule is that “when all options are equal in anticipated effect, select the option that creates the least risk to the civilian population.”

²¹ See discussion of METT-T-C on page 15, *infra*.

It is critical, however, to understand what the concept of “equality” means in assessing multiple options. It is not merely an effects-based analysis. Instead, a commander may legitimately consider both resource availability and risk to friendly forces when assessing equality. For example, a commander is not automatically obligated to use a precision guided munition (PGM) in lieu of a “dumb” round when attacking an area in which civilians are located. While the PGM will almost certainly be the option that reduces the risk to the civilian population, the commander is entitled to consider the supply of PGMs compared to “dumb” munitions, other military objectives that might require the use of the limited number of PGMs, and available resupply and rates of resupply. If the commander determines that it is operationally necessary to “husband” the PGMs, then the option to use PGM’s is not “equal” to the option to use the dumb rounds.

One area of controversy in application of this rule is the effect of risk to friendly forces when conducting equality analysis. Most experts seem to agree that a commander is entitled (some would argue obligated) to consider the comparative risk to friendly forces as a component of this analysis. Accordingly, the commander is not obligated to select the method or means of warfare that poses the least risk of harmful effects to civilians when that choice increases the risk to his own forces. For example, a commander might have a need to destroy or disable an enemy command post located in a populated area. When assessing the possible options to achieve this objective, the commander may have a choice between indirect artillery fires or a special operations assault on the objective. Because the special operations assault will reduce the risk to civilians as the result of the more precise engagement probability, from an effects standpoint it would appear to be the option the commander is obligated to adopt. However, because use of that option will pose a substantially greater risk of casualties to his forces, that option is not equal to the use of indirect fires within the meaning of the rule.

Of course, commanders may always choose to assume greater risk in the interest of minimizing harm to civilians as a matter of policy because the benefit is perceived as outweighing the risk to friendly forces (which is often a motivating factor in the imposition of constraints within rules of engagement that are more restrictive than required by the LOAC). However, such choices are not legally mandated.

8. Use of artillery in populated areas and the LOAC.

There are very few *per se* LOAC prohibitions related to the use of weapons and weapon systems during armed conflict. Some of these take the form of treaties which establish an outright prohibition against the use of certain weapons, such as the prohibition against the use of chemical, biological, and bacteriological weapons. Other prohibitions impose contextual limitations on the use of weapons or methods of warfare, such as the prohibition of bombarding undefended population areas, or the use of booby traps in certain contexts.

There is no *per se* prohibition against the use of artillery to attack lawful military objectives in populated areas. Instead, the legality of the use of this means of warfare, like the use of almost all means of warfare, is determined by application of the broad principles that regulate targeting (those discussed previously). Accordingly, the legality of use of artillery in such areas is dependent on consideration of a variety of factors related to the operational necessity for the use, the availability of alternate methods and means of warfare to achieve the military purpose, the enemy situation, and the risk to civilians. The acronym METT-T-C is used in U.S. practice to indicate the relevance of these considerations in all operational decision-making, and is a key component in assessing the propriety of use of artillery in populated areas.

METT-T-C stands for Mission, Enemy, Troops, Terrain, Time, and Civilians. METT-T-C analysis considers each of these factors to provide the contextual background for operational decisions. While “law” is not an explicit element of this analysis, the requirement to consider the civilian population and the enemy situation implicitly invokes the LOAC in assessing the propriety of targeting decisions. An example of the multiple factors a commander must assess in deciding whether to use artillery to achieve an operational effect can be found in the U.S. Army Field Manual 6-20:

Any variable that could affect the mission is a factor. Before the estimate is started, all relevant information must be collected from all available sources. Once this information has been assembled and the factors that could affect the plan have been identified, they should be listed and arranged in priority.

Examples of the factors that may be considered are as follows:

The task organization of subordinate forces and their missions.

The availability of field artillery resources, including cannons, multiple launch rocket systems (MLRSs), missiles, ammunition (conventional, nuclear, and chemical), and target acquisition assets.

The availability of other fire support resources, including mortars, NGF, tactical air support, and Army aviation support. Also included are EW and other intelligence-controlled surveillance assets.

In the attack, the enemy dispositions (including frontage and depth), the degree of protection afforded the enemy, objectives for subordinate forces or units, the number of phases, and the likely frontage and depth of the assault. These will affect the allocation of fire support resources to subordinate units.

In the defense, the mission of the security force, the frontage and depth of the MBA, the contingencies for counterattack, and considerations for deep and rear operations.

The mobility of the supporting artillery and its speed of movement to contact and withdrawal.

In light forces, the force antiarmor plan.

Courses open to the enemy artillery commander, especially his most probable course of action. These are derived from the intelligence estimate and knowledge of enemy artillery doctrine. Consideration of this factor results in--

- The probable enemy artillery plan.
- Enemy artillery vulnerabilities.
- Enemy nuclear and chemical capability and posture.
- Any information requirements on enemy that have significant influence on the tasking of weapons-locating sensors .
- The allocation of resources, weapons, and munitions for counterfire.
- Measures to reduce the vulnerability of our force.
- The recommended counterfire priorities for each phase of the battle (by the designation of critical friendly zones and enemy weapon systems).
- The enemy EW situation.
- The identification of high-payoff targets (derived from target value analysis [TVA] and IPB).
- The commander's information requirements (derived from the intelligence estimate).
- The availability and condition of roads, trails, and likely position areas. This leads to the coordination of movement and position areas with the operations staff.
- Ammunition consumption factors (type and quantity), pre-positioning requirements, and priority of combat service support.
- The effects of survey and met requirements on the ability to guarantee timely and accurate fire support (to include weapon and target acquisition assets).
- The reliability and range of communications.
- The time required for positioning and technical preparation to engage targets.
- The time to be ready to support the operation.

Use of artillery in populated areas should be dictated by assessment of these factors, and even when the acronym is not explicitly used by a commander (for example, in an Army that does not tend to follow U.S. or NATO doctrine), these considerations should inevitably be part of the targeting analysis. The commander first must determine how the mission should be tactically executed, which will drive selection of targets and dictate the effects that must be achieved for each target. The commander then assesses the enemy situation to guide analysis of which component of his power will be most effective in achieving the desired effects. The commander will then assess the assets available that

are capable of achieving the effects, the effectiveness of each asset for this purpose, other demands on each asset, etc. This is often called “weaponizing”, and involves the process of selecting the best asset for each proposed target. The commander must then consider the element of time, for time might make some assets that are potentially effective in an attack non-responsive to the operational need.

Finally, the commander must assess the impact of the targeting decision on the civilian population and civilian property. First, the commander must ensure the desired effect can be achieved without violating the prohibition against indiscriminate attacks. If the commander determines that artillery can be employed in a manner that is not indiscriminate, then so long as the object of attack is lawful, the commander should also then consider whether even if lawful, the potential harm to civilians creates an unacceptable policy risk. It is not uncommon in contemporary operations for commanders to refrain from launching lawful attacks based on policy driven concerns (it simply might not be worth the cost of having to defend the legality of the attack in the public realm; or a commander may not want to alienate the civilian population by causing casualties that while lawful, would still be perceived as unjustified). However, this consideration is directly linked to the first element of the analysis, the mission, because the mission will dictate the degree of risk of public condemnation of civilian alienation a commander is willing to assume.

While the contemporary practice of U.S. and NATO forces is to place ROE controls on the use of artillery in populated areas, it is simply improper to characterize these controls as indications of *per se* prohibitions against such use. In fact, almost all such ROE controls permit the use of artillery fires under certain circumstances, or when authorized by a certain level of command. For example, a prohibition against the use of unobserved indirect fires in populated areas will often provide an exception for “forces in contact”, or permit such fires when authorized by “Division command or higher.” The variety of control measures is not relevant. What is relevant is that by providing exceptions to these policy based constraints, ROE indicate that such fires are not prohibited *per se* by the LOAC, but are instead dictated by METT-T-C considerations.

If a commander decides to employ artillery against military objectives in civilian populated areas, the commander must act consistently with the obligation to endeavor to minimize the risk to civilians. This will often involve considering the use of artillery observers or “spotters” to better control the effects of the attack. This is referred to as “observed” indirect fires, which obviously mitigates the risk of collateral damage or incidental injury to civilians. Unobserved indirect fires use intelligence indicating the location of proposed targets and indirect fire direction calculations to maximize the probability of achieving the desired effect. Observed fires are therefore also operationally preferable because they enhance the effectiveness of the artillery attack.

However, it is not always possible to use observed indirect fires. Observation requires getting personnel into a position where they can have “eyes on” the target. Because one of the key advantages of artillery is the capability to engage in long range targeting, commanders might not be willing or even able to place friendly spotters in

close proximity to long range targets, especially those targets in areas under significant enemy control. Ultimately, commanders will have to engage in a cost/benefit analysis to decide whether placing artillery spotters in a position enabling observed fires is the best operational decision.

A *per se* prohibition on such fires would be wholly unworkable for two reasons. First, it would encourage belligerents to put their most important targets in populated areas (a practice that already occurs as the result of the knowledge that commanders often impose policy constraints on such fires), thereby increasing the danger to the civilian population. Second, it would require attacking commanders to either ignore such targets (giving an enemy a reward for co-mingling them), or resorting to ground assaults to attack such targets. Because ground assaults in populated areas are considered the most complex and dangerous type of ground operations, this will place commanders in an untenable position of having to assume maximum risk to friendly forces whenever an enemy chose to abuse the law by co-mingling important targets in civilian populated areas.

Accordingly, there is no prohibition against using artillery, either observed or unobserved, against lawful military objectives in civilian populated areas. The legality of such use must be assessed on a case-by-case basis that focuses on METT-T-C.

9. Explain generally whether an understanding of the mission and effects of artillery is essential to a proper application of the law of armed conflict.

As noted above, determining when to use artillery to achieve a desired effect requires consideration of the METT-T-C factors. As also noted above, the “troops” element of this analysis involves assessment of the anticipated effects of artillery. It is obvious that expertise in these effects enhances this assessment process by providing the commander with the best possible information on which to base his weapons selection judgment. This is the weaponeering component of the targeting process.

It is also obvious, however, that expertise in artillery capabilities and effects will vary from unit to unit, commander to commander, nation to nation, etc. Because of this, a commander will inevitably be required to base his operational judgments on the best information available to him. As a general matter, an attacking commander will almost always rely on the senior officer of artillery to provide this “effects” information. It would be unrealistic to hold a commander to a standard of care that was based on perfect information. Instead, the commander’s judgment in the selection of the method or means of attack, including the decision to employ artillery in a civilian populated areas, must be critiqued based on the information that was available to the commander at the time of his decision. The commander should consider the best information he has related to the capabilities and effects of artillery, which becomes part of his overall METT-T-C analysis.

10. Under the law of armed conflict, explain generally the types of weapons that are prohibited from being engaged within civilian populated areas.

Other than weapon systems that are the subject of express treaty prohibitions (such as chemical weapons, bacteriological weapons, air delivered incendiary weapons, etc.), all weapons are potentially lawfully used in populated areas, and all weapons are potentially unlawful for such use. Determining whether use of a weapon in such an area is lawful is contingent on two primary rules. First, the weapons must be used against a lawful military objective; using even the most precise engagement capability against a non-military objective is unlawful. Second, the weapons itself, or its employment, must not be indiscriminate.

The prohibition against indiscriminate attacks codified in Article 51 of AP I includes both weapon types (means) and weapon employment (methods). Use of a weapon that cannot be controlled once fired is treated as indiscriminate because the weapon is not subject to sufficient control to comply with the distinction obligation. Weapons that fall into this category would include gas or chemical weapons or long range missiles that can be directed against a populated area but not against any target contained therein (such as the Iraqi SCUD missile attacks against Israel and Saudi Arabia in the 1991 Persian Gulf War). Most modern weapons however, including most tube and rocket artillery, are subject to enough fire direction control as to not be considered to fall within this category.

Any weapon can also be employed in a manner that is inherently indiscriminate. This is reflected in the two additional definitions of indiscriminate attack in Article 51. The first involves treating a number of distinct military objectives in a populated area as one large objective for purposes of targeting. When a commander employs a weapon system to attack such a “lumped together” series of distinct targets (such as carpet bombing a city in order to destroy dispersed military objectives within the city), that employment is indiscriminate and is prohibited. The second is the proportionality rule discussed above. When a commander employs even a precise weapons system against a lawful military objective with the anticipation that the collateral damage and incidental injury to civilians or civilian property will be excessive in relation to the concrete and direct military advantage the commander expects to gain from the attack, the attack is treated as indiscriminate and therefore unlawful.

Because there is no *per se* prohibition against tube or rocket artillery, direct or indirect artillery fires, observed or unobserved indirect artillery fires, or conventional (non chemical or bacteriological) artillery or rocket munitions, use of these capabilities in populated areas is subject to case-by-case legality assessment based on these foregoing rules.

11. Under the law of armed conflict, explain whether there is a *per se* prohibition against using a 122 MBRL system to engage military objectives within urban areas during offensive military operations.

Consistent with the foregoing discussion, the LOAC imposes no *per se* prohibition against using rocket artillery, such as a 122 MBRL system, to engage lawful military objectives in a civilian populated area. As with almost all other weapon systems, the legality of such use would be contingent on METT-T-C analysis in relation to the LOAC prohibition against engaging in indiscriminate attacks.

Once a commander determines that a military objective within a populated area needs to be attacked, the commander must then determine the effects that must be achieved. This “effects based analysis” should drive the choice between available assets to engage the objective. If the commander determines that long range strike capability is the best or only viable option, then artillery will become a prime candidate for target engagement.

Artillery assets are generally divided between cannon and rocket. Cannon artillery uses single round munitions (such as howitzer or mortar rounds). Rocket artillery fires rocket propelled munitions, often in salvos of multiple rockets (although it should be noted that tube artillery can be delivered in salvos from multiple individual artillery assets). According to U.S. Army Field Manual 6-20, “Fire Support in the Airland Battle”:

Indirect Fire. The projectile, rocket, missile, and bomb are the weapons of indirect-fire systems. Indirect fire can cause casualties to troops, inhibit mobility, suppress or neutralize weapon systems, damage equipment and installations, and demoralize the enemy. Most casualties to troops in an indirect-fire attack are caused by the initial rounds. Best results are achieved by a short engagement at a high rate from as many weapons as possible.

Effects of Fire. A commander will decide what effect fire support must have on a particular target. There are three types of fire: destruction, neutralization, and suppression.

Rocket artillery is generally preferred for area targets. However, it is also an ideal asset for use in disruption missions. For example, rocket artillery is often a preferred means to disrupt enemy air defense assets or command and control capabilities. Furthermore, the value of rocket artillery in relation to cannon artillery will often turn on multiple factors in addition to the desired effect, including the vulnerability of enemy assets to both types of attack, degree of certainty as to location of enemy assets, the collateral effects of both types of attack, and other operational demands on these assets.

Any commander considering use of rocket artillery in a civilian populated area would be required to assess the impact of anticipated collateral damage and incidental

injury. However, it is impermissibly overbroad to assert that use of this asset would always be the most indiscriminate option of attack in comparison to cannon artillery. Factors such as the location of the civilian population (indoors or outdoors), the timing of the attack, the protection afforded to civilians by hardened structures and the potential comparative impact of cannon versus rocket rounds would all be relevant in making this determination. It is certainly conceivable that based on all these (and other METT-T-C) considerations a commander could make a good faith determination that rocket artillery is better suited to achieve a desired effect within the framework of the LOAC than cannon artillery.

12. Explain generally the concept of FIBUA and whether a commander should attempt to avoid such combat if possible.

FIBUA is the current doctrinal term for conducting ground combat operations in built up or urban areas. This type of operation is also often referred to as MOUT – Military Operations in Urban Terrain.

It is an axiom of operational art that FIBUA should be avoided whenever feasible. This is because engaging an enemy in built up or urban terrain is considered among the most difficult combat situation a commander may encounter. Such operations cede to the defender the natural advantage provided by the use of the urban terrain for cover, concealment, and overall tactical advantage. The built up environment degrades the effectiveness of fires and maneuver. It also creates an extremely high risk to civilians in area of hostilities, which adds an undesired element of uncertainty into the target engagement process.

History is replete with examples of from which this axiom is derived. From Stalingrad to Hue to Fallujah, FIBUA has historically been considered the most undesired terrain on which to engage an enemy with ground combat power. Because of this, military doctrine indicates that whenever feasible, commanders should seek to isolate and bypass enemy defensive positions in built up areas.

Unfortunately, there is an inverse relationship between built up areas and defensive operations. Because of the difficulty of dislodging forces from such areas, a defending commander obtains a force multiplication benefit from emplacing positions in such areas.

Bypassing such areas is not always feasible, and when absolutely necessary assault into built up areas may have to occur. However, if alternatives to ground assault are viable, a commander would be derelict in not considering and ultimately employing them. For example, a commander may choose to use indirect fire assets to disrupt enemy forces in a built up area during bypass operations, or to fix them in the area so that they cannot endanger friendly forces during the bypass.

The danger associated with ground assaults into built up areas would also be an important METT-T-C consideration in deciding how to address the presence of enemy forces in such an area.

13. Under the law of armed conflict, explain generally whether a commander is entitled to assume subordinates will implement orders lawfully.

The responsibility of military commanders for the LOAC violations of subordinates is a complex and ever evolving area of the law. The concept of “command responsibility” is a doctrine of criminal liability that emerged in the aftermath of World War II and continues to play a central role in contemporary war crimes prosecutions.

Pursuant to this doctrine, as a general proposition a commander can be held criminally responsible for the LOAC violations of subordinates. However, this liability is not “strict”, but requires that the commander acted with some culpable state of mind. Much of the debate related to application of this doctrine has focused on what level of proof is necessary to satisfy this *mens rea* element, particularly when liability is based not on what the commander knew, but what he “should have known.”

However, as the doctrine evolved, some aspects emerged that provided a degree of protection for military commanders. The most important of these is the principle that commanders are generally justified in relying on a presumption that subordinates will execute lawful orders in a lawful manner. This is an important qualifier to the scope of command liability, for it recognizes that it is impossible for commanders to monitor every action of every subordinate. Of course, such reliance would be invalid if the commander was on notice of some reason why subordinates would be inclined to disregard the law. However, as the U.S. military tribunal noted in the High Command case after World War II:

“Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility . . . A high commander cannot keep completely informed of the details of military operations of subordinates . . . He has the right to assume that details entrusted to responsible subordinates will be legally executed . . . There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.”

Accordingly, when a commander gives orders to subordinate units, it is neither necessary nor required that the orders explicitly direct subordinates to execute their missions in accordance with the LOAC. Such a direction is an implicit component of all orders. Therefore, when a commander issues an order, he may justifiably presume that the subordinate leaders who receive the order will resolve any uncertainty as to the legality of the method of execution in favor of lawful conduct.

ADDENDUM

1. **Based on the relevant assumptions provided above²², could a reasonable commander in General Gotovina's position have made the decision to use artillery assets against military objectives in Knin in support of the infantry assault aimed at liberating the area of the so-called RSK and re-integrating the territory into the constitutional authority of the Republic of Croatia?**

In my opinion, a commander acting in good faith and exercising reasonable judgment based on the facts and assumptions provided would have been justified in using indirect fires against targets in Knin in support of his ground offensive operations. Knin was clearly a critical command, control, and communication center serving the enemy forces. It was also a logistical center and the location of numerous important military objectives. General Gotovina's intelligence indicated that in addition to being a C3I center for enemy forces, there were other aspects of the enemy disposition within Knin that made disruption of enemy operations in the city a high priority. For example, within Knin, there were reserve forces of the ARSK, special police forces under the command of Milan Martić, special forces, and the requisite personnel manning the command, control and communications elements in the town. Furthermore, one operative assumption influencing General Gotovina's course of action selection was that pressuring or, if possible, eliminating, Milan Martić could drastically influence the decision-making process of the RSK and ARSK leadership and potentially force capitulation quickly and with less military and civilian casualties.

Among the military objectives General Gotovina knew the enemy had located within Knin were:

- a. ARSK Main Staff- This is the primary ARSK command and control building and included communications and operations centers.
- b. 7th Krajina Corps's Headquarters in the Northern Barracks- This corps level headquarters was contained within the main military barracks in Knin. Also within this barracks were elements of the ARSK 2nd Guard Brigade, the headquarters of the ARSK Military Police and other supporting units.
- c. TVIK Factory- This was a former Yugoslavian screw and bolt factory that had been used by the ARSK to produce military supplies including igniters for explosive munitions. Further, part of the factory was used as a storage facility for the ARSK.
- d. RSK Telegraph and Post Office- This was a telegraph and cable communications center used for both civilian and military purposes. It is

²² The assumptions were provided in a letter from the attorneys for General Gotovina which is attached to this report.

estimated that approximately forty percent (40%) of military communications for the ARSK ran through this center.

e. Residence of Milan Martić- The flat of Milan Martić, the President of the RSK and Commander in Chief of the ARSK, was on the top floor of a multi-story building that was built to house the civilian police personnel.

f. Senjak Barracks- This was a logistics base housing ARSK logistics headquarters and associated staff as well as military supplies. Additionally, the command of the mixed artillery regiment was based inside.

g. Knin Police Station- This was the headquarters for the regular RSK police force and those which had been mobilized to be a combat force prior to Operation Storm. This station had communications facilities for coordinating the actions of the police personnel. A portion of the front line that the HV planned to attempt to penetrate on its way to liberating Knin was defended by RSK police officers.

In addition, General Gotovina knew that Knin was a critical choke point for enemy lines of communication to and from front line defensive positions his forces would have to attack. Some of the critical aspects of this line of communication within the city included:

- a. Railway Station- This was the main railway yard in the entire RSK and it included a switch house which would have been necessary for any trains in the area to use if they were changing direction. The rail system was to be used by the ARSK to evacuate a massive weapons depot several kilometers north of Knin and to reinforce the front lines.
- b. Bridge over the River Butiznica- This is a key entry and exit point to Knin for the eastern part of the RSK. There was also a railway bridge which headed in the same direction through chains of tunnels.
- c. Bridge over the River Krka- This is a key entry and exit point to Knin for the southern part of the RSK.

It is a fundamental tenet of military operations that disruption of enemy command, control, communications, and intelligence is a critical task in the conduct of either offensive or defensive operations. Such disruption sets the conditions for the most effective use of combat power against enemy forces by isolating those forces and denying them the ability to “see” the battlefield and maneuver their forces to respond to the developments of the “fight”. Destruction or disruption of enemy C3I capabilities while protecting friendly C3I capabilities is essential in ensuring the friendly commander can set the tempo of the battle and seize and retain operational initiative.

It is equally fundamental that disrupting the enemy's ability to maneuver and re-supply is a critical component in setting the conditions for operational success during both offensive and defensive military operations. This is particularly critical during a deliberate attack against improved defensive positions because of the advantage to be gained by isolating enemy defensive positions and thereby denying them the opportunity to adjust their disposition to battlefield developments.

It is therefore axiomatic that enemy C3I, logistics, and lines of communication are all high value targets during all military operations. My review of the operational situation confronting General Gotovina prior to his decision to employ indirect fires against military objectives in Knin indicates that Knin was the seat of government of the RSK, the Main Staff of the ARSK, Corp level headquarters, factories controlled by the RSK government, government controlled radio and television stations, the main railroad junction for the RSK, a railroad station, the national railroad administration with communication system shared with the ARSK, the main crossroads for road transit throughout the RSK, several military barracks, headquarters for the Police and an RSK communications center.

Therefore, it is logical to conclude that General Gotovina would have reasonably (and accurately) concluded that Knin was a critical C3I center for enemy forces. He would have considered destruction or disruption of this C3I capability a priority mission to set the conditions for his ground offensive operations, as would virtually any reasonable military commander in his position. In fact, failure to attempt to at least disrupt this capability would itself have been unreasonable on his part because it would have provided a substantial military advantage to his enemy.

Identification of a high value target is, however, only an initial step in the targeting process. Assuming General Gotovina determined that enemy C3I capabilities centered in Knin fell into this category, it would then have been necessary to select the asset within his operational capability best suited to achieve the purpose of destruction or disruption, then to assign the task to achieve that purpose to that asset, then to employ the asset, then to assess the effects. Based on my review of General Gotovina's operational situation, it seems clear that his options for asset selection were limited. There is no indication he possessed a robust electronic warfare capability for a disruption mission. Nor did he possess the type of precision engagement capability increasingly associated with counter C3I operations conducted by advanced western militaries like the United States. Instead, his capability was essentially limited to indirect fire assets, ground combat assets, and a very limited rotary air capability.

As I noted throughout my original report, an assessment of the reasonableness of the selection of a method or means of warfare to target an enemy asset must be based on the METT-T-C situation that confronted the commander at the time of his decision. It seems clear that based on the METT-T-C General Gotovina would have had to consider, use of a ground assault to destroy or disrupt enemy C3I in Knin would not have been a viable option. In addition to the reality that such a tactic would have presented his ground forces with an extremely complex, difficult, and risk laden mission (as noted in

my original report, ground operations in urban terrain are to be avoided whenever possible because of these considerations), his mission required him to “husband” his ground assault capabilities. Accordingly, it would have been both reasonable and logical for General Gotovina to task his indirect fire assets with the mission of disrupting enemy C3I capabilities in Knin. While it is likely that General Gotovina would have realized that tasking these assets with a “destroy” mission was unreasonable in light of the limited indirect fire resources at his disposal and the nature of the enemy assets in Knin, this would not have precluded assigning these assets with a “disrupt” mission. While he undoubtedly would have preferred to destroy enemy C3I capabilities, disruption would certainly have been his next best option under the METT-T-C circumstances prevailing at the time.

There are numerous historical examples of commanders using indirect fires to disrupt C3I capabilities located in populated areas in order to set the conditions for an attack. Recent such examples include the “shock and awe” campaign conducted by US and Coalition forces against Iraqi C3I capabilities in Baghdad at the outset of Operation Iraqi Freedom; NATO use of air and missile strikes against Serbian C3I in Belgrade during Operation Allied Force; and use of air and missile strikes against C3I assets in Baghdad during the air campaign phase of Operation Desert Storm.

One example that seems particularly analogous to General Gotovina’s situation was the British use of indirect fire assets during the final phase of operations in the Falklands War. After making landings on one end of Grand Falkland Island, British ground forces conducted a tactical movement across the island to establish positions for a final ground assault against the main Argentine defensive positions protecting the capital town of Port Stanley. Port Stanley was the location of the Argentine Headquarters and the ultimate strategic objective of British forces in their effort to recapture the islands. Argentine forces had established extensive deliberate defensive positions in the hills surrounding Port Stanley; positions British forces would have to breach in order to capture the town. Tactical assets available to the British commander included a very limited indirect fire support capability, with significant ammunition limitations resulting from the loss of heavy lift helicopter assets with the sinking of the Atlantic Conveyor after it was attacked by Argentine air assets. This capability was augmented by naval gunfire support.

The final phase of the operation called for a British ground assault on the defensive positions surrounding Port Stanley. During these operations, British commanders used their limited indirect fire support assets to target Argentine defenses, resupply and lines of communication. One of the missions of the artillery was to harass and interdict movements and communications between Port Stanley and the defensive positions. Another critical mission was to degrade the ability of Argentine artillery to support the defenses with counter-battery fires, conducted primarily by naval gunfire assets. The British commanders made exceptionally effective use of their limited indirect fire assets to disrupt the Argentine commander’s ability to “see” the battlefield and maneuver in response to British success tactical success. This degraded the overall effectiveness of Argentine defenses. The combined effect of this use of indirect fires

with the exceptionally well executed ground assault led to a general capitulation of Argentine forces. Ironically, British artillery assets were down to virtually their last rounds when the capitulation was announced. Nonetheless, the ability of the British commander to use indirect fires for a variety of missions during that last phase of the battle, including harassing fires against Argentine forces retreating into Port Stanley, convinced the Argentine commander that further resistance was futile. (See generally http://books.google.com/books?id=gNb9YyNCXksC&pg=PA86&lpg=PA86&dq=british+use+of+artillery+in+the+battle+for+port+stanley&source=bl&ots=utM5-jRaKK&sig=Fk4iEqyhCEaV-fnOU9E21h0kMZ4&hl=en&ei=LIs5SqylJsHj1AfTpNTnDQ&sa=X&oi=book_result&ct=result&resnum=4).

Like his British counterparts, General Gotovina could have reasonably concluded that the best asset available to disrupt his enemy's ability to effectively manage a response to his ground assault was indirect fires directed at C3I, logistics, and reinforcement capabilities in Knin. Even if his assets were insufficient to destroy targets in Knin, creating the perception of "full spectrum operational dominance" would be beneficial to degrade the ability of the enemy to respond to his attack. Perhaps most importantly, his obligation as a commander was to use that asset to its maximum effect in order to degrade the ability of enemy ground forces to mount an effective defense in response to the ground offensive he was required to launch against deliberate defensive positions.

Another significant factor informing my opinion that General Gotovina's decision to employ indirect fires against military objectives within Knin was the relationship between that decision and his probable assumptions regarding the disposition of the civilian population at that time. As I noted repeatedly in my original report, a commander is obligated to consider the impact to the civilian population when selecting an operational course of action and this factor is an element of the METT-T-C analysis. The record indicates that prior to launching Operation Storm, General Gotovina had not ordered the use of indirect fires against military objectives in Knin, even though those objectives were well within range of his indirect fire assets. This is a significant factor in my assessment of his decision making process, for it corroborates the inference that the employment of this asset during Operation Storm was "nested" within his overall operational concept. Because of this, it is unlikely General Gotovina would have "wasted" this valuable resource on an objective with little or no tactical value. It also seems difficult to ignore the fact that this record also reinforces an inference that General Gotovina never acted with the intent to use this asset for the purpose of harassing or deliberately targeting the civilian population of Knin, as there was no fire on Knin prior to Operation Storm.

The presence of civilians within Knin did not, however, render the enemy military objectives in that city immune from indirect fire attack. Instead, General Gotovina was obligated to make a reasoned judgment, based on the information available to him at the time, that the collateral and incidental effects on the civilian population would not be excessive in relation to the military advantage he anticipated would be produced by the

use of this asset against military objectives within the city. In making this judgment, it is probable that General Gotovina considered the following facts related to the situation of civilians in Knin:

- a. Since June, HV intelligence assessed that there was a substantial emigration of citizens from the RSK, including Knin, following earlier HV military successes. Although Knin may have had a population of up to 15,000, there were indications that the number of non-mobilized civilians remaining in Knin on the eve of Operation Storm was as low as 3,000.
- b. There was a curfew imposed against civilians in Knin.
- c. School was not in session and the schools in Knin had been used to garrison troops during the summer of 1995.

Based on these facts, General Gotovina could have reasonably assumed that the substantially reduced civilian population of Knin would have “gone to ground” and would generally not be exposed to the effects of indirect fires during curfew hours. Instead, these civilians would be in buildings. This is not to say that the building would be immune from the effects of such fires. However, it would certainly have been reasonable for General Gotovina to assume that these civilians would be far less susceptible to the effects of fragmentation and blast directed against military objectives than if they were in totally unprotected open spaces.

The record indicates that General Gotovina appears to have considered these aspects of the disposition of civilians in Knin when selecting his course of action for employing his indirect fire assets. My review of the record indicates the following with relation to the actual employment of indirect fires by General Gotovina:

- a. The artillery attack commenced at 0500 on 4 August 1995.
- b. The first 30-60 minutes on 4 August 1995 were the most intense part of the artillery use on Knin for that day and included use of both T 130s and MBRLs.
- c. Throughout the remainder of the day of 4 August 1995 until approximately midnight the artillery fire continued at different paces and consisted of only T 130 guns.
- d. The vast majority of artillery fire was directed against the ARSK defense lines, ARSK artillery firing positions and the area of deployment of reinforcements with a minority of fire directed at operational and strategic targets in depth, including those in Knin.
- e. At approximately 1445, the HV breached the ARSK defense line on the Dinara mountains, while other HV forces broke ARSK defense lines on the Velebit mountains. Both successes opened the possibility for rapid movement towards

Otric, which could have allowed the HV forces to encircle the ARSK 7th Krajina Corps.

- f. At 1645, Milan Martić signed an evacuation order for the civilian population from Knin and surrounding municipalities. Subsequently, a civilian evacuation was observed by the HV.
- g. At approximately the same time as the order for the civilian evacuation, General Mrksić issued an order for the withdrawal of the ARSK 7th Krajina Corps and the creation of a shorter second line of defense in its rear, a decisive defense of Knin and the relocation of ARSK HQ and ARSK 7 Corps Headquarters to a rear location.
- h. During the night of 4 August 1995 or in the early morning of 5 August 1995, an additional order for stabilization of the defense was issued by General Mrksić, calling for the establishment of a second defense line further in the rear and a decisive defense of Knin in the conditions of encirclement.
- i. The artillery attack re-commenced at 0520 on 5 August and continued until HV troops were entering the outskirts of Knin on the north side at approximately 1000. The HV 7th Guard Brigade (consisting of professional soldiers from Northern Croatia) entered Knin from the north, while the HV 4th Guard Brigade (consisting of professional soldiers from the Dalmatian area of Croatia) was directed to outflank Knin on the northern side towards the complex of military depots in Golubac.
- j. The first 30 minutes on 5 August 1995 were the most intense part of the artillery use on Knin.
- k. The total consumption of T 130 artillery shells and 122 mm rockets for 4-5 August 1995 on Knin and its immediate vicinity was approximately 800-1100 pieces of munitions.

This record indicates that General Gotovina:

- a. Sought to exploit the curfew by “surging” his indirect fires against military objectives in Knin during curfew hours.
- b. Managed his employment of indirect fire assets in accordance with acceptable METT-T-C considerations, which is corroborated by the fact that the majority of these assets were *not* employed against targets in Knin, but instead against targets associated with the “close” fight against enemy defensive positions.
- c. Employed indirect fires during non-curfew hours in a limited manner, suggesting an intent to disrupt enemy operations while minimizing the risk of collateral damage and incidental injury to civilians.

- d. Refrained from employment of indirect fires to harass the civilian evacuation or deliberately target civilians during the evacuation observed on the afternoon of the first day of the Operation.
- e. Resumed indirect fires in response to the enemy decision to shorten their defensive lines and thereby render the value of military objectives within Knin all the more significant.
- f. Employed MBRLs only during those times he assumed civilians were under a curfew order.

In my opinion, the totality of all these facts and assumptions related to General Gotovina's decision making process indicate that his judgment to employ indirect fires against military objectives his enemy had located within Knin was reasonable. Indeed, it is my opinion that the overall record of his use of this asset suggests he acted with a degree of tactical judgment and operational restraint consistent with a high standard of fidelity to both the principles of war and the law of armed conflict. It would have been almost derelict for General Gotovina to allowed enemy forces within Knin and enemy C3I and logistics to function with complete freedom of action during the ground assault against enemy defenses. Considering the limited capabilities available to him, use of indirect fire assets to deny the enemy such freedom of action and to demonstrate to the enemy full spectrum dominance was an essential component in the overall concept of operations to achieve his tactical and operational objectives.

2. Would an artillery attack on the military objectives in Knin in conjunction with coordinated attacks on the front line and positions in the enemy's tactical depth be consistent with the NATO doctrines of "Center of Gravity" and "Shock Action"? Would this answer change if the HV could not devote sufficient artillery assets to achieve a destruction effect on the selected military objectives in Knin?

As is apparent from my discussion of question 1, it is my opinion that the decision to use indirect fires to attack military objectives within Knin was consistent with sound operational doctrine. As noted above, I consider this use of indirect fires as a significant aspect of setting the conditions for a successful breach of improved enemy positions and subsequent exploitation of success. It is difficult to dispute the effectiveness of the coordinated employment of combat power during the attack, which produced a collapse of enemy defenses sooner than even optimistically anticipated. Whether this same outcome would have occurred without the employment of indirect fires in Knin is pure speculation. However, it does seem clear that the enemy was deprived freedom of action once the attack commenced, which could certainly have been at least in part the result of attack on military objectives in Knin.

The fact that General Gotovina knew it was unlikely that he could employ sufficient indirect fire assets to achieve the effect of "destruction" of military objectives in Knin in no way alters my opinion. In fact, the nature of many of those targets, coupled with the effect he undoubtedly sought to achieve – denying the enemy freedom of action

to respond with agility to his attack, thereby ensuring his forces would set the tempo for the operation – justified a judgment that a disruption mission would be an effective use of his limited indirect fire assets.

It is clear from the actual employment of indirect fires by General Gotovina that he understood that a priority mission for those assets would have to be support to the close fight during the assault and breach operations by ground forces. This required as a matter of sound tactical judgment an even more judicious use of these assets to disrupt enemy C3I, logistics, and to fix and freeze potential reinforcements. Because breaching the enemy's forward defensive positions was the priority of effort, destruction of targets within Knin was not necessary, and attempting to achieve this effect would have distracted unnecessarily from other critical fire support missions. Accordingly, harassing, interdicting, and disrupting fires would have been a logical mission to assign to these assets.

The timing of employment supports this conclusion. It is apparent that indirect fires were "surged" during critical phases of the assault, namely in the early morning hours of both days when it is likely that friendly forces were moving from assault positions into close combat with enemy defenders. Surging fires against C3I, logistics, and reinforcement targets at this point would contribute to the sense of confusion and isolation among defending forces. The sporadic employment during most other times of day would have been a logical employment of a very limited resource in order to disrupt enemy efforts to regroup, reinforce, or secure momentum.

3. Based on the relevant assumptions provided above, would a commander in General Gotovina's position have been unreasonable to rely on the Chief of Artillery for the Split Military District and the Chiefs of Artillery for the professional brigades selection of the following military objectives for artillery preparation and support:

a. ARSK Main Staff:

Obviously the Main Staff Headquarters is a critical C3I target. This would be an ideal target for indirect fires. Destruction effect would not be required to disrupt and degrade the ability of the staff to respond to attack and control the battle. It is my understanding that MBRL assets were used to target this objective. While it would be unlikely MBRLs would achieve a "destructive" effect, their use against this target is understandable. The area effects of this weapon system could have been relied on to degrade C3I by destroying communications antennas, cables, and equipment. In addition, enemy forces required to move in and around the area would be under significant apprehension that they would be made the object of future area denial attacks, potentially degrading their ability to accomplish their missions. In light of the nature of this military objective and its importance to enemy C3I, I certainly do not consider such employment unreasonable.

b. 7th Krajina Corps's Headquarters in the Northern Barracks:

In addition to the C3I value analogous to targeting the ARSK Main Staff, targeting this objective would also offer the added value of potentially “fixing” enemy reinforcements, or at a minimum disrupting their ability to muster and maneuver. It is my understanding that MBRL assets were used to target this objective. While it would be unlikely MBRLs would achieve a “destructive” effect, their use against this target is understandable. The area effects of this weapon system could have been relied on to degrade C3I by destroying communications antennas, cables, and equipment. In addition, enemy forces required to move in and around the area would be under significant apprehension that they would be made the object of future area denial attacks, potentially degrading their ability to accomplish their missions. In light of the nature of this military objective and its importance to enemy C3I, I certainly do not consider such employment unreasonable.

c. TVIK Factory:

This was an apparent logistics supply facility, in addition to a facility for producing ammunition components. Targeting this facility with harassing fires would degrade the ability of the enemy to rapidly and effectively leverage the resources stored for re-supply of forces engaged in direct combat.

d. RSK Telegraph and Post Office:

This classic “dual use” target was an important component supporting enemy communications ability. Degrading the effectiveness of such communications would provide a significant advantage to friendly forces seeking to set and maintain the tempo of the battle.

e. Residence of Milan Martić:

As commander in chief of enemy forces, Martić was a lawful military objective. Although General Gotovina likely considered the probability of killing or disabling Martić through artillery attack limited, the potential operational advantage of doing so could have reasonably been considered substantial, justifying indirect fire attack on the building in hopes of exploiting this possibility.

f. Senjak Barracks:

This was a high value target. Disrupting enemy logistics is an essential component in isolating defensive positions, demonstrating a sense of full spectrum dominance, and limiting the sustainability of enemy defenses. In addition, this Barracks housed C2 for enemy artillery assets. Disrupting the

ability of the enemy to effectively control these assets is so obvious an important objective that it requires virtually no further assessment.

g. Knin Police Station:

Because police forces had been mobilized to participate in hostilities as combatants, this was clearly a valuable military objective. In fact, harassing fires directed against this target might have particularly potential payoff by demoralizing police forces not accustomed to the realities of combat operations. In addition, the Station contained a robust communication capability that could be used to augment military communications disrupted by other attacks, and therefore disrupting this redundancy would be an important element in depriving the enemy freedom of action.

h. Railway Station:

Harassing and disrupting movements through this critical rail choke point would be an important means of limiting the effectiveness enemy troop movements to reinforce isolated front line positions.

i. Open field outside of the Northern Barracks:

In the abstract, an open field would seem to hold little military value. However, General Gotovina could have reasonably concluded that this field was one of only a few locations within Knin that enemy forces could use to muster prior to movement to contact or reinforcement. Accordingly, sporadically targeting this location would inhibit the ability of the enemy to do so and would contribute to denying the enemy's ability to maneuver at will.

j. Bridge over the River Krka and Bridge over the River Butznica:

Bridges are quintessential military objectives because their destruction or degradation substantially inhibits the ability of the enemy to freely maneuver over water obstacles. Harassing fires to disrupt movements over these choke points would have been a logical mission for indirect fires.

Each of these targets was, under the facts and assumptions prevailing at the time of Operation Storm, lawful military objectives. Some were certainly more valuable than others, but all were viable targets for engagement with indirect fires, even assuming there was little to no expectation of achieving destructive effects. Failure to disrupt, harass, or degrade any of these objectives could very easily have offered the enemy a military advantage that was unnecessary to concede.

4. Based on the relevant assumptions above and a review of Exhibit P-64, which is a document entitled Provisional Assessment of Damage Caused by HV Ops 04-06 Aug at Knin that is attached hereto for your review, explain whether a concentration of damage against military objectives is consistent with a good faith use of artillery fire.

This provisional assessment is consistent with a tactically sound and legally permissible use of indirect fires in Knin in support of Operation Storm. The assessment indicates that the vast majority of blast effects were inflicted on lawful military objectives. In addition, it indicates that damage to pure civilian structures was minimal and sporadic, and that most of this damage occurred in the vicinity of lawful military objectives.

In my opinion, if General Gotovina had intended to employ indirect fires for an illicit purpose – to either deliberately target non-military objectives and/or to spread terror among the civilian population, the findings of this assessment would have been inversed. The nature of the effects observed corroborates a good faith employment of indirect fires against high value lawful military objectives in Knin.

Date: June 28, 2009

**ATTACHMENT TO EXPERT REPORT OF
PROFESSOR GEOFFREY CORN**

The Prosecutor v. Ante Gotovina, Ivan Cermak and Mladen Markac

Case IT-06-90



Sean P. Cronin
Tel. 813-318-5720
Fax 813-318-5900
cronins@gtlaw.com

May 19, 2009

Via U.S. Mail and Electronic Mail

Geoffrey S. Corn
7 Turtle Rock Court
The Woodlands, TX 77381

Re: Expert Report in The Prosecutor v. Ante Gotovina, et al.

Dear Professor Corn:

As a follow up to specific questions we requested you address in our March 27, 2009 correspondence, we request that your expert report also include an addendum applying the standards you set forth in response to the initial questions to a set of pertinent circumstances to assist the Trial Chamber in understanding how the laws and customs of armed conflict are applied in real world circumstances. To that end, we ask that you assume for the purpose of your analysis the following facts and commander's assumptions to be true:

Assumed Facts Prior to Operation Storm:

1. The so-called Republika Srpska Krajina ("RSK") is an area within the internationally recognized border of Croatia that has been in rebellion since 1990 and refuses to recognize the sovereign Croatian government.
2. The Croatian controlled area of the Republic of Croatia and the RSK controlled area of the Republic of Croatia are separated by a Zone of Separation ("ZOS") monitored by the United Nations.
3. Milan Martić is the president and commander in chief of the Army of the Republika Srpska Krajina ("ARSK").
4. General Mrksić, a general in the Yugoslav National Army ("JNA"), took over as the top general for the ARSK on or about 16 May 1995.
5. "Operation Storm" commenced on August 4 1995.

TRAN-511,268,909/15-19-09 ATTORNEYS AT LAW • WWW.GTLAW.COM
Courthouse Plaza • Suite 100 • 625 East Twiggs Street • Tampa, FL 33602 • Tel 813.318.5700 • Fax 813.318.5900

ALBANY
AMSTERDAM
ATLANTA
AUSTIN
BERLIN*
BOCA RATON
BOSTON
BRUSSELS*
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
HOUSTON
LAS VEGAS
LONDON*
LOS ANGELES
MIAMI
MILAN*
NEW JERSEY
NEW YORK
ORANGE COUNTY
ORLANDO
PHILADELPHIA
PHOENIX
ROME*
SACRAMENTO
SHANGHAI
SILICON VALLEY
TALLAHASSEE
TAMPA
TOKYO*
TYSONS CORNER
WASHINGTON, DC
WEST PALM BEACH*
ZURICH
*STRATEGIC ALLIANCE

6. Although planning for the liberation of the RSK began in 1993, adjustments, taking into account the new Croatian Army ("HV") positions and selection of targets, were made beginning on 31 July 1995.
7. The RSK/Republika Srpska Joint Defense Council was established on or about 20 Feb 1995. By the middle of July 1995, the RSK parliament voted for unification of the RSK and the Republika Srpska. The RSK and the Republika Srpska signed a joint defense statement on or about 1 August 1995.
8. The Army of the Republika Srpska ("VRS"), ARSK and special forces from Serbia coordinate their activities and provide offensive and defensive assistance to each other.
9. In July 1995 the ARSK and VRS engaged in joint operations in a UN safe area in Bosnia known as the Bihac Pocket which was a Bosnian Muslim enclave. In addition to the strategic implications of this area, there was fear within the international community that if the Bihac pocket fell it could result in a humanitarian disaster worse than Srebrenica and a flood of refugees into Croatia.
10. Milan Martić signed a declaration of a state of war for the RSK on 28 July 1995.
11. Knin was the political, military and economic capital of the RSK.
12. Within Knin was the seat of government of the RSK, the Main Staff of the ARSK, Corp level headquarters, factories controlled by the RSK government, government controlled radio and television stations, the main railroad junction for the RSK, a railroad station, the national railroad administration with communication system shared with the ARSK, the main crossroads for road transit throughout the RSK, several military barracks, headquarters for the Police and an RSK communications center.
13. Knin was in range of some HV artillery assets for several years and was brought into the range of additional HV artillery assets following the HV taking of Grahovo, in Bosnia, on or about July 29, 1995. Despite this, there was no artillery fired into Knin at the direction of General Gotovina prior to the commencement of Operation Storm.
14. The terrain of the RSK was mountainous, particularly between the HV positions in Bosnia and Knin, with Knin located in a valley approximately 14 kilometers from the Bosnian border.

15. The President of Croatia stated that the entire operation must conclude in four (4) days.
16. The President of Croatia further advised that the UN Sector South Headquarters in Knin must not be hit by collateral damage even though it was co-located with an ARSK Barracks.
17. The HV had two professional brigades under the operational command of General Gotovina stationed on high ground across the border in Bosnia with Knin in sight. These brigades consisted of approximately 3000 soldiers. The remaining troops under General Gotovina's operational command consisted of home guard regiments, which were mobilized citizens.
18. In early planning for the liberation of the RSK, it was anticipated that six (6) combat loads of artillery munitions would be approved for use by the artillery groups during the entire operation, however, that amount was reduced to four (4) to conserve munitions for future operations.
19. Following the operation it was anticipated that there will be continued offensive operations in conjunction with the Bosnian Muslims in Bosnia led by General Gotovina against the VRS led by Ratko Mladic and the remnants of the ARSK.
20. The only artillery assets available to the HV that had Knin in range prior to the commencement of the operation were T-130 mm guns in two (2) HV artillery groups and 122 mm multiple barreled rocket launchers ("MBRLs") in the brigades.

Commander's Assumptions Prior to Storm:

1. General Mrksic was sent by Slobodan Milosevic to assist the ARSK in improving its offensive and defensive capabilities.
2. Milan Martić and General Mrksic are in Knin on 4 August 1995.
3. Since June, HV intelligence assessed that there was a substantial emigration of citizens from the RSK, including Knin, following earlier HV military successes. Although Knin may have had a population of up to 15,000, there were indications that the number of non-mobilized civilians remaining in Knin on the eve of Operation Storm was as low as 3,000.
4. There was a curfew imposed against civilians in Knin.

5. The RSK civilian police had been militarized and had officers/soldiers stationed in front-line defense positions. The headquarters of this organization was in Knin.
6. School was not in session and the schools in Knin had been used to garrison troops during the summer of 1995.
7. In the weeks prior to Operation Storm, the JNA sent soldiers into the RSK to assist in the defense of the occupied territory.
8. The ARSK had established a perimeter defense with many of its professional soldiers, civilian police and conscripts positioned across the ZOS from the HV positions, including having a controlling position of the mountain peaks between Knin and the positions of the HV professional brigades.
9. Within Knin, there were reserve forces of the ARSK, special police forces under the command of Milan Martić, special forces and the requisite personnel manning the command, control and communications elements in the town.
10. The RSK and ARSK leadership publicly proclaimed that they intended a decisive defense of Knin.
11. If the front line soldiers retreated back into Knin, along with the reserve troops, it was assessed that an urban war including house to house combat could ensue dramatically increasing the likelihood of civilian casualties as well as the military casualties for both sides of the conflict.
12. It was assessed that pressuring or, if possible, eliminating, Milan Martić could drastically influence the decision-making process of the RSK and ARSK leadership and potentially force capitulation quickly and with less military and civilian casualties.
13. A non-exclusive list of the potential military objectives in Knin included:
 - a. ARSK Main Staff- This is the primary ARSK command and control building and included communications and operations centers.
 - b. 7th Krajina Corps's Headquarters in the Northern Barracks- This corps level headquarters was contained within the main military barracks in Knin. Also within this barracks were elements of the ARSK 2nd Guard Brigade, the headquarters of the ARSK Military Police and other supporting units.

c. TVIK Factory- This was a former Yugoslavian screw and bolt factory that had been used by the ARSK to produce military supplies including igniters for explosive munitions. Further, part of the factory was used as a storage facility for the ARSK.

d. RSK Telegraph and Post Office- This was a telegraph and cable communications center used for both civilian and military purposes. It is estimated that approximately forty percent (40%) of military communications for the ARSK ran through this center.

e. Residence of Milan Martić- The flat of Milan Martić, the President of the RSK and Commander in Chief of the ARSK, was on the top floor of a multi-story building that was built to house the civilian police personnel.

f. Senjak Barracks- This was a logistics base housing ARSK logistics headquarters and associated staff as well as military supplies. Additionally, the command of the mixed artillery regiment was based inside.

g. Knin Police Station- This was the headquarters for the regular RSK police force and those which had been mobilized to be a combat force prior to Operation Storm. This station had communications facilities for coordinating the actions of the police personnel. A portion of the front line that the HV planned to attempt to penetrate on its way to liberating Knin was defended by RSK police officers.

h. Railway Station- This was the main railway yard in the entire RSK and it included a switch house which would have been necessary for any trains in the area to use if they were changing direction. The rail system was to be used by the ARSK to evacuate a massive weapons depot several kilometers north of Knin and to reinforce the front lines.

i. Open field outside of the Northern Barracks- This is one of two open spaces in Knin that could have been by the ARSK for deploying formations of weapons systems.

j. Bridge over the River Krka- This is a key entry and exit point to Knin for the southern part of the RSK.

k. Bridge over the River Butiznica- This is a key entry and exit point to Knin for the eastern part of the RSK. There was also a railway bridge which headed in the same direction through chains of tunnels.

14. There was an expectation that the VRS would attempt to intervene in the conflict from the direction of Drvar and the possibility could not be excluded that the JNA would intervene directly to assist the ARSK.
15. There was an expectation that the ARSK could retaliate against the HV military action by firing artillery and rockets with cluster munitions on Croatian cities such as Dubrovnik, Zagreb, Split and Zadar as it had done in May 1995 following a previous successful military action.

Assumed Facts Regarding the Conduct of Storm:

1. The artillery attack commenced at 0500 on 4 August 1995.
2. The first 30-60 minutes on 4 August 1995 were the most intense part of the artillery use on Knin for that day and included use of both T 130s and MBRLs.
3. Throughout the remainder of the day of 4 August 1995 until approximately midnight the artillery fire continued at different paces and consisted of only T 130 guns.
4. The vast majority of artillery fire was directed against the ARSK defense lines, ARSK artillery firing positions and the area of deployment of reinforcements with a minority of fire directed at operational and strategic targets in depth, including those in Knin.
5. At approximately 1445, the HV breached the ARSK defense line on the Dinara mountains, while other HV forces broke ARSK defense lines on the Velebit mountains. Both successes opened the possibility for rapid movement towards Otric, which could have allowed the HV forces to encircle the ARSK 7th Krajina Corps.
6. At 1645, Milan Martić signed an evacuation order for the civilian population from Knin and surrounding municipalities. Subsequently, a civilian evacuation was observed by the HV.
7. At approximately the same time as the order for the civilian evacuation, General Mrksić issued an order for the withdrawal of the ARSK 7th Krajina Corps and the creation of a shorter second line of defense in its rear, a decisive defense of Knin and the relocation of ARSK HQ and ARSK 7 Corps Headquarters to a rear location.
8. During the night of 4 August 1995 or in the early morning of 5 August 1995, an additional order for stabilization of the defense was issued by General Mrksić, calling for the establishment of a second defense line

further in the rear and a decisive defense of Knin in the conditions of encirclement.

9. The artillery attack re-commenced at 0520 on 5 August and continued until HV troops were entering the outskirts of Knin on the north side at approximately 1000. The HV 7th Guard Brigade (consisting of professional soldiers from Northern Croatia) entered Knin from the north, while the HV 4th Guard Brigade (consisting of professional soldiers from the Dalmatian area of Croatia) was directed to outflank Knin on the northern side towards the complex of military depots in Golubic.
10. The first 30 minutes on 5 August 1995 were the most intense part of the artillery use on Knin.
11. The total consumption of T 130 artillery shells and 122 mm rockets for 4-5 August 1995 on Knin and its immediate vicinity was approximately 800-1100 pieces of munitions.

QUESTIONS:

1. Based on the relevant assumptions provided above, could a reasonable commander in General Gotovina's position have made the decision to use artillery assets against military objectives in Knin in support of the infantry assault aimed at liberating the area of the so-called RSK and re-integrating the territory into the constitutional authority of the Republic of Croatia?
2. Would an artillery attack on the military objectives in Knin in conjunction with coordinated attacks on the front line and positions in the enemy's tactical depth be consistent with the NATO doctrines of "Center of Gravity" and "Shock Action"? Would this answer change if the HV could not devote sufficient artillery assets to achieve a destruction effect on the selected military objectives in Knin?
3. Based on the relevant assumptions provided above, would a commander in General Gotovina's position have been unreasonable to rely on the Chief of Artillery for the Split Military District and the Chiefs of Artillery for the professional brigades selection of the following military objectives for artillery preparation and support:
 - a. ARSK Main Staff
 - b. 7th Krajina Corps's Headquarters in the Northern Barracks
 - c. TVIK Factory
 - d. RSK Telegraph and Post Office
 - e. Residence of Milan Martić
 - f. Senjak Barracks
 - g. Knin Police Station
 - h. Railway Station

Letter to Geoffrey S. Corn
May 19, 2009
Page 8

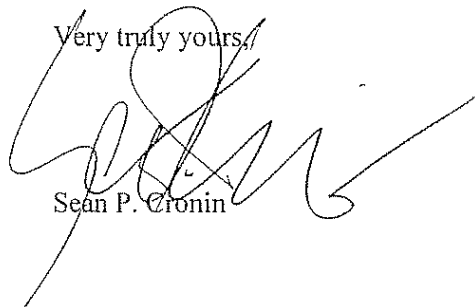
- i. Open field outside of the Northern Barracks
- j. Bridge over the River Krka
- k. Bridge over the River Butiznica

In answering this question, assume that all of the military objectives were targeted by T 130 guns and MBRLs were also used to target the ARSK Main Staff and the 7th Krajina Corps's Headquarters.

4. Based on the relevant assumptions above and a review of Exhibit P-64, which is a document entitled Provisional Assessment of Damage Caused by HV Ops 04-06 Aug at Knin that is attached hereto for your review, explain whether a concentration of damage against military objectives is consistent with a good faith use of artillery fire.

If you have any questions, please do not hesitate to contact Michael Stanton or me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Sean P. Cronin', is written over the typed name. The signature is stylized with a large loop at the end.

Sean P. Cronin

/MJS

TPA 511,268,909v1 5-19-09

REPORT.

Page 1 UTC Time: 95-08-18 14:05:33

OUT.465 : Message delivery successful

Destination 583493136550 File OUT.465
 Reference number 480633
 1 Attempt(s)

Received on
 21/8
 from UNHCR/HIO

→ Copy to be sent
 to Human Rights
 Cell.

REPORT.

IN.464

Page 1 UTC Time: 95-08-18 15:42:00

NL BURUM LES 493139170=FOKA X 18-AUG-1995 14:37:24 482517

CONFIDENTIAL
 CAPSAT OR HAND TRANSMISSION ONLY

FROM : SMO SEC SOUTH
 TO : CDR SEC SOUTH
 INFO : UNMO HQ ZAGREB
 : CIW AFFAIRS/SEC SOTH
 DTG : 1811415B AUG 95

PROVISSIONAL ASSESMENT OF DAMADE CAUSED BY HV OPS 04-06 AUG 1995
 AT KNIN

UNMO HEADQUARTERS	
FILE NO.	21
DTG RECEIVED	18 AUG 1995
ACTION	DCOO / [initials]
RETURNED TO OPS ROOM BY	
OPS 04-06 AUG 1995	

1. UNMO TEAM PODGONJE HAS MADE A PROVISIONAL ASSESSMENT OF THE DAMAGES CAUSED BY THE HV OPS 04-06 AUG 95 IN THE TOWN OF KNIN. THE REPORT IS BASED ON A RUN DOWN OF 70% OF KNIN TOWN AND GIVES ONLY A BRIEF OVERVIEW OF THE SITUATION.
2. IN GENERAL SHELLING WAS CONCENTRATED AGAINST MILITARY OBJECTIVES. THE DAMAGES CAUSED BY SHELLING TO CIVILIAN ESTABLISHMENTS IS CONCENTRATE TO THE CLOSE VICINITY OF MILITARY OBJECTIVES. ONLY FEW (3-5) IMPACTS IS OBSERVED IN OTHER URBAN AREAS.
3. IN THIS SURVEY A HOUSE IS CONSIDERED SEVERELY DAMAGED IF THE ROOF IS CAVED IN OR IS NOT OTHERWISE WATERPROOF. A HOUSE IS CONSIDERED SLIGHTLY DAMAGED IF THE DAMAGE CONCENTRATES ON WINDOWS ETC. BLOCKS OF FLATS IS COUNTED AS ONE FIGURE.

ALSO OBSERVED WAS HOUSES THAT WERE BURNT BUT NOT SHELLED. BURNING OF THESE HOUSES TOOK PLACE DURING AND AFTER OPS 04-06 AUG. DAMAGES CAUSED BY FIRE ARE DIVIDED IN THE SAME MANNER AS ABOVE.

SHELLED BLDS	SEVERELY DAMAGED	21
	SLIGHTLY DAMAGED	23
BURNED BLDS	SEVERELY DAMAGED	24

18a

SLIGHTLY DAMAGED	23
TOTAL	97

4. LOOTING IN THE AREA HAS TAKEN PLACE IN LARGE SCALE. IN THE TOWN OF KNIN. GENERALLY ALL SHOPS, RESTAURANTS, BARS, OFFICES ETC HAS BEEN LOOTED. ALL SHOPS OBERVED WAS LOOTED. THESE HOUSES SHOULD ALSO BE CONSIDERED AS SLIGHTLY DAMAGED BUT IS NOT INCLUDED IN THE COUNTED NUMBERS ABOVE.

5. APPROXIMATELY 70 CIVILIAN HOUSES IS SAVED FROM LOOTING SPECIALLY IN THE GENERAL AREA NORTH EAST OF KNIN CENTAR GRID (WJ 9678).

6. THIS ASSESSMENT IS BASED ON A BRIEF SURVEY AND GIVES ONLY A ROUGH ESTIMATE OF THE DAMAGE. ESPECIALLY PARA 2 IS CONSIDERED SENSITIVE AND MUST NOT BE RELEASED TO THE MEDIA AT THE PRESENT STAGE. THIS INFORMATION SHOULD THEREFORE BE KEPT CONFIDENTIAL FOR INTERNAL USE ONLY.

7. THE SURVEY CONTINUES TO GET A MORE ACCURATE PICTURE AND BETTER ASSESSMENT. DETAILED REPORT TO FOLLOW WITHIN A WEEK.

REGARD
SMO SEC SOUTH

CONFIDENTIAL
CAPSAT OR HAND TRANSMISSION ONLY

IN.464
