UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-29-A
		Date:	30 November 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Mr. Mark Ierace
Ms. Michelle Jarvis
Ms. Shelagh Mc Call
Ms. Anna Kotzeva

Counsel for Stanislav Galić:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

CONTENTS

I. INTRODUCTION ... **1**

II. STANDARD FOR APPELLATE REVIEW ... **3**

III. GROUND 1: GALIĆ'S RIGHT TO TESTIFY AT TRIAL ... **6**

A. THE TRIAL CHAMBER'S ORDER AND THE SUBMISSIONS OF THE PARTIES ... 6
B. THE APPLICABILITY OF RULE 90(F) OF THE RULES ... 7
C. GALIĆ'S RIGHT TO A FAIR TRIAL ... 10
D. THE NON-CERTIFICATION OF THE TRIAL CHAMBER'S RULING FOR APPEAL ... 11

IV. GROUND 2: DISQUALIFICATION OF A JUDGE ... **12**

A. THE FAIRNESS OF THE PROCEDURE FOR DISQUALIFICATION ... 12
1. Whether the lack of an interlocutory appeal from a decision on disqualification of a Judge pursuant to Rule 15(B) of the Rules violates an accused's right to a fair trial ... 13
2. Whether the continued participation at trial of a Judge whose withdrawal was requested during the disqualification proceeding renders the trial unfair ... 14
B. THE ALLEGED PARTIALITY OF JUDGE ORIE ... 15
1. Requirement of impartiality ... 16
2. Application of the statutory requirement of impartiality to the instant case ... 18
(a) Whether Judge Orie's continuation as a trial Judge after he confirmed the *Mladić* Indictment establishes actual bias ... 18
(b) Whether Judge Orie's continued participation as a trial Judge after confirming the Mladić Indictment would lead a reasonable and informed observer to apprehend bias ... 18

V. GROUND 3: THE TRIAL CHAMBER'S DECISION NOT TO TRAVEL TO SARAJEVO ... **20**

A. THE TRIAL CHAMBER'S ON-SITE VISIT DECISION ... 21
B. VALIDITY OF GALIĆ'S GROUND OF APPEAL ... 22

VI. GROUNDS 4, 13 AND 11: EVALUATION OF EVIDENCE ... **24**

A. GROUNDS 4 AND 13: EVALUATION OF ADDITIONAL EVIDENCE ... 24
B. GROUND 11: APPRAISAL OF EVIDENCE AND TESTIMONIES ... 25
1. General argument ... 26
2. Testimonies of UNPROFOR witnesses ... 26
3. Alleged lack of impartiality ... 28
4. The Total Exclusion Zone [TEZ] agreement and the impossibility to conduct a campaign of shelling ... 29

VII. GROUNDS 5, 16 AND 7: THE CRIME OF ACTS OR THREATS OF VIOLENCE THE PRIMARY PURPOSE OF WHICH IS TO SPREAD TERROR AMONG THE CIVILIAN POPULATION ... **31**

A. GROUNDS 5 AND 16: THE ALLEGED RECLASSIFICATION BY THE TRIAL CHAMBER OF THE CRIME CHARGED OF "INFLICTION OF TERROR" AMONG THE CIVILIAN POPULATION TO "INTENT TO SPREAD TERROR" AMONG THE CIVILIAN POPULATION AND THE PRINCIPLE OF *IN DUBIO PRO REO* ... 31
1. Whether the Trial Chamber impermissibly departed from the charge stated in the Indictment ... 32
2. The principle of *in dubio pro reo* ... 34

B. GROUND 7: THE CRIME OF ACTS OR THREATS OF VIOLENCE THE PRIMARY PURPOSE OF WHICH IS TO SPREAD TERROR AMONG THE CIVILIAN POPULATION AS A CRIME PUNISHABLE UNDER ARTICLE 3 OF THE STATUTE 36
1. Whether a crime under Article 3 of the Statute must be grounded in customary international law or can be based on an applicable treaty 37
2. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population 39
(a) The prohibition of terror against the civilian population in customary international law 39
(b) The criminalisation of the prohibition of terror against the civilian population 44
3. The elements of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population 48
(a) *Actus reus* 49
(b) *Mens rea* and result requirement 50
4. Whether Galić intended to spread terror 52

VIII. GROUND 6: ALLEGED ERROR OF LAW IN CONNECTION WITH THE CRIME OF ATTACK ON CIVILIANS 55

A. CHAPEAU REQUIREMENTS OF ARTICLE 3 OF THE STATUTE 55
1. Arguments of the Parties 55
2. Discussion 57
B. OBJECTIVE AND SUBJECTIVE ELEMENTS OF THE CRIME OF ATTACK ON CIVILIANS 58
1. The qualification of the crime of attack on civilians as a "violation of the laws and customs of war" 59
2. *Actus reus* of the crime of attack on civilians 60
(a) The alleged re-qualification of the Indictment 60
(b) The targeting of civilians and military necessity 61
(c) Indiscriminate and disproportionate attacks 61
(d) Individual combatants within the civilian population 64
3. *Mens rea* of the crime of attack on civilians 65

IX. GROUND 8: ALLEGED ERRORS OF LAW CONCERNING CRIMES UNDER ARTICLE 5 OF THE STATUTE 67

A. CHAPEAU REQUIREMENTS OF ARTICLE 5 OF THE STATUTE 67
B. MURDER 69
C. INHUMANE ACTS 71

X. GROUND 9: ERRORS OF LAW IN CONNECTION WITH CUMULATIVE CHARGES AND CONVICTIONS 73

A. CUMULATIVE CHARGES 73
B. CUMULATIVE CONVICTIONS 73
1. Cumulative convictions under Articles 3 and 5 of the Statute 74
2. Cumulative convictions under Article 5 of the Statute 75

XI. GROUND 10: ERROR OF LAW IN DETERMINING CRIMINAL RESPONSIBILITY 77

A. CHALLENGES RELATING TO ARTICLE 7(1) RESPONSIBILITY 77
1. The Trial Chamber's reliance on circumstantial evidence 77
2. The omissions of an accused and the Trial Chamber's finding that Galić ordered the crimes 77
B. CHALLENGES RELATING TO ARTICLE 7(3) RESPONSIBILITY 79
C. CHALLENGE TO CONCURRENT APPLICATION OF ARTICLES 7(1) AND 7(3) OF THE STATUTE 81

XII. GROUND 12: COLLATERAL DAMAGE 82

A. ASSESSMENT OF THE LEGALITY OF THE ATTACKS 83
B. ASSESSMENT OF EVIDENCE IN RELATION TO THOSE ATTACKS 84

XIII. GROUND 14: DEFINITION OF TERMS 86

XIV. GROUND 15: ALLEGED ERRORS OF LAW AND FACT REGARDING THE EXISTENCE OF A CAMPAIGN 88

A. BACKGROUND ON THE TRIAL CHAMBER'S FINDINGS REGARDING THE EXISTENCE OF A CAMPAIGN 88
B. ALLEGED ERROR IN THE EVALUATION OF EVIDENCE 89
1. Arguments of the Parties 89
2. Discussion 94
(a) Alleged failure to prove the material facts of a campaign beyond a reasonable doubt 94
(b) Alleged error in consideration of evidence 95
(c) Alleged error in drawing conclusions on the existence of a campaign from scheduled incidents 96
3. Conclusion 97
C. ALLEGED ERROR OF LAW 97
D. ALLEGED ERRORS OF FACT 98
1. Alleged failure to prove the "widespread" nature of the attacks. 98
2. Alleged errors in the application of the principles of distinction and proportionality 99
(a) Submissions of the Parties 99
(b) Discussion 100
3. Alleged failure to prove that Galić ordered a campaign of shelling and sniping against civilians 101
(a) The Trial Chamber's findings 101
(b) Alleged failure to provide direct evidence of Galić's orders 102
(c) Alleged response to protests 102
(d) Alleged evidence that Galić ordered subordinates not to target civilians 103
E. ALLEGED ERRORS IN EVALUATION OF WITNESS TESTIMONY 104

XV. GROUND 17: ALLEGED ERRORS CONCERNING SNIPING AND SHELLING INCIDENTS 105

A. PRELIMINARY ISSUE 106
B. ALLEGED ERRORS OF FACTS 108
1. Allegations that the Trial Chamber did not consider evidence 108
(a) The Trial Chamber did consider the evidence 109
(b) The evidence advanced by Galić was not relevant 110
(c) The evidence was relevant and there is no clear showing that the Trial Chamber considered it 112
2. Allegations that the Trial Chamber came to the incorrect conclusion based on the evidence 113
(a) Allegations presenting reasons 114
(b) Allegations not presenting reasons 117
3. Allegations that contain misrepresentations of the evidence or the Trial Judgement, or that ignore other findings of the Trial Chamber 119
4. Challenges to findings without presenting argument 126
5. Challenges to findings purely because other witnesses testified differently 128
6. Re-presentation of the same argument that was made unsuccessfully at trial 130
7. Allegations that the Trial Chamber accepted incredible or unreliable evidence 131
8. Allegations contrary to evidence, experience or common sense 133
9. Allegations based on new evidence 135
C. SPECIFIC INCIDENTS 136
1. Markale Market 136
2. Koševo Hospital 144

XVI. GROUND 18: GALIĆ'S CRIMINAL RESPONSIBILITY 151

A. ERRORS ON GENERAL MATTERS 151
B. EFFECTIVE COMMAND OF SRK FORCES 152
C. REPORTING AND MONITORING SYSTEMS OF THE SRK 153
D. CONTROL OF SRK PERSONNEL 155
1. Control over sniping activity 155
2. Control over shelling activity 156
E. WAS GALIĆ IN A POSITION TO PUNISH HIS SUBORDINATES? 157
F. GALIĆ'S KNOWLEDGE OF THE CRIMES 158
1. Protests delivered to Galić in person 158
2. Protests delivered to Galić's subordinates 159
3. The character of the protests delivered 160
4. The control of the artillery assets 160
G. REASONABLENESS OF MEASURES TAKEN BY GALIĆ 161
H. ACTIONS UNDERTAKEN IN FURTHERANCE OF A PLAN 162
I. ARTICLE 7(1) RESPONSIBILITY OF GALIĆ 163
1. Preliminary issue 163
2. Whether orders were given to target civilians 164

XVII. APPEAL AGAINST SENTENCE 165

A. STANDARD OF REVIEW IN SENTENCING 165
B. GALIĆ'S APPEAL AGAINST SENTENCE (GROUND 19) 166
1. Maximum sentence 166
2. The Trial Chamber's finding that the commission of the crimes in the present case would have attracted the harshest sentence in the former Yugoslavia 167
3. Whether the Trial Chamber took into account as aggravating circumstances factors which are elements of the crimes for which he was found guilty 169
(a) Gravity of the offence 170
(b) Galić's superior position as an aggravating circumstance 170
4. Whether the Trial Chamber failed to take into account several mitigating circumstances 172
(a) The conditions under which Galić commanded the troops 172
(b) The conditions of urban warfare 174
(c) Personal and family situation 175
(i) Denial of his voluntary surrender 175
(ii) Family situation 176
(iii) Cooperation with UNPROFOR and the international community 177
(iv) Cooperation with the Prosecution 177
(v) Illness and exemplary conduct in the UNDU 178
5. Whether the mode of liability influences the sentence of an accused 178
C. PROSECUTION'S APPEAL AGAINST SENTENCE 179
1. Preliminary issues 180
2. Whether the sentence rendered was unreasonable 181
(a) The factors put forward by the Prosecution and the findings of the Trial Chamber 181
(i) The "victimisation" 181
(ii) The actual infliction of terror on the civilian population of Sarajevo 182
(iii) The systematic, prolonged and premeditated participation of Galić 182
(iv) Galić's position of authority 183
(v) Mitigating circumstances 183
(b) Conclusion 183

XVIII. DISPOSITION 185

XIX. PARTIALLY DISSENTING OPINION OF JUDGE POCAR 186

XX. SEPARATE OPINION OF JUDGE SHAHABUDDEEN 189

XXI. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE MERON 203

XXII. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG 211

XXIII. ANNEX A: PROCEDURAL BACKGROUND 221

A. HISTORY OF TRIAL PROCEEDINGS 221
B. THE APPEAL 222
1. Notices of Appeal 222
2. Composition of the Appeals Chamber 222
3. Filing of the Appeal Briefs 223
4. Motions to Strike 223
5. Rule 115 Motions 224
6. Requests for Provisional Release 228
7. Status Conferences 228
8. Appeal Hearing 228

XXIV. ANNEX B: GLOSSARY OF TERMS 229

A. LIST OF TRIBUNAL AND OTHER DECISIONS 229
1. International Tribunal 229
2. ICTR 234
3. Decisions Related to Crimes Committed During World War II 235
4. Other Decisions 235
(a) ICJ 235
(b) ECHR 235
(c) Domestic cases 236
B. LIST OF OTHER LEGAL AUTHORITIES 236
1. Books, Edited Volumes and Collections, and Journals 236
2. Other Legal Authorities 237
C. LIST OF ABBREVIATIONS, ACRONYMS AND SHORT REFERENCES 238

I. INTRODUCTION

1. **THE APPEALS CHAMBER** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal," respectively) is seized of two appeals[1] from the Judgement rendered by the Trial Chamber on 5 December 2003, in the case of *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T ("Trial Judgement").

2. Stanislav Galić was born on 12 March 1943, in the village of Goleš in the municipality of Banja Luka, Bosnia and Herzegovina. Prior to the war in Bosnia, he was commander of the 30th Partizan Brigade of the 1st Krajina Corps operating in the area south-west of Banja Luka.[2] On 7 September 1992, the Minister of Defence of Republika Srpska appointed him commander of the Sarajevo Romanija Corps; he assumed his new duty from the outgoing officer, Major General Tomislav Šipčić, on 10 September 1992. In November 1992, he was promoted to the rank of Major General.[3] For all military persons present in Sarajevo, Galić was the *de jure* Sarajevo Romanija Corps (SRK) Commander, his superiors being the Chief of Staff of the Army of the Serbian Republic (VRS), General Ratko Mladić, and the supreme commander of the VRS, Radovan Karadžić.[4]

3. In an indictment filed on 26 February 1999, Galić was charged with conducting a campaign of shelling and sniping against civilian areas of Sarajevo between 10 September 1992 and 10 August 1994, thereby inflicting terror upon its civilian population (Count 1); a protracted campaign of sniper attacks upon the civilian population of Sarajevo, killing and wounding a large number of persons of all ages and both sexes (Counts 2 to 4); and a coordinated and protracted campaign of artillery and mortar shelling onto civilians areas of Sarajevo, resulting in thousands of civilians being killed or injured (Counts 5 to 7). The counts in the Indictment were supported by a representative number of individual incidents ("scheduled incidents"), for specificity of pleading,[5] as well as other evidence of sniping, shelling incidents and others aspects of the situation in Sarajevo as evidence of a more general evidentiary nature ("non-scheduled incidents").[6]

---

[1] Defence Notice of Appeal, 4 May 2004; Prosecution Notice of Appeal, 18 December 2003.
[2] Trial Judgement, para. 603.
[3] Trial Judgement, para. 604.
[4] Trial Judgement, para. 606.
[5] Trial Judgement, paras 186-188.
[6] Trial Judgement, para. 189.

4. On 5 December 2003, the Trial Chamber, by a majority,[7] found Galić guilty of acts of violence, the primary purpose of which was to spread terror among the civilian population, a violation of the laws or customs of war, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949 (Count 1); murder as a crime against humanity through sniping (Count 2); inhumane acts other than murder as crimes against humanity through sniping (Count 3); murder as a crime against humanity through shelling (Count 5); and inhumane acts other than murder as crimes against humanity through shelling (Count 6). As a consequence of the finding of guilt it entered on Count 1, the Trial Chamber dismissed Counts 4 and 7 (attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 as a violation of the laws or customs of war). Galić was sentenced to a single sentence of 20 (twenty) years' imprisonment.[8] Both the Prosecution[9] and Galić[10] have appealed the decision.

5. The Appeals Chamber heard oral submissions of the Parties regarding this appeal on 29 August 2006. Having considered the written and oral submissions of Galić and the Prosecution, the Appeals Chamber hereby renders its Judgement.

[7] Judge Alphons Orie and Judge Amin El Madhi constituted the majority, with Judge Rafael Nieto-Navia partially dissenting. The views of the majority will hereinafter be referred to as the "Trial Chamber".
[8] Trial Judgement, para. 769 (Disposition).
[9] *See* Prosecution Appeal Brief, 2 March 2004.
[10] *See* Defence Appeal Brief, 19 July 2004.

II. STANDARD FOR APPELLATE REVIEW

6. On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[11] and the ICTR.[12] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the International Tribunal's jurisprudence.[13]

7. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[14] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[15]

8. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[16] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[17] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[18] The Appeals Chamber will not review the entire trial record *de novo*; rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the Judgement or in a related footnote; evidence

---

[11] *See, e.g.*, *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.

[12] *See Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[13] *Stakić* Appeal Judgement, para. 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247.

[14] *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.

[15] *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6; *Kupreškić et al.* Appeal Judgement, para. 26. *See also Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

[16] *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

[17] *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.

[18] *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17. *Blaškić* Appeal Judgement, para. 15.

contained in the trial record and referred to by the parties; and additional evidence admitted on appeal.[19]

9. When considering alleged errors of fact on appeal from the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[20] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[21] In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[22] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić,* which stated:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[23]

10. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[24] Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[25]

---

[19] *Stakić* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12.

[20] *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Kordić and Čerkez* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

[21] *Stakić* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 458. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. *See Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.

[22] *Stakić* Appeal Judgement, para. 10; *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64. *See also Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Aleksovski* Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 18.

[23] *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19, quoting *Kupreškić et al.* Appeal Judgement, para. 30. *See also Kordić and Čerkez* Appeal Judgement, para. 19, fn. 11; *Blaškić* Appeal Judgement, paras 17-18.

[24] *Stakić* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9. *See also Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.

[25] *Stakić* Appeal Judgement, para. 11; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

11. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[26] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[27]

12. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[28] Furthermore, the Appeals Chamber may dismiss arguments which are evidently unfounded without providing detailed reasoning.[29]

---

[26] Practice Direction on Appeals Requirements, para. 4(b). *See also Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

[27] *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

[28] *Stakić* Appeal Judgement, para. 13; *Kunarac et al.* Appeal Judgement, para. 47; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 8.

[29] *Stakić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, para. 48; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 8; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.

III. GROUND 1: GALIĆ'S RIGHT TO TESTIFY AT TRIAL

13. In his first ground of appeal, Galić argues that the Trial Chamber made an error of law invalidating the Trial Judgement in requiring that, in the event that he should choose to testify, he do so before the Defence calls its expert witnesses, thereby violating his right to a fair trial.[30] He also argues that the Trial Chamber erred in refusing to certify this ruling for appeal.[31]

A. The Trial Chamber's order and the submissions of the Parties

14. The Prosecution submits that when the Defence presented its witness list on 19 September 2001, it reserved its position as to whether Galić would testify.[32] Further, after 34 of its fact witnesses had already testified,[33] the Defence reserved its position regarding Galić's possible testimony until the last witness, that is, the last expert witness, was called.[34] The Trial Chamber ruled that if the Defence wished to continue to reserve the right to call Galić, it would have to provide the Prosecution with a survey of subjects about which he would testify.[35] It also established parameters for the timing of such testimony, as follows:

> (1) [I]f the Defence wishes to call the Accused to testify as a witness, it must do so prior to the testimonies of the Defence expert witness and (2) the Defence may in any event apply to recall the Accused in light of and after these expert testimonies.[36]

15. Galić submits that the Trial Chamber's order "caused [him] to decide not to testify", thus "directly prevent[ing] the Defence from introducing one important witness" and inhibiting his right to a fair trial, as prescribed in Article 21 of the Statute.[37] He claims that this order of the Trial Chamber, issued pursuant to Rule 90(F) of the Rules, abrogated his right to testify on his own behalf "at any time during the trial" and that an accused has a fundamental right to "present facts and arguments actually relevant for all the presented evidence and to speak about all the evidence".[38]

---

[30] Defence Appeal Brief, para. 20.
[31] Defence Appeal Brief, para. 21.
[32] Prosecution Response Brief, para. 1.4.
[33] Prosecution Response Brief, para. 1.4.
[34] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Defence Submission Regarding the Possible and Hypothetical Hearing of General Stanislav Galić as a Witness, 21 January 2003.
[35] T. 18076.
[36] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Confidential Decision on Certification Pursuant to Rule 73(B) Regarding the Possible Testimony of the Accused as a Witness, 4 February 2003 ("Certification Decision"), p. 2. *See also* T. 18076.
[37] Defence Reply Brief, para. 6.
[38] Defence Appeal Brief, para. 20.

16. The Prosecution claims that the Trial Chamber acted within the discretion granted to it by Rule 90(F) of the Rules by requiring Galić's testimony before the expert witnesses, so the experts would have all the facts adduced available to them.[39] It further argues that the Trial Chamber preserved Galić's right to testify after the experts, so he was never deprived of his right.[40] It states that Galić could still have testified as the final witness by applying for permission to do so from the Trial Chamber.[41] It claims that while Rule 85(C) of the Rules gives an accused the right to testify, it does not give him or her the right to do so at any time of his or her choosing, and does not guarantee the right to testify as the final witness.[42] It refers to the laws of several national jurisdictions and the International Military Tribunal to show there is no unanimity of state practice on an accused's right to determine the timing of his or her testimony.[43] It argues that the order of the Trial Chamber did not contravene Galić's right to a fair trial enshrined in Article 21 of the Statute because he was not compelled to testify.[44]

B. The applicability of Rule 90(F) of the Rules

17. While Rule 85(C), which states that an "accused may appear as a witness in his or her own defence", could on its face be read as implying that an accused who chooses to testify in his own defence is subject to the same Rules as any other witness, the Appeals Chamber has previously confirmed that "[t]here is a fundamental difference between being an accused, who might testify as a witness if he so chooses, and a witness".[45] There are Rules relating to testimony that are "completely inapplicable to the accused and incompatible with his rights".[46] Rule 77(A)(i) of the Rules, which envisages that "a witness before a Chamber [who] contumaciously refuses or fails to answer a question" can be held in contempt of the International Tribunal, obviously cannot apply to an accused, who cannot be compelled to testify in his own trial or compelled to answer a question, by virtue of his fundamental right under Article 21(4)(g) of the Statute "not to be compelled to testify against himself or to confess guilt". The same applies to Rule 90(E), which envisages that a

[39] Prosecution Response Brief, paras 1.10-1.12.
[40] Prosecution Response Brief, para.1.1.3.
[41] Prosecution Response Brief, para. 1.17.
[42] Prosecution Response Brief, paras 1.1.4-1.16. An accused may still testify last, but the Prosecution argues that Rule 85(C) of the Rules does not guarantee that.
[43] Prosecution Response Brief, paras 1.21-1.22.
[44] Prosecution Response Brief, para. 1.18.
[45] *Delalić et al.*Decision on Production of Notes, para. 35, discussed with approval at paragraph 125 of the *Kvočka et al.* Appeal Judgement. In that same paragraph of the *Kvočka et al.* Appeal Judgement, the Appeals Chamber concluded: "[A]n accused who testifies as a witness is not to be treated *qua* witness […]."
[46] *Delalić et al.* Decision on Production of Notes, para. 35, confirmed at paragraph 125 of the *Kvočka et al.* Appeal Judgement.

Chamber may compel a witness to answer a question that is self-incriminating.[47] In sum, the Statute and the Rules of the International Tribunal concerning witnesses cannot automatically apply to accused persons testifying under Rule 85(C) as an accused enjoys "specific protection with regard to respect for the rights of the defence".[48]

18. The fact that Rule 90 contains some provisions concerning "Testimony of Witnesses" that are completely "inapplicable to the accused and *incompatible with his rights*",[49] does not necessarily mean that all its provisions are inapplicable. Rule 90(F) is a case in point. It states that Trial Chambers "shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time". This provision gives Trial Chambers discretion in the administration of trials.[50] The Trial Chamber's discretion, however, is "subject to [a] Trial Chamber's obligation to respect the rights of an accused".[51]

19. Rule 85(C) of the Rules does not expressly address any parameters that might restrict the accused's right to appear as a witness in his or her own trial. Some basic guidance in this regard may be taken from Rules 85(A) and 86 of the Rules, which indicate that such testimony must take place during the presentation of defence evidence. Beyond this, the only specification made by the Rules is, as noted above, that the right of an accused to testify in his own trial not be infringed.[52] While Rule 85(C) of the Rules does not restrict the right of the accused to testify to a particular stage of his defence, this fact is not incompatible with a Trial Chamber exercising its given powers to administer the conduct of a trial by imposing a justified restriction. The fact that to date "it has been the practice of the International Tribunal to allow those accused who choose to testify to determine when to do so",[53] serves only as evidence of a practice – it has not created an enforceable

---

[47] Rule 90(C), which states that a witness "who has not yet testified shall not be present when the testimony of another witness is given", is a further example of a rule that cannot apply, as an accused is present in court during the testimonies of the witnesses in his case.

[48] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać.*, Case No. IT-98-30/1-T, Decision on the Admission of the Record of the Interview of the Accused Kvočka, 16 March 2001, p. 3, cited with approval at paragraph 125 of the *Kvočka et al.* Appeal Judgement.

[49] *Kvočka et al.* Appeal Judgement, para. 125.

[50] *See, e.g.*, *Prlić et al.* Decision on Interlocutory Appeal, page 3 (the Appeals Chamber affords deference to the Trial Chamber in the exercise of its discretion in managing the trial).

[51] *Prosecutor v. Zdravko Tolimir, Radivoje Miletić and Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 29. It is clearly stated in Article 20(1) of the Statute that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* […]" (emphasis added).

[52] *Delalić et al.* Order on Witness Appearance, p. 3.

[53] *Kordić and Čerkez* Trial Procedure Decision, p. 4. *See also Delalić et al.* Order on Witness Appearance, p. 3. The Prosecution referred to those two decisions to support its proposition that Trial Chambers have a wide discretion in ordering when to call witnesses. *See* Prosecution Response Brief, para. 1.19. Galić, to the contrary, interpreted those decisions as confirming that an accused has the right to choose when to testify. *See* Defence Reply Brief, para. 4. In both cases, the Trial Chamber denied the Prosecution's request to order the accused, if they wanted to testify, to do so at

right to this end. Moreover, a survey of national law practices on this issue is of no further assistance to Galić's argument – it simply demonstrates that there is no established rule as to when an accused may testify or speak in his own trial. While in some countries, an accused may testify as a witness at any time during the defence case,[54] in other countries like Malaysia,[55] South Africa,[56] and Singapore,[57] the accused generally must do so before other defence witnesses. In civil law countries, an accused may give a statement or make a declaration throughout the proceedings, however, he does not have the role of a witness.[58] There exists no uniform practice as to when an accused is entitled to speak. For example, in Italy the accused may be examined during the defence case at any time after other interested parties [59] although the accused is entitled to add a declaration at any time during the trial[60] and to have the final word.[61] In Germany, the accused plays a particularly active role that can be described as follows: as a rule, he may give a statement and be interrogated before any evidence is adduced;[62] he is entitled to add a statement at any time during the taking of evidence;[63] and is entitled to have the final word.[64] In conclusion the Appeals Chamber finds no general rule as to when the accused is entitled to take the floor.

20. The Appeals Chamber therefore concludes that Trial Chambers have discretion pursuant to Rule 90(F) of the Rules to determine when an accused may testify in his own defence, but this

---

the beginning of the Defence case. *See Delalić et al.* Order on Witness Appearance, p. 3; *Kordić and Čerkez* Trial Procedure Decision, p. 5. That is a much greater restriction than requiring testimony before the experts and leaving open the door to testify after them. Therefore, neither of the two cases cited is controlling in this regard as both present very different factual situations from the case at hand, and neither considered the countervailing considerations of Rule 90(F) of the Rules, which were not at issue.

[54] *See, e.g.*, *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972), holding that a law "violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all"; *R. v. Angelantoni* (1975) 31 C.R. n.s. 342 (Ont. CA), holding that a "trial Judge in a criminal case can neither direct the calling of the accused nor the order in which the accused will testify."

[55] Malaysia, *Criminal Procedure Code* (Act 593), Section 173(j)(iii) (1999): "Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence."

[56] South Africa, *Criminal Procedure Act of 1999*, para. 151(1)(B)(i): if an accused chooses to testify, "he shall, except where the court on good cause shown allows otherwise, be called as a witness before any other witness for the defence". If an accused initially remains silent, but subsequently chooses to speak, "the court may draw such inference from the accused's conduct as may be reasonable in the circumstances."

[57] Singapore, *Criminal Procedure Code*, Chapter 68, para. 190(3) (1985): "If an accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence."

[58] Consequences of this different approach are, among others, that the accused is not heard under oath and that lying by the accused is not regarded as a criminal offense.

[59] Italy, *Code of Criminal Procedure*, para. 503(1).

[60] Italy, *Code of Criminal Procedure*, para. 494(1).

[61] Italy, *Code of Criminal Procedure*, para. 523(5).

[62] Germany, *Code of Criminal Procedure*, Section 243 (4): ""[After the public prosecutor reads the charges] [t]he defendant shall […] be informed that he may choose to respond to the charges or not to make any statement on the charges"; Germany, *Code of Criminal Procedure*, Section 244 (1): "Evidence shall be taken after the defendant's examination."

[63] Germany, *Code of Criminal Procedure*, Section 257 (1): "After each co-defendant has been examined and after evidence has been taken in each individual case the defendant should be asked whether he has anything to add."

[64] Germany, *Code of Criminal Procedure*, Section 258 (3): "The defendant shall be asked, even if defence counsel has spoken for him, whether he himself has anything to add to his defence."; Germany, *Code of Criminal Procedure*, Section 258 (2): "The defendant shall have the last word."

power must nevertheless be exercised with caution, as it is, in principle, for both parties to structure their cases themselves, and to ensure that the rights of the accused are respected, in particular his or her right to a fair trial.

C. Galić's right to a fair trial

21. On Appeal, Galić alleges that his right to testify was unduly prejudiced by the condition placed on his exercise of that right by the Trial Chamber, and the fairness of his trial was therefore impugned. Where a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused such prejudice to it as to amount to an error of law invalidating the judgement.[65]

22. The Appeals Chamber has already found that, reading Rule 85(C) together with Rule 90(F), Galić had a right to testify if he so desired and the Trial Chamber had the discretion to determine when he could do so, provided there was no unreasonable interference with his right to testify. In the present case, the Trial Chamber only required that Galić testify, if he so desired, before the expert witnesses did. The Trial Chamber articulated the reason for its decision: it determined that ascertainment of the truth would be best served if all fact witnesses – including Galić – testified before the expert witnesses, so the experts could base their testimony on all the facts adduced, including those adduced by Galić.[66] In addition, if Galić had testified before the experts and had still wanted to testify last, the Trial Chamber said he would be able to apply to give further testimony in light of and after these expert testimonies, so that any opportunity denied to him to testify in relation to all the evidence adduced in the trial would have been mitigated by this further opportunity.[67] In these circumstances, the Appeals Chamber is not satisfied that the conditions placed by the Trial Chamber on Galić's right to testify on his own behalf so unreasonably interfered with his right to testify that his right to a fair trial was infringed.

23. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not violate Galić's right to testify in his own trial and dismisses this part of his first ground of appeal.

---

[65] *Kordić and Čerkez* Appeal Judgement, para. 119.
[66] The Prosecution also notes that Galić is not an expert, so no benefit would accrue to the Defence in having him testify after the experts. *See* Prosecution Response Brief, para. 1.26. That is, he would not have been able to testify about the expert evidence.
[67] Certification Decision, p. 2. The Appeals Chamber also notes that Galić argues that there was no guarantee that the Trial Chamber would have granted the application of a recall. *See* Defence Reply Brief, para. 3. The Appeals Chamber will not address the issue whether or not the denial of a recall in his case would have infringed his rights as his argument is based on mere speculation.

D. The non-certification of the Trial Chamber's ruling for appeal

24. Galić also argues that the Trial Chamber erred in refusing to certify the ruling for appeal because "it would have been significant for the further practice of the Tribunal to have this matter debated in the interlocutory appeal procedure".[68]

25. Certification of interlocutory decisions pursuant to Rule 73 of the Rules is within the discretion of the Trial Chamber, which may certify decisions if they involve an issue which "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".[69] In order to succeed on this ground, Galić must show that the Trial Chamber erred in the exercise of its discretion in refusing to certify the issue.[70] On appeal, however, Galić only claims that the refusal to certify was an error because of the significance of the issue,[71] but he has not shown how certification would have significantly affected the fair and expeditious conduct or outcome of the trial, nor has he demonstrated how, if at all, the Trial Chamber abused its discretion in refusing certification.[72]

26. For the foregoing reasons, the Appeals Chamber dismisses Galić's first ground of appeal.

---

[68] Defence Appeal Brief, para. 21.
[69] Rule 73(B) of the Rules.
[70] *Prosecutor v. Milošević*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002, paras 3-4.
[71] Defence Appeal Brief, para. 21.
[72] As noted above, the Trial Chamber did not infringe on Galić's right to testify in his own trial as he could have asked to testify at a later stage.

IV. GROUND 2: DISQUALIFICATION OF A JUDGE

27. Under his second ground of appeal, Galić challenges the fairness of the International Tribunal's procedure pursuant to Rule 15(B) for disqualification of a Judge.[73] He also claims that the impartiality and the appearance of impartiality of Judge Orie, the Presiding Judge in his trial, were compromised by the Judge's confirmation of an indictment against Ratko Mladić ("*Mladić* Indictment") on 8 November 2002. He argues that the factual allegations of the Mladić case overlap with the factual allegations of his case and that he was named in the *Mladić* Indictment as a participant in a joint criminal enterprise to commit genocide.[74]

A. The fairness of the procedure for disqualification

28. Galić challenges the fairness of the International Tribunal's procedure for disqualification of a Judge pursuant to Rule 15(B) of the Rules on two grounds. He first argues that he was improperly denied the right to submit to "the control of a higher authority"[75] the decisions ruling on his request for disqualification, and claims that "[e]very [such] decision […] should be submitted to the control of a higher authority".[76] Second, he claims that the proceedings are unfair since the Judge had an obligation to suspend his work on the case until the completion of the disqualification proceedings, which he did not do.[77] At the Appeal Hearing, Galić argued that case-law from the European Court of Human Rights and United States supports his proposition that Judge Orie was not impartial and should have been disqualified.[78]

29. The Prosecution responds that the International Tribunal's procedure for disqualification of a Judge offers sufficient procedural safeguards to be considered fair.[79] With regard to Galić's first claim, it argues that the fact that the Bureau makes a *de novo* finding, rather than merely reviewing the Presiding Judge's decision, may be more beneficial to an accused because it offers him a second opportunity, unlike an interlocutory appeal, in which the Appeals Chamber is limited to reviewing

---

[73] Defence Appeal Brief, para. 23.
[74] Defence Appeal Brief, para. 23, fn. 5.
[75] Defence Appeal Brief, para. 23.
[76] Defence Appeal Brief, para. 23.
[77] Defence Appeal Brief, para. 24.
[78] AT 61-64, citing, without elaboration and without properly filing a supplement to the book of authorities, *Piersack v Belgium,* judgment of 1 October 1982, 53 Eur. Ct. H.R. (ser. A) at 14-15; *De Cubber v. Belgium*, judgment of 26 October 1984, 86 Eur. Ct. H.R. (ser. A); *Hauschildt v. Denmark*, judgment of 24 May 1989, 154 Eur. Ct. H.R. (ser. A); *Padovani v. Italy*; judgment of 26 February 1993, 257 Eur. Ct. H.R. (ser. A); *Şahiner v. Turkey*, judgment of 25 September 2001, 155 Eur.. Ct. H.R. (2001-IX); *Sramek v. Austria*, judgment of 22 October 1984, 84 Eur. Ct. H.R. (ser. A); *Sainte-Marie v. France*, judgment of 16 December 1992, 235-A Eur. Ct. H.R. (ser. A); *Findlay v. United Kingdom*, judgment of 25 February 1997, 263 Eur. Ct. H.R; *Collins v. Dixie Transport, Inc.*, 543 So. 2d 160 (Sup. Ct. Miss. 1989); *Berger v. United States*, 255 U.S. 22 (1921).
[79] Prosecution Response Brief, paras 2.4, 2.11.

errors of law and fact.[80] Furthermore, it points out that the Appeals Chamber can examine this issue on appeal if it is relevant to the fairness of the trial.[81] With respect to Galić's second argument, the Prosecution claims that the Judge's continued participation in the trial while the disqualification request was pending was entirely appropriate given the trial's advanced stage and the need for efficiency.[82] Finally, it submits that the Bureau's finding that the Judge's impartiality was not compromised renders the question moot.[83]

1. Whether the lack of an interlocutory appeal from a decision on disqualification of a Judge pursuant to Rule 15(B) of the Rules violates an accused's right to a fair trial

30. The disqualification procedure of a Judge is governed by Rule 15(B) of the Rules. This Rule provided at the time relevant to this appeal that the disqualification and withdrawal of a Judge should be referred to the Presiding Judge of the Chamber, who shall confer with the Judge in question.[84] After such consultation, Rule 15(B) of the Rules envisaged that the Presiding Judge had to decide whether it was "necessary" to refer the matter to the Bureau.[85] Even if the Presiding Judge decided that it was not "necessary" to do so, the President had to refer the matter to the Bureau if the decision of the Presiding Judge not to withdraw a Judge was challenged by the accused.[86]

31. While no interlocutory appeal to the Appeals Chamber is available from a decision of the Presiding Judge pursuant to Rule 15(B) of the Rules[87] and there is no interlocutory appeal from

[80] Prosecution Response Brief, para. 2.12.
[81] Prosecution Response Brief, para. 2.13-2.16.
[82] Prosecution Response Brief, para. 2.17.
[83] Prosecution Response Brief, para. 2.17.
[84] Rule 15(B) was amended on 21 July 2005 and now reads in relevant part:

> (B)(i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President.
> (ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.
> (iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.

The Appeals Chamber refers in the present case to Rule 15(B) as in force before that amendment, which read in relevant part:

> Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question, and if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.

[85] Pursuant to Rule 23(A) of the Rules, the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.
[86] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003 ("Appeal Decision on Disqualification"), para. 8.
[87] Appeal Decision on Disqualification, para. 8.

decisions of the Bureau,[88] the Appeals Chamber nevertheless notes that, upon referral of a motion for disqualification to the Bureau, the Bureau reviews the motion for disqualification *de novo*.[89] As noted by the Bureau in the present case, the impartiality and appearance of impartiality of the Judges that Rule 15(B) of the Rules aims at preserving is guaranteed by the fact that the Presiding Judge in charge of reviewing the motion for disqualification has to refer the matter to the Bureau in case the moving party does not agree with his decision:

> [T]he Rule might be read as indicating that, when the challenged Judge and the Presiding Judge agree on the proper outcome (except when those are one and the same person), that is the end of the matter. But one of the Rule's leading aims seems to be to promote both impartiality and the appearance of impartiality by having the disqualification decision made by Judges other than the challenged Judge. Allowing *de novo* consideration by the Bureau – which stands at a greater remove from the challenged Judge than does the Presiding Judge of the challenged Judge's Chamber – thus serves that purpose. Moreover, disqualification motions almost never involve factual disputes (other than about the ultimate question of bias), thus enabling the Bureau to address the question directly by applying the established legal tests to the undisputed record.[90]

Hence, while there is no interlocutory appeal of a decision under Rule 15(B) of the Rules, the role of the Bureau effectively provides a second course to an accused to have his arguments for disqualification reconsidered in full by an independent panel of Judges. Further, the fact that a decision on disqualification cannot be appealed at trial does not necessarily mean that the impartiality of a Judge cannot be considered in an appeal from a judgement.

32. For the foregoing reasons, the Appeals Chamber finds that the lack of an interlocutory appeal from a decision on disqualification of a Judge pursuant to Rule 15(B) of the Rules does not violate an accused's right to a fair trial. Accordingly, this subground of Galić's appeal is dismissed.

2. Whether the continued participation at trial of a Judge whose withdrawal was requested during the disqualification proceeding renders the trial unfair

33. Neither the Statute nor the Rules provide for the suspension of trial while a motion for disqualification is being considered. That does not mean, however, that an accused cannot request a suspension of the proceedings. The Trial Chamber's decision to suspend a trial while a disqualification motion is pending is a discretionary decision. Where the Trial Chamber refuses to suspend the proceedings, the accused can petition the Bureau to do so upon its consideration of the

[88] *See Prosecutor v. Blagojević et al.,* Case No. IT-02-60, Bureau, Decision on Blagojević's Motion for Clarification, 27 March 2003, para. 4.
[89] *See Prosecutor v. Blagojević,* IT-02-60-T, Decision on Blagojević's Motion for Clarification, 27 March 2003, para. 4. *See also Decision* on Galic's Application Pursuant to Rule 15(B), IT-98-29-T, Bureau, 28 March 2003 ("Galić Bureau Decision on Disqualification"), para. 7.

application for disqualification. Again, the Appeals Chamber is satisfied that the recourse available to the applicant through the Bureau is a sufficient mechanism to ensure that the accused's rights are not prejudiced. Moreover, Galić did not present any arguments that the continuation of Judge Orie despite the pending disqualification proceeding violated his right to fair trial, or that he was prejudiced by it in any way. This part of Galić's second ground of appeal is dismissed.

B. The alleged partiality of Judge Orie

34. Prior to addressing the issue whether Judge Orie, the Presiding Judge in Galić's trial, was impartial or gave an appearance of bias, the Appeals Chamber first addresses the basis for considering this challenge. In the *Furundžija* Appeal Judgement, despite the fact that the issue could reasonably have been raised at trial and on that basis the Appeals Chamber could have considered that Furundžija had waived his right to raise the matter on appeal, the Appeals Chamber considered the argument based on its "general importance".[91] Further, in the *Čelebići* Appeal Judgement, the Appeals Chamber addressed the issue of the disqualification of a Judge on the basis of arguments presented by the parties on appeal that had not previously been considered by the Trial Chamber.[92] The Appeals Chamber is thus satisfied that it is properly seised of this challenge.

35. In the instant case, the allegation of bias relates to Judge Orie's role in confirming the amended indictment against Ratko Mladić in which Mladić was charged with crimes relating to the case against Galić. Galić submits that the Bureau's finding that Judge Orie was not biased and that a reasonable observer could not reasonably apprehend such bias is unacceptable.[93] He first contends that the overlap between the charges and evidence in the *Mladić* Indictment and the case against him demonstrate that Judge Orie, by confirming the *Mladić* Indictment, effectively pre-judged his guilt for some of the crimes for which he has been prosecuted.[94] He also argues that because the *Mladić* Indictment alleged his participation in crimes for which he had not been charged, Judge Orie's perception would be unfavourably biased.[95]

36. The Prosecution contends that Judge Orie's continuation as Presiding Judge after having confirmed the *Mladić* Indictment did not render Galić's trial unfair. First, it argues that Judge Orie's confirmation of the *Mladić* Indictment does not establish actual bias. It submits that Galić has failed to acknowledge the different functions performed by a confirming Judge and a Judge who sits at

[90] Galić Bureau Decision on Disqualification, para. 7.
[91] *Furundžija* Appeal Judgement, para. 174.
[92] *Čelebići* Appeal Judgement, paras 651-709.
[93] Defence Appeal Brief, para. 24.
[94] Defence Appeal Brief, fn 5.
[95] Defence Appeal Brief, fn 5.

trial.[96] It argues that a confirming Judge merely determines whether a *prima facie* case exists, namely whether a reasonable trier of fact could find the evidence sufficient to find the accused guilty beyond reasonable doubt, while a trial Judge has to determine whether the Prosecution has established an accused's guilt beyond reasonable doubt.[97] It further submits that Rule 15(C) of the Rules, which states that the Judge confirming an indictment is not incompetent to hear that case at trial, would indicate *a fortiori* that a Judge should be able to sit as trial Judge in a case that presents an overlap with one in which he was the confirming Judge.[98] In relation to Galić's second argument, the Prosecution contends that Judges' professional experience and training enable them to put out of their mind evidence other than that presented at trial.[99] Finally, it submits that there is no appearance of bias. In support of this point, it relies on jurisprudence of the International Tribunal rejecting motions based on the claim that a Judge's participation in one case tainted his hearing of the evidence in another.[100]

1. Requirement of impartiality

37. The Appeals Chamber recalls that Article 21 of the Statute guarantees the right to a fair trial and that the right to be tried before an independent and impartial tribunal is an integral component of this right.[101] Accordingly, Article 13 of the Statute provides that Judges of the International Tribunal "shall be persons of high moral character, impartiality and integrity". That requirement is reflected in Rule 15(A) of the Rules, governing disqualification of Judges, which provides that "[a] Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality".

38. In interpreting and applying the impartiality requirement in the Statute and the Rules, the Appeals Chamber stated in the *Furundžija* Appeal Judgement:

> [T]here is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[102]

39. An appearance of bias is established if:

---

[96] Prosecution Response Brief, para. 2.21.
[97] Prosecution Response Brief, para. 2.22.
[98] Prosecution Response Brief, para. 2.24.
[99] Prosecution Response Brief, para. 2.27.
[100] Prosecution Response Brief, paras 2.28-2.29.
[101] *Furundžija* Appeal Judgement, para.177; *Kayishema and Ruzindana* Appeal Judgement, para. 51; *Rutaganda* Appeal Judgement, para. 39.
[102] *Furundžija* Appeal Judgement, para. 189.

> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[103]

40. With regard to the test of the "reasonable observer", the Appeals Chamber has held:

> [T]he reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.[104]

41. This two part test is entirely consistent with the European Court of Human Rights case-law pointed to by Galić during the Appeal Hearing. Indeed, many of those cases were cited in the *Furundžija* Appeal Judgement.[105] When applying this test, the Appeals Chamber emphasises that the Judges of the International Tribunal enjoy a presumption of impartiality. The Appeals Chamber stated in the *Furundžija* Appeal Judgement:

> [I]n the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal ''can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the Judge in question] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality.[106]

In the context of the allegations made in the instant case, it should be recalled in particular that the Judges of the International Tribunal "are professional judges, who are called upon to try a number of cases arising out of the same events or arising out of the same contextual background, and that they may be relied upon to apply their mind to the evidence in the particular case before them".[107]

---

[103] *Furundžija* Appeal Judgement, para. 189.
[104] *Furundžija* Appeal Judgement, para. 190. *See also Čelebići* Appeal Judgement, para. 683.
[105] *See Furundžija* Appeal Judgement, footnotes 243-245, and accompanying text. In addition, the United States case law referred to by Galić also describes a two part, subjective and objective, test for impartiality similar to one applied by the International Tribunal.
[106] *Furundžija* Appeal Judgement, para. 197. *See also Akayesu* Appeal Judgement, para. 91; *Rutaganda* Appeal Judgement, para. 42.
[107] *Akayesu* Appeal Judgement, para. 269, citing *Talić* Decision on Disqualification and Withdrawal of a Judge, para. 17.

2. Application of the statutory requirement of impartiality to the instant case

(a) Whether Judge Orie's continuation as a trial Judge after he confirmed the *Mladić* Indictment establishes actual bias

42. The Appeals Chamber finds that Galić's claim in relation to Judge Orie's alleged compromised impartiality is not supported. With respect to the argument that Judge Orie's confirmation of the *Mladić* Indictment shows that the Judge predetermined his guilt, Galić has failed to appreciate the fundamental difference between the functions of a Judge who confirms an indictment and a Judge who sits at trial. Confirming an indictment requires the Judge to assess whether, on the basis of the material submitted *ex parte* by the Prosecutor, "there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question."[108] At this stage of the proceeding, the Judge does not determine the guilt or the innocence of an accused; nor is he or she engaged in a process of fully verifying the evidence or the alleged facts. Conversely, reaching a verdict at trial requires a determination, in light of all the evidence brought by the parties, of whether the Prosecution has established the accused's guilt beyond a reasonable doubt. Because these tasks involve different assessments of the evidence and different standards of review, the confirmation of an indictment does not involve any improper pre-judgement of an accused's guilt. This conclusion is embodied in Rule 15(C) of the Rules, which provides that "[t]he Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61 [of the Rules], shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused". If the same Judge may without compromising his impartiality confirm an indictment and try the same case, a Judge may *a fortiori* confirm an indictment in one case that may implicate an accused in another case and sit in the latter case.

43. For the foregoing reasons, the Appeals Chamber finds that Judge Orie's confirmation of the *Mladić* Indictment did not establish actual bias.

(b) Whether Judge Orie's continued participation as a trial Judge after confirming the Mladić Indictment would lead a reasonable and informed observer to apprehend bias

44. The Appeals Chamber must determine whether the reaction of the hypothetical fair-minded observer, with sufficient knowledge of the circumstances to make a reasonable judgement, would be that Judge Orie did not bring an impartial and unprejudiced mind to the issues arising in the

[108] *Čelebići* Appeal Judgement, para. 434. *See also* Article 19(1) of the Statute, Rule 47(E) of the Rules.

case.[109] Galić complains that, by confirming the indictment against Ratko Mladić, Judge Orie "publicly stated […] that General Galić was also likely to be prosecuted as an accomplice to General Mladić as part of a joint criminal enterprise of genocide."[110] The Appeals Chamber, however, finds that a hypothetical fair-minded observer, properly informed, would recognise that Judge Orie's confirmation of the *Mladić* Indictment neither represented a pre-judgement of Galić's guilt nor prevented him from assessing the evidence presented at Galić's trial with an open mind. In particular, a fair-minded observer would know that Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict. Judges who serve as fact-finders are often exposed to information about cases before them either through the media or from connected prosecutions. Accordingly, the Appeals Chamber considers that the allegation of apprehension of bias against Judge Orie, based upon his prior confirmation of the *Mladić* Indictment, is unfounded.

45. For the foregoing reasons, Galić's second ground of appeal is dismissed.

[109] *Čelebići* Appeal Judgement, para. 697; *Talić* Decision on Disqualification and Withdrawal of a Judge, para. 15.
[110] AT 62.

V. GROUND 3: THE TRIAL CHAMBER'S DECISION NOT TO TRAVEL TO SARAJEVO

46. Under his third ground of appeal, Galić submits that the Trial Chamber erred in law by determining in its decision of 4 February 2003[111] ("On-site Visit Decision") that it was not necessary to travel to Sarajevo to view the alleged crime sites.[112] He argues that later developments at trial demonstrated that this decision was erroneous and violated his right to a fair trial.[113] He first asserts that the Trial Chamber erred in law when it assumed that it was impossible to guarantee his or the other parties' safety during the visit, claiming that the Trial Chamber placed the safety of the parties above the need to establish the truth.[114] Second, he argues that the Trial Chamber erroneously found that the evidence before it was sufficient to "form the picture of the terrain".[115] He claims that the picture of the terrain and the locations of the alleged incidents can only correctly be perceived when assessed *in situ*.[116] He argues that the Trial Chamber "missed a reliable way of establishing beyond any reasonable doubt the relevant facts important for its decision".[117] Consequently, he seeks reversal of the Trial Judgement.[118]

47. The Prosecution responds that the real issue is whether the Trial Chamber was in a position to determine the case without visiting the sites of the alleged crimes.[119] With respect to Galić's argument that the Trial Chamber placed the safety of the participants above the truth, the Prosecution submits that Galić ignored the Trial Chamber's careful weighing of all relevant factors in deciding not to visit Sarajevo.[120] The Prosecution argues that the Trial Chamber correctly exercised its discretion in balancing the serious security risks posed by Galić's presence against the probative value of a site visit.[121] It further asserts that the Trial Chamber correctly held that only compelling reasons could legitimate a visit in the accused's absence, and then correctly reached the conclusion that a visit was not integral to the case.[122] Finally, the Prosecution argues that Galić has

---

[111] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Confidential Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo, 4 February 2003 ("On-site Visit Decision").
[112] Defence Appeal Brief, paras 25-28.
[113] Defence Appeal Brief, para. 26.
[114] Defence Appeal Brief, para. 27.
[115] Defence Appeal Brief, para. 28.
[116] Defence Appeal Brief, para. 28.
[117] Defence Appeal Brief, para. 28.
[118] Defence Appeal Brief, para. 28.
[119] Prosecution Response Brief, paras 3.4, 3.8.
[120] Prosecution Response Brief, para. 3.7.
[121] Prosecution Response Brief, para. 3.9.
[122] Prosecution Response Brief, para. 3.13, referring to On-site Visit Decision, para. 17.

failed to show that the On-site Visit Decision led to erroneous factual findings by the Trial Chamber causing him prejudice.[123]

48. Galić replies that the Trial Chamber erred in balancing relevant factors in deciding whether or not to travel to Sarajevo since "the obligation to establish the truth is beyond and above all the possible reasons and there can be no balancing here".[124] He also argues that it cannot be said that an on-site visit has a relatively limited probative utility as those visits are of "utmost utility for creating a picture of the site".[125]

A. The Trial Chamber's On-site Visit Decision

49. In its On-site Visit Decision, the Trial Chamber agreed that, in principle, an accused should be present during such a visit.[126] The Trial Chamber decided, however, that in light of the "characteristics of the case, including the charges brought against [Galić], his former position in the VRS and the locations to be visited", it would not be possible to guarantee the safety of the parties and accompanying support staff.[127] The Trial Chamber thus concluded that Galić's presence "would pose an unacceptably high risk for the participants of the On-site Visit" and that "it should not order that an On-site Visit be undertaken in his presence".[128] The Trial Chamber went on to consider that such a visit in his absence would infringe his right to be tried in his presence[129] and could thus be justified only if there were "compelling reasons" for the visit.[130] It identified as the core question: "what would an On-site Visit add to the evidence that has been already adduced at trial and can still be expected to be presented"?[131] After conducting that assessment, the Trial Chamber found that while such a visit could add information to its image of the terrain, "the added value of such an On-site Visit [was] not such that not having physically visited the locations would impair [its] ability to adopt the images of the terrain it would need to deliver a judgement in this case".[132] It added, "The minimal expectations of what such an On-site Visit could add to the evidence presented by both parties at trial justifies that the Trial Chamber desists from such a visit."[133]

[123] Prosecution Response Brief, paras 3.16.-3.21.
[124] Defence Reply Brief, para. 20.
[125] Defence Reply Brief, para. 21, fn. 11.
[126] On-site Visit Decision, para. 11.
[127] On-site Visit Decision, para. 12.
[128] On-site Visit Decision, para. 13.
[129] On-site Visit Decision, para. 15.
[130] On-site Visit Decision, para. 16.
[131] On-site Visit Decision, para. 16.
[132] On-site Visit Decision, para. 17.
[133] On-site Visit Decision, para. 19.

B. Validity of Galić's ground of appeal

50. At the outset, the Appeals Chamber notes that managerial decisions, such as whether to make a site visit, are left to the discretion of the Trial Chamber.[134] The Appeals Chamber must thus ask whether the Trial Chamber has abused its discretion in concluding that "denying the Motion to Travel does not affect any of the Accused's rights nor does it affect the Trial Chamber's ability to decide upon the case against the Accused."[135] To help determine whether there was an abuse of discretion, the Appeals Chamber expressly requested that, at the Appeal Hearing, Galić either explain what specific "later developments" at trial showed that the decision not to travel to Sarajevo was erroneous or point to specific issues that the Trial Judgement would have handled differently had there been a site visit.[136] At the Appeal Hearing, Galić did not clarify what he meant by "later developments" at trial. As he failed to do so, and as his brief was devoid of any specific arguments in this regard, this ground of appeal is dismissed.

51. Galić did, however, address the second part of the Appeals Chamber's question, arguing that had the Trial Chamber made a site visit, it "would have been able to satisfy itself that Mojmilo, Debelo Brdo, Velika and Mala [K]apa, part of Treb[e]vić and Žuč […] were not really controlled by the SRK."[137] During his reply, Galić clarified that had the Trial Chamber toured the Hrasno hill – specifically Ozrenska Street, which the Prosecution claimed was the street from which the SRK targeted civilians – it would have found that this area was actually under control of the ABiH army and that there were still trenches in this area dug by the ABiH army.[138]

52. Specifically, Galić submitted at the Appeal Hearing that in the areas of Hrasno Brdo where the SRK did have positions, it would have been impossible for the SRK to have carried out sniping incidents 10, 15, 20 and 27, which would have necessarily led the Trial Chamber to conclude that he was not guilty for these four incidents.[139]

53. Regarding the above argument that the Trial Chamber would not have entered a conviction on the charge of murder under Count 2 if it had conducted a site visit, the Appeals Chamber notes that the Trial Chamber specifically considered evidence for each of the incidents mentioned at the Appeal Hearing – sniping incidents 10, 15, 20 and 27 – and cited to the precise paragraphs in the

[134] *See Prlić et al.* Decision on Interlocutory Appeal, page 3.
[135] On-site Visit Decision, para. 20.
[136] *See* Scheduling Order for Appeal Hearing, 14 August 2006, p. 2, question 5.
[137] *See* AT 101-102.
[138] *See* AT 170.
[139] *See* AT 101-102, 170.

Defence's Final Trial Brief where the same impossibility arguments were presented.[140] It is thus clear that the Trial Chamber thoroughly considered Galić's fact-specific arguments for each of the specified sniping incidents and rejected them only after considering whether it was possible for the incidents to have occurred at all – the same line of defence presented at the Appeal Hearing.

54. In light of the above, the Appeals Chamber finds that Galić has not demonstrated that the Trial Chamber abused its discretion in denying the Motion to Travel. His third ground of appeal is accordingly dismissed.

---

[140] Trial Judgement, paras 270 (citing Defence Final Trial Brief, paras 176-178); 274 (citing Defence Final Trial Brief, paras 242-243); 280 (citing Defence Final Trial Brief, para.303); 288 (citing Defence Final Trial Brief, paras 433-435).

VI. GROUNDS 4, 13 AND 11: EVALUATION OF EVIDENCE

A. Grounds 4 and 13: evaluation of additional evidence

55. Under his fourth ground of appeal, Galić alleges that the evidence disclosed by the Prosecution after the close of the trial, pursuant to Rule 67(C) of the Rules, could have been exculpatory evidence, governed by Rule 68 of the Rules,[141] and that the Trial Chamber did not consider this evidence.[142] He also contends that the Prosecution "did not offer convincing reasons for its belated disclosure".[143] Under his thirteenth ground, Galić presents arguments referring to the same material, alleging that had the evidence been disclosed earlier, he would not have been placed "in an inequitable position and deprived […] of the possibility to direct the Defence in the desired direction".[144] He contends that it was "simply impossible for the Defence to examine this material, to discuss it, to confront and compare the material with the evidence presented over 18 months (almost) of continuous hearings, to have it translated for [him], and finally, to meet with [him], all this over 13 days only".[145] The Prosecution responds that the submissions of the Defence are vague and fail to meet the standard on appeal to seek a remedy for alleged breaches of disclosure of exculpatory evidence pursuant to Rule 68 of the Rules.[146] The Prosecution identifies "three items of evidence" which it believes the Defence is referring to,[147] submits that those items are not exculpatory,[148] and claims that in any case the Defence has not shown that Galić was prejudiced by the late disclosure.[149]

56. The Appeals Chamber notes that the arguments of Galić under these grounds of appeal were dealt with by the Trial Chamber in the Trial Judgement. With regard to the additional material submitted by the Prosecution in August 2003, the Trial Chamber found upon review that "apart from one piece of evidence, the evidence lately disclosed by the Prosecution is redundant or does not concern the Indictment".[150] The only piece of evidence it admitted was a video interview, which it did not find exculpatory, but rather took into account "for the purpose of a better understanding of the overall context of the conflict in Sarajevo during the Indictment period".[151] Galić's argument that the Trial Chamber did not consider the material is therefore without merit. The Appeals

---

[141] Defence Appeal Brief, para. 29.
[142] Defence Appeal Brief, para. 30.
[143] Defence Appeal Brief, para. 30.
[144] Defence Appeal Brief, para. 161.
[145] Defence Appeal Brief, para. 162.
[146] Prosecution Response Brief, para. 4.2
[147] Prosecution Response Brief, para. 13.2.
[148] Prosecution Response Brief, para. 13.4.
[149] Prosecution Response Brief, para. 13.5.
[150] Trial Judgement, para. 180.
[151] Trial Judgement, para. 180.

Chamber also finds that Galić's argument that he did not have enough time to consider this material is without merit. If he needed additional time to consider the material he could have requested that additional time from the Trial Chamber, but he did not do so. The Appeals Chamber recalls in this respect that, as a general principle, an appellant "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*".[152] The same applies to the material disclosed by the Prosecution in November 2003. With respect to this material, the Appeals Chamber notes that the Trial Chamber "refrain[ed] from any decision" on whether it was exculpatory because the Defence remained silent after being asked to give its position on the material.[153] The Appeals Chamber could dismiss those grounds of appeal for which Galić remained silent at trial for this reason alone. In any case, Galić did not meet the requirements on appeal to establish that a remedy was warranted for the Prosecution's alleged breach of its disclosure obligations pursuant to Rule 68, which are: (i) that the Prosecution has acted in violation of its obligations under Rule 68; and (ii) that the Defence's case suffered material prejudice as a result.[154]

57. In light of the foregoing, Galić's fourth and thirteenth grounds of appeal are dismissed.

B. Ground 11: appraisal of evidence and testimonies

58. Galić alleges that the Trial Chamber did not assess the evidence and the testimonies of witnesses "with full impartiality".[155] He says that the problem relates to the methodology used by the Trial Chamber, which he claims reached its findings "along the principle 'from general to particular' and not 'from particular to general'".[156] Under this ground of appeal, Galić makes arguments relating to whether he ordered the crimes charged,[157] whether there was a campaign to target civilians,[158] and whether the issue of collateral damage was contemplated.[159] Those issues touch upon grounds 18, 15 and 12 respectively and will accordingly be dealt with later in this Judgement.

---

[152] *Tadić* Appeal Judgement, para.55, cited in *Kambanda* Appeal Judgement, para. 25. *See also Čelebići* Appeal Judgement, para. 640, *Furundžija* Appeal Judgement, para. 174, *Akayesu* Appeal Judgement, para. 361.
[153] Trial Judgement, para. 180.
[154] *Krstić* Appeal Judgement, para. 153. *See also Akayesu* Appeal Judgement, para. 340.
[155] Defence Notice of Appeal, paras 74-75.
[156] Defence Appeal Brief, para. 118.
[157] Defence Appeal Brief, paras 129, 133-134. Defence Reply Brief, paras 101-110.
[158] Defence Appeal Brief, paras 120, 126. *See also* Defence Reply Brief, para. 98.
[159] Defence Appeal Brief, para. 127.

1. General argument

59. Galić's main argument is that the Trial Chamber inferred from general evidence of incidents that particular incidents were proven, thereby ignoring that what "must be proved beyond any reasonable doubt is that an incident really took place and that this incident was criminal".[160] The Prosecution responds that the Trial Chamber did not draw its factual conclusions by accepting "evidence of generalisations" in order to draw conclusions as to specific incidents, but rather considered the evidence before it in its totality.[161]

60. Galić's argument fails to demonstrate where the Trial Chamber improperly inferred incidents were proved beyond reasonable doubt. To the contrary, the Trial Judgement shows that the Trial Chamber made clear that it assessed the evidence for each of the scheduled incidents giving "particular attention to questions of distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight".[162] Accordingly, this part of Galić's ground of appeal is dismissed.

2. Testimonies of UNPROFOR witnesses

61. Galić argues that the evidence proffered by the members of UNPROFOR consisted of only "assumptions" since "[n]one of them [. . .] testified about any specific incident" and they were "unable to precisely indicate places, time or circumstances in which any alleged incident (non-scheduled) should allegedly have taken place".[163] He draws the attention of the Appeals Chamber to the evidence of General van Baal, Mr. Harding, Baron van Lynden, Commandant Hamill, Dr. Mandilović and Mr. Heneberry, and contends that "[t]hese witnesses would not be accepted as reliable ones by any reasonable trier of fact [and] were not admitted by the Trial Chamber trying [the] Milosević case".[164] He claims that their evidence "cannot serve as [a] ground for establishing beyond any reasonable doubt that there was deliberate shelling or sniping against civilians with the intent to spread terror on civilian populations".[165] The Prosecution responds that those witnesses

---

[160] Defence Appeal Brief, para. 119. *See also* Defence Reply Brief, para. 93.
[161] Prosecution Response Brief, para. 11.4.
[162] Trial Judgement, para. 188.
[163] Defence Appeal Brief, para. 121.
[164] Defence Appeal Brief, para. 121.
[165] Defence Appeal Brief, para. 122.

gave "'stand alone' evidence of specific incidents, observed by them at first hand" and that "[t]here was conclusive evidence for many of these incidents that the victim was a civilian, that there was no reasonable possibility of the intended victim being perceived as other than a civilian […] and that the source of fire was from territory held by [Galić]'s subordinate forces".[166] The Prosecution further responds that, when the Trial Chamber referred to evidence of a general nature, "those observations were reliable as to their accuracy of recounting" and that "there was no reasonable possibility of the firing having been intended to hit a military target".[167]

62. The Appeals Chamber notes that in his Appeal Brief, Galić pointed to the evidence of many UNPROFOR witnesses but failed to refer to specific parts of their evidence. He alleges broadly that their evidence amounted to "assumptions" or that they did not refer to any specific incident, but does not provide concrete examples in support. The only specific reference is found in the Defence Reply Brief, in which he identifies the evidence of Witness Harding as illustrative of the "ambiguity of evidence given by these witnesses".[168] He argues that this witness testified about the presence of "militia" wearing civilian clothes[169] and explains that this is "yet another proof that further facts must be established regarding the status of the alleged victims, without limiting the establishment of status of a victim on the basis of clothing only".[170] He argues that the Prosecution did not prove the status of the victims in the non-scheduled incidents, "except for a generalized statement by the witness that civilians had perished".[171] As this is the only specific reference he identifies in support of the broad allegation that UNPROFOR witnesses gave evidence based on assumptions, Galić has failed to substantiate the arguments he made in his Notice of Appeal and his Appeal Brief. Further, his argument that Witness Harding could not differentiate between civilians and combatants is taken out of context. Witness Harding was asked whether he could define what a "militia" was, to which he answered that a militia "would be a group of people drawn into a conflict, working to a common aim, commanded by a common headquarters and undertaking military training".[172] He said militia members in Sarajevo did not always wear uniforms, but also stated that they were armed when "active on the front".[173] The Appeals Chamber cannot see how such testimony is illustrative of the fact that the Prosecution did not prove that the victims were civilians and Galić fails to point to any specific part of the Trial Judgement where the Trial Chamber did not properly satisfy itself that the victims were civilians. Galić further argues that Harding's evidence on one of the events is not

[166] Prosecution Response Brief, para. 11.6.
[167] Prosecution Response Brief, para. 11.7.
[168] Defence Reply Brief, para. 94.
[169] Defence Reply Brief, para. 94, referring to T. 6429, lines 5-8.
[170] Defence Reply Brief, para. 94.
[171] Defence Reply Brief, para. 95.
[172] T. 6428-6429.
[173] T. 6429.

reliable as it does not indicate the time when it occurred.[174] The part of the transcript referred to by Galić relates to a case of sniping against the witness himself. While it is true that Witness Harding did not remember the precise date he was the target of sniping,[175] Galić does not show how any findings of fact were undermined by that testimony. That is, Galić fails to show any findings of fact that became unreasonable in the absence of Witness Harding's testimony. Galić's argument under this part of the eleventh ground of appeal therefore fails.

3. Alleged lack of impartiality

63. Galić argues that the "guarantee of impartiality [...] prescribed in Article 21 of the Statute (fair and public trial) and in Rule 14" was violated as the Judges did not evaluate the evidence and testimonies of the witnesses with full impartiality.[176] He argues that this lack of impartiality is especially clear at paragraph 717 of the Trial Judgement, where the Trial Chamber "concluded its (very brief) review of matter establishing whether [Galić] had undertaken all reasonable measures to prevent crimes [by stating that he] 'may have issued orders to abstain not to attack civilians'".[177] Galić contends that such a finding "clearly means that the [Trial Chamber found that] orders were given to attack civilians".[178] The Prosecution responds that this argument does not go to "lack of impartiality" and that in any case the Trial Chamber was entitled to make a finding that Galić ordered that civilians be attacked, which it did at paragraph 742 of the Trial Judgement.[179]

64. Galić notes that his fundamental right to a fair trial as enshrined in Article 21 of the Statute is *inter alia* guaranteed by the requirement in Article 13(1) of the Statute and Rule 14 of the Rules that the Judges be impartial. A Judge should be disqualified if it is demonstrated that there is actual bias or there is an "unacceptable appearance of bias".[180] In the present case, Galić does not attempt to show any bias on the part of the Judges but argues only that they failed to recognise that he gave orders not to attack civilians, claiming that he had "clearly proved that permanent orders were issued to the troops not to open fire on civilians".[181] The Appeals Chamber notes that the Trial Chamber did assess the evidence adduced by Galić and accepted that orders were given to that effect.[182] In any case, to the extent that Galić's arguments under this part of his eleventh ground of

[174] Defence Reply Brief, paras 95-96.
[175] T. 6480-6481.
[176] Defence Appeal Brief, paras 130-131.
[177] Defence Appeal Brief, para. 132. *See also* Defence Appeal Brief, para. 135.
[178] Defence Appeal Brief, para. 132.
[179] Prosecution Response Brief, para. 11.11.
[180] *Furundžija* Appeal Judgement, para. 189.
[181] Defence Appeal Brief, para. 133.
[182] *See* Trial Judgement, paras 565, 707.

appeal attempt to challenge the Trial Chamber's finding that he ordered that civilians be attacked, those will be addressed below under his tenth ground of appeal.

65. For the foregoing reasons, this part of Galić's ground of appeal is dismissed.

4. The Total Exclusion Zone [TEZ] agreement and the impossibility to conduct a campaign of shelling

66. Galić argues that the Trial Chamber erred when it found him "guilty of crimes which form part of a single campaign committed in a geographically limited territory over an uninterrupted period of time",[183] whereas "already in February 1994, the TEZ was efficiently implemented in Sarajevo [and] the shelling of Sarajevo was practically rendered impossible".[184] He further argues that "[p]ractically not a single shelling incident was technically examined during trial" for the first part of the Indictment, from September 1992 to June 1993.[185] The Prosecution responds that Galić misunderstood the Trial Chamber's finding as the Trial Chamber in any case found that there had been ceasefires and that there were fluctuations in the intensity of sniping and shelling.[186] It submits accordingly that the word "uninterrupted" was not meant to suggest that the shelling and sniping took place throughout the entire day and every day.[187] Further, it submits that Galić's argument that the implementation of the TEZ agreement rendered shelling impossible as he had no shelling weaponry within range of the city is misleading[188] as this agreement only concerned heavy weaponry and did not include mortars lighter than 81mm and infantry weapons such as machine guns and rifles.[189] Further, the Prosecution contends that Galić did not fully comply with the TEZ agreement.[190]

67. The Appeals Chamber first notes that, contrary to Galić's claim, although no scheduled incident of shelling concerned the period prior to June 1993, abundant evidence was nevertheless adduced that the shelling was "fierce in 1992 and 1993".[191] Further, the finding of the Trial Chamber concerned not only shelling incidents but also sniping incidents, for which, in addition to Scheduled Sniping Incident number two of 13 December 1992,[192] a plethora of evidence was also

[183] Trial Judgement, para. 768.
[184] Defence Appeal Brief, para. 137.
[185] Defence Appeal Brief, para. 138.
[186] Prosecution Response Brief, para. 11.18.
[187] Prosecution Response Brief, para. 11.19.
[188] Prosecution Response Brief, para. 11.21.
[189] Prosecution Response Brief, para. 11.22.
[190] Prosecution Response Brief, para. 11.22.
[191] Trial Judgement, para. 561. For evidence of shelling within that period, see, for example, Trial Judgement, paras 215, 220, 231, 244-245, 329, 369, 414, 435, 498-509, 568, 639.
[192] Trial Judgement, paras 532-537.

adduced.[193] With regard to Galić's interpretation of the finding of the Trial Chamber, the Appeals Chamber notes that the word "uninterrupted" does not mean the Trial Chamber considered that the campaign of sniping and shelling took place all day and every day. The Trial Chamber found there were changes in the intensity of the shelling and sniping throughout the period of the Indictment.[194] The Trial Chamber also found on many occasions there had been ceasefires during the period of the Indictment, but ceasefires did not always prevent civilians from being targeted.[195] With regard to the TEZ plan, the Trial Chamber found that the agreement was complied with and that witnesses testified that following the Markale incident of 5 February 1994, the shelling of the city ceased "almost completely for some weeks".[196] The Appeals Chamber therefore need not consider whether the TEZ agreement rendered shelling impossible as no such shelling is referred to by the Trial Chamber for that period. However, this finding does not undermine the finding of the Trial Chamber that Galić "is guilty of crimes which form part of a single campaign committed in a geographically limited territory over an uninterrupted period of time".[197]

68. For the foregoing reasons, Galić's eleventh ground of appeal is dismissed.

---

[193] *See, e.g.*, Trial Judgement, paras 229-230, 234, 236-238, 244-245, 348, 414.
[194] *See* Trial Judgement, paras 561, 590.
[195] Trial Judgement, paras 251, 255-256, 287, 311, 362-364, 630, 687, 713. *See also* Trial Judgement, para. 734: "The Majority is satisfied beyond reasonable doubt that orders were periodically given in the SRK's chain of command to decrease sniping fire against the civilian population."
[196] Trial Judgement, para. 562.
[197] Trial Judgement, para. 768.

VII. GROUNDS 5, 16 AND 7: THE CRIME OF ACTS OR THREATS OF VIOLENCE THE PRIMARY PURPOSE OF WHICH IS TO SPREAD TERROR AMONG THE CIVILIAN POPULATION

69. The crime charged under Count 1 of the Indictment pursuant to Article 3 of the Statute and on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II is the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population. It encompasses the intent to spread terror when committed by combatants[198] in a period of armed conflict. The findings of the Appeals Chamber with respect to grounds five, sixteen and seven will therefore not envisage any other form of terror.

A. Grounds 5 and 16: the alleged reclassification by the Trial Chamber of the crime charged of "infliction of terror" among the civilian population to "intent to spread terror" among the civilian population and the principle of *in dubio pro reo*

70. Galić alleges under his fifth ground of appeal that the Prosecution charged "infliction of terror" among the civilian population in Count 1 of the Indictment, but the Trial Chamber impermissibly convicted him of acts of violence with the intent to spread terror among the civilian population, thereby going beyond the scope of the Indictment and violating his right to a fair trial pursuant to Article 21 of the Statute.[199] He argues that "[i]n the majority of the legal systems a trial chamber is bound by the charges stated in the indictment" and that the Trial Chamber "has no power to change the description of the criminal acts charged against the accused".[200] Galić claims that he has been convicted of an offence for which he has not been charged.[201] The Prosecution responds that Galić "misstates the situation" as "[t]here was no doubt throughout the course of the trial that the offence at issue was drawn from the prohibition of terror in Article 51(2) of [Additional Protocol I] and Article 13 of [Additional Protocol II]".[202] It claims that, while a Trial Chamber must confine itself to the charges set out in an indictment, it is not bound to accept the elements of the crimes charged.[203] In his reply, Galić maintains that he was sentenced for a different offence than that charged, requiring "a different set of evidence for completely different elements",[204] and that the Trial Chamber thereby "violated the Indictment".[205]

[198] *See Kordić and Čerkez* Appeal Judgement, para. 50.
[199] Defence Notice of Appeal, paras 11-14. *See also* Defence Appeal Brief, para. 32.
[200] Defence Appeal Brief, para. 31.
[201] Defence Appeal Brief, para. 32. *See also* AT 63-64, 97.
[202] Prosecution Response Brief, para. 5.2.
[203] Prosecution Response Brief, para. 5.3.
[204] Defence Reply Brief, para. 32.

1. Whether the Trial Chamber impermissibly departed from the charge stated in the Indictment

71. Article 19(1) of the Statute and Rules 47(E) and (F) of the Rules provide that, on receipt of an indictment for review from the Prosecutor, the confirming Judge must determine whether there is a *prima facie* case against the subject of the indictment in relation to each count alleged in that indictment. The review of an indictment by a Judge involves two steps: (1) the Judge makes an assessment whether, on the face of the indictment, it is alleged that the suspect committed acts which, if proven beyond reasonable doubt, are crimes within the subject matter jurisdiction of the International Tribunal; and (2) the Judge determines whether the evidence accompanying the indictment, viewed in its totality, establishes a *prima facie* case against the suspect in relation to each count alleged.[206] While the Judge reviewing an indictment must assess whether the crimes charged fall within the jurisdiction of the International Tribunal, the Judge does not have to make a final determination as to the precise elements of those crimes. Similarily, while the Prosecution may identify the elements of offences in the indictment it presents to the Judge for confirmation, the only obligation set forth in Article 18(4) of the Statute and Rule 47(C) of the Rules is that the indictment contain a concise statement of the facts of the case and of the crimes with which the suspect is charged. The determination of the legal elements of the crimes charged in an indictment is, as noted by the Prosecution,[207] not a duty of the confirming Judge but the responsibility of the Trial Chamber, which must ensure that, pursuant to the *nullum crimen sine lege* principle, an accused is only found guilty of a crime with respect to acts which constituted a violation of international humanitarian law at the time of their commission.[208] In so ensuring, the Trial Chamber is not bound to accept the elements of an offence as proposed by the parties but is responsible for determining those elements for itself.[209] Accordingly, the Trial Chamber's holding that infliction of terror is not an element of the crime of terror against the civilian population[210] was perfectly within its authority. Indeed, as the Prosecution correctly noted, there are several cases before the International Tribunal in which a Trial Chamber or the Appeals Chamber decided not to adopt the elements of the crimes charged proposed by the Prosecution.[211] In the *Čelebići* case, for example, the Appeals Chamber upheld the interpretation given by the Trial Chamber of the standard "had reason to know" and found that a superior will be criminally responsible as a superior only if information was available

---

[205] Defence Reply Brief, para. 35.
[206] *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995; *Prosecutor v. Zoran Marinić*, Case No. IT-95-15-I, Decision on the Review of the Indictment, 10 November 1995; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-I, Decision on the Review of the Indictment, 10 November 1995.
[207] Prosecution Reply Brief, para. 5.5.
[208] *Stakić* Appeal Judgement, para. 315; *Kordić and Čerkez* Appeal Judgement, para. 44; *Tadić* Jurisdiction Decision, para. 143.
[209] *Aleksovski* Appeal Judgement, para. 127; *see also Čelebići* Appeal Judgement, para. 173.
[210] Trial Judgement, para. 65.
[211] Prosecution Response Brief, para. 5.4.

to him which would have put him on notice of offences committed by subordinates.[212] Similarly, in the *Kunarac* case, the Trial Chamber found, contrary to the Prosecution's submission,[213] that "the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".[214]

72. In the present case, Galić was charged under Count 1 with "unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 [as a violation of the laws or customs of war pursuant to] Article 3 of the Statute".[215] The Trial Chamber noted in the Trial Judgement that the introductory paragraph to the Indictment reads "[i]nfliction of terror" upon the civilian population of Sarajevo, but it decided that "[i]nfliction of terror" was "not an appropriate designation of the offence [...] because infliction of terror is not a required element of the offence".[216] The Trial Chamber found that proof of the offence required establishing that Galić committed "acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949".[217] Under that definition, infliction of terror on the civilian population was not an element of the crime charged. In this circumstance, it cannot be said that the Trial Chamber re-qualified the offence "in order to make the facts allegedly fit with an alleged crime".[218] Rather, the Trial Chamber merely identified the elements that needed to be established for the crime to be made out.

73. The Appeals Chamber therefore finds that while the Prosecution initially envisaged in its description of the charges in the Indictment that the crime of terror among the civilian population comprised actual infliction of terror, the Trial Chamber was acting within the confines of its jurisdiction in determining that the elements of this crime do not comprise the actual infliction of terror on that population.

74. The core issue remains, however, that the accused has to be properly informed of the nature and cause of the charges against him so that he can adequately prepare his defence.[219] Indeed, Galić

---

[212] *Čelebići* Appeal Judgement, para. 241 (upholding *Čelebići* Trial Judgement, para. 363).
[213] *Prosecutor v. Kunarac*, Case No. IT-96-23-PT, Prosecutor's Pre-Trial Brief, 9 December 1999, para. 142.
[214] *Kunarac et al.* Trial Judgement, para. 496. This finding was confirmed by the Appeals Chamber. *See Kunarac et al.* Appeal Judgement, para. 148.
[215] Trial Judgement, para. 64.
[216] Trial Judgement, para. 65.
[217] Trial Judgement, para. 769.
[218] Defence Appeal Brief, para. 33.
[219] The obligation of the Prosecution to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and 21(4)(a) and (b) of the Statute, which state that, in the determination of the charges against him, an accused is entitled to a fair hearing and, more particularly, has to be informed of the nature and cause of the charges against him and to have adequate facilities for the preparation of his defence. *See Prosecutor v. Ivan Čermak and Mladen Markac.*, Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markač's Motion on Form

argues that the finding of the Trial Chamber that the actual infliction of terror on the civilian population is not an element of the crime charged under Count 1 of the Indictment violates his "undisputed right to […] prepare and organise his defence".[220] The Appeals Chamber does not agree. Count 1 of the Indictment, an offence for which Galić was convicted, is taken *verbatim* from the wording of Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. In addition, the Prosecution qualified, in its Pre-Trial Brief, the "special intent requirement" for the crime of terror among the civilian population as "the key distinguishing feature of this crime",[221] stating that "acts or threats [of violence] fall within the prohibition against deliberately inflicting terror only if they are unlawful and if the *principal purpose* of the acts or threats is to terrorise civilians".[222] Galić was therefore properly put on notice of the nature of the charges against him. Further, the Appeals Chamber notes that, at the end of the Prosecution case, Galić did not deny that terror was inflicted on the civilian population. He submitted that terrorisation of the civilian population was a natural result of the urban warfare in Sarajevo and that the core issue was in fact whether he had the intent to use terror against the civilian population.[223] Galić's principal argument was that he did not intend to inflict terror on the civilian population and that he did not intend to inflict terror on the civilian population to gain military advantage.[224] Therefore, he cannot suggest that the intent to inflict terror on the civilian population was in any way an unforeseen requirement.

75. For the foregoing reasons, Galić's fifth ground of appeal is dismissed.

2. The principle of *in dubio pro reo*

76. Under his sixteenth ground of appeal, Galić argues that the "re-classification"[225] or "re-qualification"[226] of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population violates the principle of *in dubio pro reo*, which requires that "whenever there is doubt in establishing the credibility of some fact, interpretation must be made in

---

of Indictment, 8 March 2005, para. 5; *Kupreškić et al.* Appeal Judgement, para. 88; *Blaškić* Appeal Judgement, para. 209.

[220] Defence Appeal Brief, fn. 22.

[221] Prosecution Pre-Trial Brief, para. 164.

[222] Prosecution Pre-Trial Brief, para. 169. *See also ibid.*, para. 170 (quoting the ICRC Commentary to Article 51(2) of Additional Protocol I to the effect that the type of prohibition under that Article envisages "acts of violence the primary purpose of which is to spread terror among the civilian population", that is, excludes terror incidental to a state of war).

[223] T. 13057: "I believe that we cannot deny that a civil war in an urban setting would naturally produce terror, whoever happens to be there, and certainly would have very good reasons to suffer from this terror, from this fear. But one would have to prove the will, hierarchical will, of the accused to use this fear, this terror, as means -- as military means against the population."

[224] T. 13058: "Any shelling naturally will cause terror. However, this terror was not a weapon of war. And I will give you proof, and this is a very far-fetched proof." Galić also stated in his Appeal Brief that he "was contesting from the beginning the allegation that there was an intent to spread terror among [the] civilian population". *See* Defence Appeal Brief, fn. 17.

[225] Defence Notice of Appeal, para. 99.

[226] Defence Appeal Brief, para. 249.

favour of the accused".[227] He contends that, the existence of terror against the civilian population not having been proved beyond reasonable doubt at the end of the trial, the Trial Chamber should have acquitted him of Count 1 of the Indictment.[228] The Prosecution reiterates that there was no "re-qualification" of the offence but "simply a permissible clarification of its elements".[229] It says that the fact that the Trial Chamber decided that infliction of terror on the civilian population is not an element of the offence implies that "whether terror was inflicted has no determinative bearing on [Galić]'s criminal responsibility under Count 1 and *in dubio pro reo* has no application".[230]

77. The principle of *in dubio pro reo* dictates that any doubt should be resolved in favour of the accused and encompasses doubts as to whether an offence has been proved at the conclusion of a case.[231] In the present case, the question whether there could have been doubt as to the culpability of Galić is dependent on whether the actual infliction of terror is an element of the offence charged under Count 1 or not. As will be shown below, actual infliction of terror is not an element of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as charged under Count 1 of the Indictment.[232] Therefore, Galić's argument that the principle of *in dubio pro reo* was violated is moot.

78. In his Appeal Brief, Galić contends that the Trial Chamber "failed to proceed" in accordance with the principle of *in dubio pro reo* "in all the counts pronouncing [him] guilty"[233] and argues that "[r]egarding Counts 2, 3, 5 and 6 the same reasoning [as the one regarding Count 1] applies, *mutatis mutandis*".[234] In his Reply Brief, Galić asserts that the Trial Chamber reached conclusions based on "assumptions" or on facts "not supported by firm proof",[235] and argues that the Trial Chamber, in its assessment of "all the so-called scheduled incidents", violated the principle of *in dubio pro reo*.[236] The Appeals Chamber notes that those arguments go beyond the scope of the Defence Notice of Appeal[237] and therefore the Appeals Chamber is not required to consider them. Further, the Appeals Chamber recalls that, in filing an appeal, appellants have an obligation to set out their grounds of appeal clearly, and to provide the Appeals Chamber with specific references to the

---

[227] Defence Appeal Brief, para. 249.
[228] Defence Appeal Brief, para. 250.
[229] Prosecution Response Brief, para. 5.19.
[230] Prosecution Response Brief, para. 5.20.
[231] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, dated 15 October 1998, filed 16 October 1998, para. 73: "[A]ny doubt should be resolved in favour of the Appellant in accordance with the principle *in dubio pro reo*"; *Čelebići* Trial Judgement, para. 601: "[A]t the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved".
[232] *See* below, paras 103-104.
[233] Defence Appeal Brief, para. 251.
[234] Defence Appeal Brief, para. 251.
[235] Defence Reply Brief, para. 149.
[236] Defence Reply Brief, para. 150.

alleged errors of the Trial Judgement and the parts of the record they are using to support their case.[238] In the present case, Galić does not refer to any specific finding or ruling in the Trial Judgement. This part of the sixteenth ground of appeal is dismissed.

B. Ground 7: the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as a crime punishable under Article 3 of the Statute

79. Galić argues under his seventh ground of appeal that the Trial Chamber violated the principle of *nullum crimen sine lege* in convicting him under Count 1. He argues that the International Tribunal has no jurisdiction over the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as "there exists no international crime of terror". [239] He submits that the Trial Chamber erred in considering treaty law to be sufficient to give jurisdiction to the Tribunal, which may only exercise jurisdiction over crimes under customary international law.[240] In particular, he submits that the Trial Chamber erred in finding that the 22 May 1992 Agreement was binding upon the parties to the conflict.[241] Further, he challenges the Trial Chamber's finding with regard to the elements of the crime.[242] Finally, he argues that the Prosecution has not proved that the acts of "sniping" and "shelling" were carried out with the primary purpose of spreading terror among the civilian population.[243]

80. The Prosecution responds that Galić's argument that the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was previously unknown "ignores the jurisprudence of the Tribunal that has elucidated its parameters".[244] In particular, the Prosecution asserts that Galić "fails to address the Appeals Chamber's jurisprudence that a clearly applicable treaty-based provision is sufficient to satisfy the requirements of *nullum crimen sine lege* and that the principle does not prevent a court from developing, within reasonable limits, the elements of an offence".[245] With regard to the 22 May Agreement, the Prosecution submits that Galić had the relevant information at trial and that as a result he has now waived his right to appeal on this point.[246] With regard to Galić's arguments that he did not act with the

---

[237] The Defence should have sought leave to amend its Notice of Appeal pursuant to Rule 108 of the Rules.
[238] Practice Direction on Appeals Requirements, para. 4(b); *see also Vasiljević* Appeal Judgement, para. 12.
[239] Defence Notice of Appeal, para. 25. Similarly, Galić also states that "there is no such […] criminal offence in the customary law", "this alleged offence was never criminalized", and "such an alleged offence could not be based on treaty law".
[240] Defence Notice of Appeal, para.30; Defence Appeal Brief, paras 58-59.
[241] Defence Appeal Brief, para. 60.
[242] Defence Notice of Appeal, paras 40-41.
[243] Defence Notice of Appeal, para. 42.
[244] Prosecution Response Brief, para. 7.1.
[245] Prosecution Response Brief, para. 7.1. *See also* AT 115-120.
[246] Prosecution Response Brief, paras 7.4-7.5.

required intent, the Prosecution argues that this claim is "vague and unsupported" and fails to address the detailed reasoning of the Trial Chamber.[247] The Prosecution claims that Galić "must do significantly more than make unsubstantiated claims in order to justify the intervention of the Appeals Chamber"; it submits that his argument should be dismissed on that basis alone.[248]

1. Whether a crime under Article 3 of the Statute must be grounded in customary international law or can be based on an applicable treaty

81. Pursuant to Article 1 of the Statute, the International Tribunal has jurisdiction over "serious violations of international humanitarian law". What is encompassed by "international humanitarian law" is however not specified in the Statute. Some indication can be found in the Report of the Secretary-General recommending the establishment of the International Tribunal, in which the Secretary-General explained that this body of law is comprised of both conventional law and customary international law:

> This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.[249]

To avoid "the problem of adherence of some but not all States to specific conventions" and to respect the principle of *nullum crimen sine lege*, the Secretary-General then added that the International Tribunal was expected to apply "rules of international humanitarian law which are beyond any doubt part of customary law".[250]

82. When first seized of the issue of the scope of its jurisdiction *ratione materiae*, the International Tribunal interpreted its mandate as applying not only to breaches of international humanitarian law based on customary international law but also to those based on international instruments entered into by the conflicting parties – including agreements concluded by conflicting parties under the auspices of the ICRC to bring into force rules pertaining to armed conflicts[251] – provided that the instrument in question is:

> (i) […] unquestionably binding on the parties at the time of the alleged offence; and (ii) […] not in conflict with or derogat[ing] from peremptory norms of

[247] Prosecution Response Brief, para. 7.2.
[248] Prosecution Response Brief, para. 7.2.
[249] Report of the Secretary-General (ICTY), para. 33.
[250] Report of the Secretary-General (ICTY), para. 34.
[251] *See Čelebići* Appeal Judgement, para. 44.

international law, as are most customary rules of international humanitarian law.[252]

83. However, while conventional law can form the basis for the International Tribunal's jurisdiction, provided that the above conditions are met, an analysis of the jurisprudence of the International Tribunal demonstrates that the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements. In the *Kordić and Čerkez* case, for example, while the Trial Chamber held that "the International Tribunal […] has jurisdiction over violations which are prohibited by international treaties",[253] it based itself on customary international law to determine that the conduct gave rise to individual criminal responsibility.[254] On appeal, the Appeals Chamber followed the same approach. It confirmed that a treaty can serve as a basis for the International Tribunal's jurisdiction,[255] but had recourse to customary international law to establish that individual criminal responsibility attached to the prohibition of attacks directed against the civilian population.[256]

84. In recent judgements, the Appeals Chamber also had recourse to customary international law because the elements of the crimes or the modes of liability were not defined or not defined sufficiently in conventional law. In *Stakić*, for example, the Appeals Chamber rejected the mode of liability of "co-perpetratorship", as defined and applied by the Trial Chamber, as having no support in customary international law or in the jurisprudence of the International Tribunal, in favour of joint criminal enterprise, which it found to be "firmly established in customary international law".[257] The Appeals Chamber in that case also relied on customary international law for the

[252] *Tadić* Jurisdiction Decision, para. 143.
[253] *Kordić and Čerkez* Trial Judgement, para. 167, citing *Tadić* Jurisdiction Decision, para. 143.
[254] When it addressed the issue of whether the conventional prohibition of attacks on civilians and civilians objects as embodied in Articles 51(2) and 52(1) of Additional Protocol I entailed individual criminal responsibility, the Trial Chamber relied by analogy on the finding of the Appeals Chamber at paragraph 134 of the *Tadić* Jurisdiction Decision that "customary international law imposes criminal liability for serious violations of common Article 3". *See Kordić and Čerkez* Trial Judgement, para. 168. The Trial Chamber also recalled its previous decision in which it held that those articles belonged to customary international law (*Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Decision on Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999, para. 31).
[255] *Kordić and Čerkez* Appeal Judgement, paras 41-42.
[256] *Kordić and Čerkez* Appeal Judgement, paras 59-66.
[257] *Stakić* Appeal Judgement, para. 62, quoting *Tadić* Appeal Judgement, para. 220.

elements of the crimes of extermination[258] and deportation.[259] In *Naletilić and Martinović*, the Appeals Chamber relied on customary international law for its finding that the existence of an armed conflict is an element of crimes under Articles 2 and 3 of the Statute.[260]

85. The Appeals Chamber rejects Galić's argument that the International Tribunal's jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law. However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.

2. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

86. On appeal, Galić argued that the 22 May 1992 Agreement was not binding on the parties[261] and even if binding did not give rise to individual criminal responsibility on the part of the parties.[262] The Appeals Chamber does not consider it necessary to address this argument on the ground that, as will be demonstrated below, it is satisfied that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, was a part of customary international law from the time of its inclusion in those treaties. The Appeals Chamber, by majority, Judge Schomburg dissenting, is further satisfied that a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law at the time of the commission of the offences for which Galic was convicted.

(a) The prohibition of terror against the civilian population in customary international law

87. In the present case, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute, on the

---

[258] *Stakić* Appeal Judgement, para. 260: "[T]here is no support in customary international law for the requirement of intent to kill a certain threshold number of victims […]."
[259] *Stakić* Appeal Judgement, para. 300: "In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law"; *ibid.*, para. 301: "[I]t is necessary to examine whether customary international law would support a finding that 'constantly changing frontlines' may amount to *de facto* borders sufficient for the purposes of the crime of deportation." *See also ibid.*, paras 302-303.
[260] *Naletilić and Martinović* Appeal Judgement, para. 120: "[T]he existence of an armed conflict or its character has to be regarded, in accordance with the principle of *in dubio pro reo*, as ordinary elements of a crime under customary international law when applying Articles 2 and 3 of the Statute to the conduct at issue in this case."
[261] Defence Appeal Brief, para. 60. *See also* AT 65.
[262] Defence Appeal Brief, para. 63.

basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which state:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 51 of Additional Protocol I was adopted with 77 votes in favour, one against and 16 abstentions.[263] Neither France, which voted against, nor the States that abstained from voting, expressed any concern as to the content of the prohibition contained in Article 51(2). The only concerns expressed were confined to paragraphs 4, 5, 7 and 8 of this Article.[264] Article 13 of Additional Protocol II, which incorporates the first three paragraphs of Article 51 of Additional Protocol I, was adopted by consensus.[265] The purposes of Additional Protocols I and II, as expressly stated by the High Contracting Parties in the preambles to those treaties, were to "reaffirm and develop the provisions protecting the victims of armed conflicts"[266] and "to ensure a better protection for the victims" of armed conflicts.[267] Additional Protocol II, further, is considered to embody the "fundamental principles on protection for the civilian population".[268] Articles 51(2) of Additional Protocol I and 13(2) of Additional Protocol II, in essence, contribute to the purpose of those treaties. They do not contain new principles but rather codify in a unified manner[269] the prohibition of attacks on the civilian population. The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law.[270] These principles incontrovertibly form the basic foundation of international humanitarian law[271] and constitute "intransgressible principles of international customary law".[272] As the Appeals Chamber has held in previous decisions, the conventional prohibition on attack on civilians contained in Articles 51 of Additional Protocol I and

---

[263] *Travaux préparatoires*, Vol. VI, p. 163, para. 118.
[264] *Travaux préparatoires*, Vol. VI, pp. 164-168, 187-188.
[265] *Travaux préparatoires*, Vol. VII, p. 134, para. 76.
[266] Additional Protocol I, Preamble.
[267] Additional Protocol II, Preamble.
[268] ICRC Commentary (Additional Protocols), paras 4762, 4764.
[269] The prohibition of terror was first discussed during the *travaux préparatoires* with regard to Additional Protocol I but was then discussed together with the same provision in Additional Protocol II. *See Travaux préparatoires*, Vol. XIV, pp. 59-75.
[270] The necessary distinction between civilians and combatants was made as early as three-and-a-half centuries ago by Grotius, in *De Jure Belli Ac Pacis* (1625). It was later maintained in the Lieber Code of 24 April 1863 at Articles 23 and 25.
[271] In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice ("ICJ") described the principle of distinction and the principle of protection of the civilian population as "the cardinal principles contained in the texts constituting the fabric of humanitarian law" and stated that "States must never make civilians the object of attack." *Nuclear Weapons* Case, para. 78.
[272] *Nuclear Weapons* Case, para. 78. The principle of distinction is further set out, among other places, in Article 48 of Additional Protocol I, which states that the warring parties must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". *See also Kordić and Čerkez* Appeal Judgement, para. 54.

13 of Additional Protocol II constitutes customary international law.[273] In so holding, the Appeals Chamber has made no distinction within those articles as to the customary nature of each of their respective paragraphs. In light of the above, and considering that none of the States involved in the Diplomatic Conference leading to the adoption of both Protocols expressed any concern as to the first three paragraphs of Article 51 of Additional Protocol I, and as Article 13 of Additional Protocol II was adopted by consensus, the Appeals Chamber considers that, at a minimum, Article 51(1), (2) and (3) of Additional Protocol I and Article 13 of Additional Protocol II in its entirety constituted an affirmation of existing customary international law at the time of their adoption. The Appeals Chamber therefore affirms the finding of the Trial Chamber that the prohibition of terror, as contained in the second sentences of both Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, amounts to "a specific prohibition within the general (customary) prohibition of attack on civilians".[274]

88. The Appeals Chamber found further evidence that the prohibition of terror among the civilian population was part of customary international law from at least its inclusion in the second sentences of both Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The 1923 Hague Rules on Warfare prohibited "[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants".[275] Similarly, the 1938 Draft Convention for the Protection of Civilian Populations against New Engines of War expressly prohibited "[a]erial bombardment for the purpose of terrorising the civilian population".[276] Even more importantly, Article 33 of Geneva Convention IV, an expression of customary international law,[277] prohibits in clear terms "measures of intimidation or of terrorism"[278] as a form of collective punishment, as they are "opposed to all principles based on humanity and justice".[279] Further, Article 6 of the 1956 New Delhi Draft Rules for protection of civilians states that "[a]ttacks directed against the civilian population, as such,

---

[273] *See Strugar et al.* Jurisdiction Decision, para. 9; *see also Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, para. 28.

[274] Trial Judgement, para. 98.

[275] Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Article 22. The Rules were drafted by a Commission of Jurists at the Hague, from December 1922 to February 1923. This Commission was composed of representatives of the United States, France, Great Britain, Italy, Japan and The Netherlands. It prepared rules for the control of radio in time of war (part I of the report of the Commission) and rules of air warfare (part II). Although these rules were never adopted in legally binding form they are of importance "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war". Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th Edition, Vol. 2 (London: Longman, Green, 1952), p. 519.

[276] Draft Convention for the Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938. This draft convention was prepared by a committee of the International Law Association and approved in principle by the Fortieth Conference of the Association in 1938.

[277] *See Blaškić* Appeal Judgement, para. 145; *Krnojelac* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 113. *See also* Report of the Secretary-General (ICTY), para. 35.

[278] Fourth Geneva Convention, Article 33.

whether with the object of terrorizing it or for any other reason, are prohibited."[280] More recently, Article 6 of the 1990 Turku Declaration of Minimum Humanitarian Standards envisaged that "[a]cts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited."[281]

89. Another indication of the customary international law nature of the prohibition of terror at the time of the events alleged in this case can be found in the number of States parties to Additional Protocols I and II by 1992.[282] Also, references to official pronouncements of States and their military manuals further confirm the customary international nature of the prohibition.[283] With respect to official pronouncements, the Appeals Chamber notes that the United States, a non-party to Additional Protocol I, expressed in 1987 through the deputy Legal Adviser to the US Department of State its support for the "principle that the civilian population as such, as well as individual citizens, not be the objects of acts or threats of violence the primary purpose of which is to spread terror amongst them".[284] Similarly, in 1991, in response to an inquiry of the ICRC as to the application of international humanitarian law in the Gulf region, the US Department of the Army pointed out that its troops were acting in respect of the prohibition of acts or threats of violence the main purpose of which was to spread terror among the civilian population.[285] With respect to military manuals, the Appeals Chamber notes that a large number of countries have incorporated provisions prohibiting terror as a method of warfare,[286] some of them in language similar to the prohibition set out in the Additional Protocols,[287] or even verbatim.[288]

---

[279] ICRC Commentary (GC IV), p. 226.

[280] Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, 1956. The Draft Rules were drawn up by the ICRC with the help of experts and submitted to the 19th Conference of the Red Cross, which took place in New Delhi in 1957. Although those draft rules did not lead to concrete steps, it is particularly noteworthy that many of the provisions therein resemble provisions finally adopted in Additional Protocols I and II.

[281] Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Turku Declaration).

[282] By 1992, as correctly noted by the Trial Chamber, there were around 191 States in the world, 118 of which had ratified Additional Protocol I and 108 of which had ratified Additional Protocol II.

[283] *Tadić* Jurisdiction Decision, para. 99.

[284] Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2 (1987), p. 426.

[285] Letter from the Department of the Army to the Legal Adviser of the US Army Forces Deployed in the Gulf Region, 11 January 1991, § 8(F), Report on US Practice, 1997, ch. 1.4, cited in Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, Volume II (Cambridge 2005), p. 73. *See also ibid.*, § 4(B)(6): "Acts or threats of violence the main purpose of which is to spread terror among the civilian population are prohibited."

[286] *See, e.g.*, Belgium, Le Droit de la Guerre, Dossier d'Instruction pour Soldats, à l'attention des officiers instructeurs, JS3, Etat-Major Général, Forces Armées Belges (*Teaching Manual for Soldiers*), p. 14; Belgium, Droit Pénal et Disciplinaire Militaire et Droit de la Guerre, Deuxième Partie, Droit de la Guerre, Ecole Royale Militaire, par J. Maes, Chargé de cours, Avocat-Général près la Cour Militaire, D/1983/1187/029, 1983 (*Law of War Manual*), p. 31; Cameroon, Droit International Humanitaire et Droit de la Guerre, Manuel de l'Instructeur en vigueur dans les Forces Armées, Présidence de la République, Ministère de la Défense, Etat-Major des Armées, Trosième Division, Edition

1992 (*Instructors' Manual*), p. 152; Croatia, Compendium « Law of Armed Conflicts », Republic of Croatia, Ministry of Defence, 1991 (*Law of Armed Conflicts Compendium*), p. 40; France, Fiche de Synthèse sur les Règles Applicables dans les Conflits Armés, Note No. 432/DEF/EMA/OL.2/NP, Général de Corps d'Armée Voinot (pour l'Amiral Lanxade ; Chef d'Etat-Major des Armées), 1992 (*Law of Armed Conflict Summary Note*), para. 4.1; Germany, Humanitarian Law in Armed Conflicts, Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English Translation of ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten, Handbuch, August 1992 (*Military Manual*), para. 507; Hungary, A Hadijog, Jegyzet a Katonai, Föiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülötiszti Föiskola, 1992 (*Military Manual*), page 64; Nigeria, The Laws of War, By Lt. Col. L. Ode PSC, Nigerian Army, Lagos, undated (*Manual on the Laws of War*), para. 20; Russia, Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR, **A**ppendix to Order of the USSR Defence Minister No. 75, 1990 (*Military Manual*), para. 5(n); Soviet Union, *Soviet Minister of Defence Order No. 75 of 16 February 1990 on the Publication of the Geneva Conventions of 12 August 1949 Relative to the Protection of Victims of War and their Additional Protocols* (*Manuel d'application des normes du droit international humanitaire par les Forces armées de l'URSS*), Annex, para. 5(o). The Appeals Chamber also notes that the trend in prohibiting terror against the civilian population as a method of warfare at the national level continued after 1992. *See*, *e.g.*, Benin, Le Droit de la Guerre, III fascicules, Forces Armées du Bénin, Ministère de la Défense Nationale, 1995 (*Military Manual*), p. 12; Colombia, Derecho Internacional Humanitario, Manual Básico para las Personerías y las Fuerzas Armadas de Colombia, Ministerio de Defensa Nacional, 1995 (*Basic Military Manual*), p. 30; France, Fiche didactique relative au droit des conflits armés, Directive of the Ministry of Defence, 4 January 2000, annexed to the Directive No. 147 of the Ministry of Defence of 4 January 2000 (*Law of Armed Conflict Teaching Note*), para. 403; **G**ermany, ZDv 15/1, Humanitäres Völkerrecht in bewaffneten Konflikten, Grundsätze, DSK VV230120023, Bundesministerium der Verteidigung, June 1996 (*International Humanitarian Law Manual*), para. 403; Kenya, Law of Armed Conflict, Military Basic Course (ORS), The School of Military Police, 1997 (*Law of Armed Conflict Manual*), Précis No. 4, p. 2, para. (g).

[287] *See, e.g.*, Argentina, Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489-89 del Ministerio de Defensa, 23 April 1990 (*Laws of War Manual*), para. 7.08 (prohibiting "acts which aim to terrorise the [civilian] population"); Ecuador, Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques, Academia de Guerra Naval, 1989 (*Naval Manual*), para. 6.2.5 ("The civilian population as such, as well as individual civilians, may not be the objects of attack or of threats or acts of intentional terrorisation"); Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, Januray 1991 (*International Humanitarian Law Manual*), sec. 3.2.1.5, p. 44 (prohibiting "attacks deliberately aimed at causing heavy losses and creating fear among the civilian population"); Switzerland, Lois et coutumes de la guerre (Extrait et commentaire), Règlement 51.7/II f, Armée Suisse, 1987 (*Basic Military Manual*), art. 27(2) ("It is prohibited to commit acts of violence with the primary aim of spreading terror among the civilian population."); United States, Air Force Pamphlet 110-31, International Law, The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976 (*Air Force Pamphlet*), para. 5.3(a)(1)(a) ("Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited"); Yugoslavia, *Regulations on the Application of International Laws of War in the Armed Forces of the SFRY* (1988), para. 67 ("Attacking civilians for the purpose of terrorising them is especially prohibited."). The Appeals Chamber also notes that the trend in prohibiting terror against the civilian population as a method of warfare at the national level continued after 1992. *See*, *e.g.*, **N**etherlands, Toepassing Humanitair Oorlogsrecht, Voorschrift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993 (*Military Manual*), p. V-4, para. 4 (stating that "acts or threats of violence whose primary aim is to terrorise the civilian population are prohibited" during international armed conflicts), p. XI-6 (stating the same for non-international armed conflicts); Australia, Australian Defence Force, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operation Series, ADFP 37, Interim Edition, 1994 (*Defence Force Manual*), para. 554 ("[A]cts or threats of violence primarily intended to spread terror among the civilian population are prohibited."); Spain, Orientaciones, El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996 (*Law of Armed Conflicts Manual*), Vol. I, paras 2.3.b.(3), 3.3.b.(7); Togo, Le Droit de la Guerre, **E**tat-Major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996 (*Military Manual*), Fascicule III, p. 12 (prohibiting "terrorising the civilian population through acts or threats of violence"); United States, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (*Naval Handbook*), para. 11.3 ("The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization").

[288] *See*, for example, New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992 (*Interim Law of Armed Conflict Manual*), para. 517(1), for international armed conflicts, and para. 1819(1) for non-international armed conflicts; Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, B-GJ-005-104/FP-021, 1999 (*The Law of Armed Conflict at the Operational and Tactical Level*), applicable to both international and non international armed conflicts, which prohibits as a "General Rule" "acts or threats of violence the primary

90. In light of the foregoing, the Appeals Chamber finds that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.

(b) <u>The criminalisation of the prohibition of terror against the civilian population</u>

91. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute. The conditions that must be fulfilled for a violation of international humanitarian law to be subject to Article 3 of the Statute are ("*Tadić* conditions"):

> i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met […];
>
> iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;
>
> iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[289]

92. Individual criminal responsibility under the fourth *Tadić* condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.[290]

---

purpose of which is to spread terror among the civilian population" (para. 423) and also specifically states the following under "Terrorizing the civilian population": "Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited. The protection of civilians is a fundamental principle of the [Law of Armed Conflict]. A campaign of threats or violence designed to terrorize the civilian population is simply not acceptable under any circumstances, even when the civilian population exhibits a hostile attitude toward the presence of the [Canadian Forces]."

[289] *Tadić* Jurisdiction Decision, para. 94.

[290] *Tadić* Jurisdiction Decision, para. 128.

93. The first reference to terror against the civilian population as a war crime, as correctly noted by the Trial Chamber,[291] is found in the 1919 Report of the Commission on Responsibilities, created by the Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies in World War I.[292] The Commission found evidence of the existence of "a system of terrorism carefully planned and carried out to the end", stated that the belligerents employed "systematic terrorism", and listed among the list of war crimes "systematic terrorism".[293] Although the few trials organised on that basis in Leipzig did not elaborate on the concept of "systematic terrorism", this is nonetheless an indication that, in 1919, there was an intention to criminalise the deliberate infliction of terror upon the civilian population. Further, in 1945, Australia's War Crimes Act referred to the work of the 1919 Commission on Responsibilities and included "systematic terrorism" in its list of war crimes.[294]

94. With respect to national legislation, the Appeals Chamber notes that numerous States criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population– within their jurisdiction. The Norwegian Military Penal Code of 1902, as amended, provides that "[a]nyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [the four Geneva Conventions and the two Additional Protocols of 1977] is liable to imprisonment."[295] The 1962 Geneva Conventions Act of Ireland, for example, provides that any "minor breach" of the Geneva Conventions, including violations of Article 33 of Geneva Convention IV, is a punishable offence.[296]

95. The Appeals Chamber also notes that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols. The Criminal Codes of the Czech Republic and the Slovak Republic, for example, criminalise "terroris[ing] defenceless civilians with

---

[291] Trial Judgement, para. 116.

[292] On the Commission on Responsibilities, *see* UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), Chapter III.

[293] *Ibid*., pp. 34-35 (reproducing the Commission's list of war crimes).

[294] *See Australian Law Concerning Trials of War Criminals by Military Courts*, in *Law R. Trials War Crim.*, **V**ol. 5, pp. 94-95, referred to at paragraph 118 of the Trial Judgement.

[295] Norway, Militaer Straffelov (*Military Penal Code*), Act No. 13 of 22 May 1902, as amended in 1981, published in Norwegian Law Journal , Volume I, Law and Central Regulations , sec. 108.

[296] Ireland, *Geneva Conventions Act* (1962), sec. 4. *See also* Bangladesh, *International Crimes (Tribunal) Act* (1973), sec. 3(2)(e) (providing *inter alia* that "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" are "crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility" (Bangladesh ratified Additional Protocols I and II, in their entireties, on September 8, 1980); Switzerland, Code pénal militaire (*Military Penal Code*), 13 June 1927, published in the Recueil officiel des lois fédérales, 1927, art. 109 (criminalising acts "contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property"; Switzerland ratified Additional Protocols I and II, in their entireties, on February 17, 1982).

violence or the threat of violence".[297] Further, numerous States have incorporated provisions that criminalise terrorisation of civilians in time of war. The Penal Code of Côte d'Ivoire, for example, provides that measures of terror in time of war or occupation amount to a "crime against the civilian population".[298] The Penal Code of Ethiopia punishes anyone who organises, orders or engages in "measures of intimidation or terror" against the civilian population in time of war, armed conflict or occupation.[299] During the relevant period, the Netherlands included "systematic terrorism" in its list of war crimes that carried criminal penalties.[300]

---

[297] Czech Republic, Trestní zákon (Criminal Code), Act No. 140/1961 Coll. 29 November 1961, as amended by Act No. 305/1999 Coll. of 18 November 1999, art. 263(a)(1); Slovakia, Trestní zákon (Criminal Code), Act. No. 140/1961 Coll. 29 November 1961, as amended, art. 263(a)(1). The Appeals Chamber notes the continuing trend of nations criminalising terror as a method of warfare. *See*, *e.g.*, Argentina, Draft Code of Military Justice (1998), art. 291, introducing a new article 875(1) in the Code of Military Justice as amended (1951): punishes "acts or threats of violence whose primary aim is to terrorise"; Bosnia & Herzegovina, Criminal Code of the Federation of Bosnia and Herzegovina No. 327, adopted on 29 July 1998, published in Službene Novine Federacije Bosne i Hercegovine, No. 43/98, 20 November 1998, art. 154(1): criminalises "the application of measures of intimidation and terror" against civilians (1998); Colombia, Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal (Penal Code), published in Diario Oficial, No. 44.097, 24 July, 2000, art. 144: imposes criminal sanction on "anyone who, during an armed conflict, carries out or orders the carrying out of […] acts or threats of violence whose primary purpose is to terrorise the civilian population"; Croatia, Criminal Code (1997), art. 158(1): imposes criminal sanctions on "whoever, in violation of the rules of international law, at a time of war, armed conflict or occupation, […] orders […] the imposition of measures of intimidation and terror"; El Salvador, Código Penal de la Republica de El Salvador, Decreto No. 1030, Título XIX, (Criminal Code, as amended 1998), art. 362: criminalises violations of "international laws […] of war" (El Salvador ratified Additional Protocols I and II, in their entireties, on November 23, 1978); Finland, Penal Code, Act. No. 39/1889, as amended by Act No. 578/1995 of the Finnish legislative gazette (Suomen säädöskokoelma), issued 21 April 1995, Chapter 11, art. 1: imposes criminal sanction on "a person who in an act of war […] otherwise violates the provisions of an international agreement on warfare binding on Finland" (Finland ratified Additional Protocols I and II, in their entireties, on August 7, 1980); Ireland, Geneva Conventions Act (1962), as amended by Act No. 35 of 13 July 1998, published in The Acts of the Oireachtas as promulgated, sec. 4: criminalises any "minor breach" of Additional Protocol I, including violations of Article 51(2), as well as any "contravention" of Additional Protocol II, including violations of Article 13(2) (Ireland ratified Additional Protocols I and II, in their entireties, on May 19, 1999); Lithuania, Lietuvos Respublikos baudziamas kodeskas (Criminal Code of the Republic of Lituania), 26 June 1961, published in Valstybes zinios, No. 18-147, 1961, as amended 9 June 1998, art. 336: criminalises "the use of intimidation and terror" in time of war, armed conflict or occupation; Mauritius, Geneva Conventions (Amendment) Act, Act No. 2 of 2003, Government Gazette, 17 May 2003, General Notice 722, section 4(e), amending section 3 of the Geneva Conventions Act of 1970: criminalises breaches of the Additional Protocols under Mauritian law (Mauritius ratified Additional Protocols I and II, in their entireties, on March 22, 1983); Mexico, Código Penal Federal (Federal Criminal Code as amended 2006), First Book, Preliminary Title, art. 6: criminalises acts which are an offence under an international treaty to which Mexico is a party (Mexico ratified the entirety of Additional Protocol I on March 10, 1983); Russia, Criminal Code of the Russian Federation, No. 63-FZ, 13 June 1996, promulgated in Collection of legislation of the Russian Federation, No. 25, 17 June 1996, art. 356(1): punishes the "cruel treatment of […] the civilian population" and the use in an armed conflict of "means and methods prohibited by an international treaty of the Russian Federation" (Russia ratified Additional Protocols I and II, in their entireties, on September 29, 1989); Spain, Ley Orgánica 10/1995, de 23 de Noviembre, del Código Penal (Penal Code), published in Boletín Oficial del Estato, No. 281, 24 November 1995, art. 611(1): punishes anyone who, during an armed conflict, makes the civilian population the object of "acts or threats of violence whose primary purpose is to terrorise them"; Yemen, Military Criminal Code, Law No. 21/1998 relative to military offences and penalities, 25 July 1998, published in Official Gazette of the Republic of Yemen, No. 18, 20 September 1999: criminalises all acts which constitute an offence against persons or property protected under international agreements to which Yemen is a party (Yemen ratified Additional Protocols I and II, in their entireties, on April 17, 1990).

[298] Côte d'Ivoire, Loi No. 81-640 du 31 juillet 1981 instituant le Code Pénal (*Penal Code)*, published in the Journal Officiel de la République de Côte d'Ivoire, No. 1 (numéro special), as amended, art. 138(5).

[299] Ethiopia, Penal Code of the Empire of Ethiopia, Proclamation No. 158, published in Negarit Gazeta, *16th Year, No. 1* (1957), art. 282(g).

[300] Netherlands, Law Concerning Trials of War Criminals, art. 1, in Law R. Trials War Crim., Vol. 11, pp. 86, 93. *See also* Slovenia, Kazenski zakonik (Penal Code) 29 September 1994, art. 374(1) (criminalising the imposition of

96. The Appeals Chamber also notes the references by the Trial Chamber to the laws in force in the former Yugoslavia at the time of the commission of the offences charged,[301] particularly Article 125 ("War Crime Against the Civilian Population") in Chapter XI ("Criminal Offences Against Humanity and International Law") of the 1960 Criminal Code of the Republic of Yugoslavia[302] and the superseding Article 142 ("War Crime Against the Civilian Population") in Chapter XVI ("Criminal Offences Against Humanity and International Law") of the 1976 Criminal Code,[303] both of which criminalise terror against the civilian population, and provisions of Yugoslavia's 1988 "[Armed Forces] Regulations on the Application of International Laws of War",[304] which incorporated the provisions of Additional Protocol I, following Yugoslavia's ratification of that treaty on 11 March 1977. Those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime, but are also relevant to the assessment of the foreseeability and accessibility of that law to Galić.[305]

97. In addition to national legislation, the Appeals Chamber notes the conviction in 1997 by the Split County Court in Croatia for acts that occurred between March 1991 and January 1993, under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, including "a plan of terrorising and mistreating the civilians", "open[ing] fire from infantry arms […] with only one goal to terrorise and expel the remaining civilians", "open[ing] fire from howitzers, machine guns, automatic rifles, anti-aircraft missiles only to create the atmosphere of fear among the

measures of "intimidation [and] terrorism" against the civilian population). Several of the above references to military manuals and national legislation were extracted from Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, Volume II (Cambridge 2005).

[301] Trial Judgement, paras 121-124.

[302] Yugoslavia, Criminal Code of 1951, as amended June 30, 1959, entered into force January 1, 1960, in *Collection of Yugoslav Laws*, Volume XI, Institute of Comparative Law, Belgrade (1964). Art. 125 states, in relevant part: "Whoever, in violation of the rules of international law at the time of war, armed conflict or occupation, orders or executes wilful killings, tortures, or inhuman treatment of the civilian population, including […] use of measures of intimidation and terror […] shall be punished by imprisonment for not less than five years or by the death penalty".

[303] Krivični zakon SFRJ (Criminal Code of the SFRY), adopted on September 28, 1976, published in the Official Gazette SFRJ No. 44 of October 8 1976. Article 142 reads, in relevant part: "Whosoever, in violation of the rules of the international law effective at the time of war, armed conflict or occupation, orders that the civilian population be subject to […] the application of measures of intimidation and terror […] shall be punished by imprisonment for not less than five years or by the death penalty".

[304] Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, ex. P5.1. This manual provides *inter alia* that "Serious" violations of the laws of war are considered criminal offences (p. 14), considers as war crimes "attack on civilians [...] inhuman treatment [of civilians] inflicting great suffering or injury to bodily integrity or health [...] application of measures of intimidation and terror" (p. 18, emphasis added), mentions explicitly under the part dealing with means and methods of combat that "Attacking civilians for the purpose of terrorising them is especially prohibited." (p. 29), and envisages that that the perpetrators of war crimes "may also answer before an international court, if such a court has been established" (p. 15).

[305] *Ojdanić* Appeal Decision on Joint Criminal Enterprise, para. 40. *See also Hadžihasanović et al.* Appeal Decision on Jurisdiction in Relation to Command Responsibility, para. 34.

remaining farmers", and "carrying out the orders of their commanders with the goal to terrorise and threaten with the demolishing of the Peruča dam".[306]

98. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Schomburg dissenting, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment.

3. The elements of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

99. Galić argues under his fifth ground of appeal that although he stood trial under Count 1 for terror against the civilian population including as one of its elements the infliction of terror against the civilian population, he was convicted and sentenced for a different offence which did not require the infliction of terror against the civilian population, but merely the intent to spread terror among the civilian population. He argues that the Trial Chamber thereby impermissibly departed from the Indictment.[307] He also contends in his sixteenth ground of appeal that, the existence of terrorisation of the civilian population not being proved beyond reasonable doubt at the end of the trial, the Trial Chamber should have acquitted him of Count 1 of the Indictment, by virtue of the principle of *in dubio pro reo*.[308] The Appeals Chamber has already found that, in principle, the Trial Chamber was acting within the confines of its jurisdiction when it found that actual infliction of terror on the civilian population was not an element of the crime of terror against the civilian population, and rejected both arguments.[309] Under the present ground of appeal, Galić again argues that it was not proven that "terror as such was inflicted upon the civilian population",[310] an argument that the Appeals Chamber understands to address the substantive content of the crime rather than the Trial Chamber's ability to exercise jurisdiction over the crime. He argues in his Notice of Appeal that the Trial Chamber erred both specifically when it found that infliction of

---

306 *Prosecutor v. R. Radulović et al.*, Split Country Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997. The Appeals Chamber also notes the reference made by the Trial Chamber to the first conviction for terror against the civilian population, delivered in July 1947 by a court martial sitting in the Netherlands East Indies in the *Motomura et al.* case; the court martial convicted 13 of the 15 accused before it of "systematic terrorism practised against civilians" for acts including unlawful mass arrests. *See* Trial Judgement, paras 114-115, referring to *Trial of Shigeki Motomura and 15 Others*, in *Law R. Trials War Crim.*, Vol. 13, p. 138.

307 Defence Appeal Brief, para. 35. *See also* Defence Notice of Appeal, para. 13: "No rules whatsoever would allow the Tribunal to find someone guilty of a crime which, in the end, is not the same as the one of which the Accused was informed and for which he was prosecuted."

308 Defence Appeal Brief, para. 250.

309 *See supra* para. 72.

310 Defence Appeal Brief, para. 57.

terror against the civilian population is not an element of the crime[311] and generally in identifying the elements of the crime.[312] Although Galić does not specifically identify how the Trial Chamber erred in its determination of the elements of the crime of terror against the civilian population, the Appeals Chamber will now assess whether the Trial Chamber correctly identified the elements of crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as charged, as this could have an impact on Galić's criminal responsibility under Count 1.

100. The Trial Chamber held at paragraph 133 of the Trial Judgement that the crime of terror against the civilian population as charged in the Indictment consists of the elements common to offences falling under Article 3 of the Statute as well as the following elements:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
>
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
>
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[313]

On the basis that the question was not before it, the Trial Chamber did not consider whether the International Tribunal would have jurisdiction over forms of violence other than those charged under Count 1. That is, it did not consider whether the crime of terror against the civilian population under Count 1 of the Indictment could consist only of threats of violence or acts of violence not causing death or injury.[314]

101. Having found that the prohibition on terror against the civilian population in the Additional Protocols was declaratory of customary international law, the Appeals Chamber will base its analysis of the elements of the crime under consideration under Count 1 on the definition found therein: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population."

(a) *Actus reus*

102. The Appeals Chamber has already found that the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population falls within the general

[311] Defence Notice of Appeal, para. 40.
[312] Defence Notice of Appeal, paras 40, 41, 43, 44.
[313] Trial Judgement, para. 133.

prohibition of attacks on civilians.[315] The definition of terror of the civilian population uses the terms "acts or threats of violence" and not "attacks or threats of attacks." However, the Appeals Chamber notes that Article 49(1) of Additional Protocol I defines "attacks" as "acts of violence".[316] Accordingly, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population can comprise attacks or threats of attacks against the civilian population. The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary;[317] the primary concern, as explained below, is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population. Further, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of "extensive trauma and psychological damage"[318] being caused by "attacks [which] were designed to keep the inhabitants in a constant state of terror".[319] Such extensive trauma and psychological damage form part of the acts or threats of violence.

(b) *Mens rea* and result requirement

103. As the Trial Chamber correctly noted, a plain reading of Article 51(2) of Additional Protocol I does not support a conclusion that the acts or threats of violence must have actually spread terror among the civilian population.[320] Where a treaty provision is capable of sustaining more than one meaning, Article 31(1) of the 1969 Vienna Convention on the Law of Treaties directs that it shall be interpreted in accordance with its ordinary meaning in light of its object and purpose and in the context of the treaty.[321] The object and purpose of Article 51(2) of Additional Protocol I is to confirm both the customary rule that civilians must enjoy general protection against the danger arising from hostilities and the customary prohibition against attacking civilians. The prohibition of acts or threats of violence would in that sense stem from the unconditional obligation

[314] Trial Judgement, para. 130.
[315] *See supra* para. 87.
[316] The jurisprudence of the Tribunal also defines "attacks" as a course of conduct involving "acts of violence". *See Kunarac et al.* Trial Judgement, para. 415, confirmed at paragraph 94 of the *Kunarac et al.* Appeal Judgement.
[317] The Appeals Chamber also notes that many States referred to "propaganda" as a possible method of terror (*Travaux Préparatoires*, Vol. XV, pp. 52, 61, 67).
[318] Indictment, para. 4(c).
[319] Indictment, para. 4(b).
[320] Trial Judgement, para. 76. Terror could be defined, as the Trial Chamber did, as "extreme fear" (Trial Judgement, para. 137).
[321] *See* Vienna Convention, art. 31(1).

not to target civilians for any reason, even military necessity.[322] Further, pursuant to Article 32 of the 1969 Vienna Convention, recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31".[323] As noted by the Trial Chamber,[324] the *travaux préparatoires* to Additional Protocol I clearly establish that there had been attempts among the delegations to replace the original wording from intent to spread terror among the civilian population to actual infliction of terror on the civilian population but that this proposed change was not accepted.[325] As noted by the representative of France, the waging of war would almost automatically lead to the spreading of terror among the civilian population and the intent to spread terror is what had to be prohibited.[326] In the report of its second session, the committee stated: "The prohibition of 'acts or threats of violence which have the primary object of spreading terror' is directed to intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful."[327]

104. In light of the foregoing, the Appeals Chamber finds that actual terrorisation of the civilian populations is not an element of the crime. The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, the Appeals Chamber finds that a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.

---

[322] *Blaškić* Appeal Judgement, para. 109: "the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which '[t]argeting civilians or civilian property is an offence when not justified by military necessity.' The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law."

[323] Vienna Convention, art. 32.

[324] Trial Judgement, para. 134.

[325] The representatives of Ghana, Nigeria, Uganda and Tanzania proposed that the words "methods intended to spread" terror be replaced by "acts capable of spreading" terror. *Travaux préparatoires*, Vol. III, p. 203. The representatives of Algeria, Egypt, South Yemen, Iraq, Kuwait, Libya, Morocco, Sudan, Syria, the United Arab Emirates, Mongolia and the USSR proposed that "intended to spread terror" be replaced by "that spread terror". *Ibid*., p. 205, Vol. XIV, pp. 53, 73. The representative of Philippines proposed that paragraph 1 be redrafted as such: "It is prohibited to attack, or commit acts capable of spreading terror among the civilian population and individual civilians." *Ibid.*, Vol. III, p. 206. The representative of Iraq said intent was "subjective and vague" and proposed that "intended to spread terror" be replaced by "which spread terror". The representative of Indonesia proposed that the prohibition read "The spreading of terror among the civilian population is prohibited." *Ibid.*, Vol. XIV, p. 55.

[326] *Travaux préparatoires*, Vol. XIV, p. 65 : "in traditional war attacks could not fail to spread terror among the civilian population: what should be prohibited […] was the intention to do so.".

[327] *Travaux préparatoires*, Vol. XV, p. 274, cited at paragraph 101 of the Trial Judgement.

4. Whether Galić intended to spread terror

105. Galić agrees in principle with the Trial Chamber that the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population "excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful",[328] but contends that the Trial Chamber did not in fact consider whether "the alleged terror could have been excluded on that basis".[329] He argues that "it was certainly not proven that [he] had the intent to commit 'acts of violence the primary purpose of which is to spread terror among the civilian population'".[330] Further, he contends that the Trial Chamber considered that "acts of violence" constituted the manner used to spread terror among the civilian population while the Prosecution alleged that sniping and shelling served to inflict terror upon the civilian population, thereby making no reference to such "acts of violence".[331] The Prosecution explains that the Trial Chamber's analysis of Galić's intent to spread terror among the civilian population proceeded on two fronts: first establishing that the campaign of sniping and shelling in Sarajevo was conducted with the aim of inflicting terror on the civilian population, and then examining the role of Galić in the campaign in order to determine whether he intended that terror be spread among the civilian population.[332] The Prosecution goes into some detail of the Trial Chamber's analysis and notes that Galić "ignores the voluminous evidence that the Majority relied upon to find that the shelling and sniping campaign was carried out for the primary purpose of causing terror"[333] and similarly "fails entirely to address the pages and pages of reasons the Majority gave for concluding that [Galić] was acting with the specific intent to cause terror".[334]

106. With regard to Galić's claim that the Trial Chamber convicted him under Count 1 for "acts of violence" while the facts alleged in the Indictment were concerned with a "protracted campaign of shelling and sniping upon civilians areas in Sarajevo",[335] the Appeals Chamber simply notes that Galić disregards the unambiguous finding of the Trial Chamber with regard to the *actus reus* of the crime of terror against the civilian population as charged, that is that "attacks by sniping and

---

[328] Defence Appeal Brief, para. 70, citing paragraph 101 of the Trial Judgement.
[329] Defence Appeal Brief, para. 70. *See also ibid.*, para. 71: "[The Trial Chamber] necessarily had to examine and determine whether this terror was not a terror which had to be excluded *in casu*"; *ibid.*, para. 72: "Not only [did] the Defence formally den[y] the mere existence of any crime of terror, but it clearly stated that the mere fact of a war waged in urban conditions where belligerent parties or enemies were separated by a few blocks […] would naturally and automatically provoke terror. If a crime of terror really existed, this 'licit' terror had to be somehow quantified and determined by the Tribunal, and this before any other factual or legal conclusion."
[330] Defence Appeal Brief, paras 57, 84-85.
[331] Defence Appeal Brief, page 8, fn. 17. *See also ibid.*, para. 83.
[332] Prosecution Response Brief, para. 7.67. *See* Trial Judgement, paras 600-601.
[333] Prosecution Response Brief, para. 7.68.
[334] Prosecution Response Brief, para. 7.72.

shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence".[336] The Appeals Chamber finds that the sniping and shelling in question undoubtedly fall within the scope of "acts of violence" contemplated under the definition of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.

107. With regard to the conclusion of the Trial Chamber that Galić had the intent to spread terror among the civilian population, the Appeals Chamber notes that Galić only challenges in his Appeal Brief that the Prosecution "failed to prove any such intent in any of the scheduled incidents, and even less in the unscheduled incidents".[337] The Appeals Chamber notes that the Trial Chamber relied on a plethora of evidence to demonstrate that terrorisation of the civilian population was the primary purpose of the campaign of sniping and shelling and that Galić ordered the commission of the underlying acts with the same specific intent. It reached its conclusion that Galić had the intent to spread terror in the following way: it first assessed the evidence before it to determine whether the SRK forces deliberately targeted civilians,[338] reached the conclusion that they did,[339] and then inferred from "the nature of the civilian activities targeted, the manner in which the attacks on civilians were carried out and the timing and duration of the attacks on civilians"[340] that "the aim of the campaign of sniping and shelling in Sarajevo was to terrorise the civilian population of the city".[341] The Trial Chamber found *inter* alia, in view of the evidence before it, that "the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition", that those attacks "had no discernible significance in military terms […], occurred with greater frequency in some periods, but very clearly [carried] the message […] that no Sarajevo civilian was safe anywhere, at any time of day or night", and that "the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instill in the civilian population a state of extreme fear".[342] The Trial Chamber then proceeded to assess the criminal responsibility of Galić.[343] It found that he failed to prevent the commission of the crimes and to punish the perpetrators even though he had knowledge of the crimes and had control over the SRK forces. It also found that he furthered the campaign of terror through orders relayed down the SRK chain of

[335] Indictment, Count 1.
[336] Trial Judgement, para. 596.
[337] Defence Appeal Brief, para. 84.
[338] Trial Judgement, paras 209-591.
[339] Trial Judgement, para. 591: "The Majority is convinced by the evidence in the Trial Record that civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured."
[340] Trial Judgement, para. 592.
[341] Trial Judgement, para. 592.
[342] Trial Judgement, para. 593.

command. As a result, it concluded that he "intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo".[344]

108. The Appeals Chamber recalls that an appellant "has the obligation to set out his grounds of appeal clearly, and to provide the Appeals Chamber with references to the alleged errors of the Trial Judgement and to the part of the record he is using to support his case".[345] A mere assertion that the Trial Chamber erred on a particular point without any argument as to why this is so, or a mere reference to the Trial Chamber's finding being contrary to the evidence without the citation of any particular evidence, does not suffice to meet the obligations of the appellant. Galić's only specific arguments are found in his Reply Brief, mainly with regard to the interpretation of witnesses' testimonies.[346] He alleges, for example, that the Trial Chamber wrongly interpreted at paragraph 743 of the Trial Judgement the statements of witnesses Razek and DP35.[347] In particular, he claims that there were no orders to target the civilians crossing the tarmac of Sarajevo airport. At paragraph 743, however, the Trial Chamber does not find that orders were given to target the civilians. It relied on the evidence of witnesses Razek and DP35 to support its earlier conclusion that there was "an irresistible inference to be drawn from the evidence on the Trial Record that what the Trial Chamber has found to be widespread and notorious attacks against the civilian population of Sarajevo could not have occurred without it being the will of the commander of those forces which perpetrated it and that the lack of measures to prevent illegal sniping and shelling activities was deliberate".[348] The Trial Chamber's reference to the evidence of Witness DP35 was also used as evidence that "counteracts the Defence's various arguments that orders were not given to SRK troops to fire either in a deliberately indiscriminate manner or specifically against civilians".[349] The Appeals Chamber therefore finds that Galić has not demonstrated that no reasonable trier of fact could have reached the Trial Chamber's conclusion that he had the intent to spread terror among the civilian population.

109. In light of the foregoing, this part of Galić's ground of appeal is dismissed.

---

[343] Trial Judgement, paras 603-753.
[344] Trial Judgement, para. 749.
[345] Practice Direction on Appeals Requirements, para. 4(b); *see also Kvočka* Appeal Judgement, para. 15; *Vasiljević* Appeal Judgement, para. 12.
[346] Some other arguments of the Defence pertain to the criminal responsibility of Galić, such as whether or not he ordered crimes to be committed, and as such touch upon Galić's eighteenth ground of appeal, which will be dealt with below. *See* Defence Reply Brief, para. 59, referring to paragraph 544 of the Defence Appeal Brief.
[347] Defence Reply Brief, paras 58, 60.
[348] Trial Judgement, para. 742.
[349] Trial Judgement, para. 743. *See also ibid.*, para. 416, where the Trial Chamber addressed the issue of the crossing of Sarajevo's airport, and found that the firing was indiscriminate in that the "SRK was well aware that civilians crossed the runway" and in that Galić stated that "he intended to stop such movement 'by all means'", thereby agreeing that attacks would be carried out indiscriminately.

VIII. GROUND 6: ALLEGED ERROR OF LAW IN CONNECTION WITH THE CRIME OF ATTACK ON CIVILIANS

110. Galić contends that the Trial Chamber made various errors of law with respect to the count of "attack on civilians". Significantly, the Trial Chamber found that only the first sentence of the second paragraph of Article 51 of Additional Protocol I to the Geneva Conventions, stating "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack",[350] and not Article 51 as a whole, formed the basis for this crime as charged by the Prosecution in Counts 4 and 7.[351]

A. Chapeau requirements of Article 3 of the Statute

1. Arguments of the Parties

111. Galić first alleges that the Trial Chamber erred in its understanding of Article 3 of the Statute.[352] He asserts that the jurisprudence of the International Tribunal is founded upon an erroneous interpretation of Article 3, which was first applied in the *Tadić* Jurisdiction Decision.[353] In this regard, he admits that the *Tadić* Jurisdiction Decision and its application of the *Tadić* conditions, which set out preconditions for the application of Article 3 of the Statute,[354] represent the "generally accepted stand in the practice of the Tribunal".[355] However, he claims that a textual reading of Article 3 of the Statute requires that "the provisions of this Article may be applied only in cases of unlawful conduct violating international standards prescribed for protection of material goods and assets, *but not of physical persons whose integrity is protected under Articles 2, 4, and 5 of the Statute*".[356]

112. Furthermore, Galić argues that Article 3 of the Statute cannot have been intended to refer to common Article 3 to the Geneva Conventions, which stipulates the minimum guaranteed protections in cases of non-international armed conflicts,[357] because Article 2 of the Statute already

[350] Additional Protocol I, art. 51(2), first sentence.
[351] Trial Judgement, para. 41. At first glance, it is unusual that Galić is challenging the Trial Chamber's findings with regard to Counts 4 and 7, because the Trial Chamber dismissed those counts. *See* Trial Judgement, para. 769. However, it did so only in order to avoid a conviction cumulative with the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population (Count 1), which includes the crime of attacks upon civilians as a lesser included offence. Therefore, this section in actuality applies, *mutatis mutandis*, to the finding of guilt for the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.
[352] Specifically, Galić seeks to impugn paragraphs 9-12 and 16-34 of the Trial Judgement. *See* Defence Appeal Brief, para. 37, fn. 23, para. 43.
[353] *Tadić* Jurisdiction Decision, paras 87-91, 94. *See* Defence Appeal Brief, para. 37.
[354] *See supra* para. 91.
[355] Defence Appeal Brief, para. 37 fn. 24.
[356] Defence Appeal Brief, para. 38 (emphasis added).
[357] Common Article 3 to the Geneva Conventions reads in relevant part:

performs this function.[358] He argues that the text of Article 2 of the Statute limits crimes for prosecution only to the grave breaches contained therein, and consequently the prosecution of other grave breaches under Article 3 of the Statute would not be in compliance with Article 1 of the Statute.[359] Galić argues that if the alternative were true, then Article 2 of the Statute would have made provision for further powers of prosecution for grave breaches, as was done in Article 3 of the Statute.[360]

113. As a result, Galić asserts that the line of decisions that the Trial Chamber used in support of its decision was "erroneously established",[361] and its determination that the *Tadić* conditions were fulfilled in the present case was made in error.[362]

114. Finally, Galić raises a question as to whether the International Tribunal has the power to apply Articles 2 and 3 of the Statute to internal armed conflicts. He notes that Article 5 of the Statute expressly confers authority to prosecute crimes against humanity committed in armed conflict, "whether international or internal in character",[363] but that such an express conferral of authority is absent from Articles 2 and 3 of the Statute. Galić claims that this raises doubts as to whether those Articles grant the power to prosecute crimes committed in the context of an internal armed conflict.[364] The conclusion drawn from this submission is that the Trial Chamber allegedly erred in applying Article 3 of the Statute to find Galić guilty of the crime of attack on civilians,

---

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous Judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> (2) The wounded and sick shall be collected and cared for.

[358] Defence Appeal Brief, para. 39. Galić posits that the title of Article 2 of the Statute explicitly designates it as the provision by which "Grave breaches of the Geneva Conventions of 1949" should be prosecuted. *See* Defence Appeal Brief, para. 40 fn. 28.
[359] Defence Appeal Brief, para. 40.
[360] Defence Appeal Brief, para. 40, fn. 30.
[361] Defence Appeal Brief, para. 41.
[362] Defence Appeal Brief, para. 43.
[363] Defence Appeal Brief, para. 43, citing Article 5 of the Statute.
[364] Defence Appeal Brief, para. 42.

without properly determining whether the attack occurred during an internal or international armed conflict.[365]

115. The Prosecution responds that the relevant sections of the Trial Judgement contain no legal errors and this ground of appeal should accordingly be dismissed.[366] It maintains that the law is well settled in this area and that Galić raises no novel argument or interests that would support a departure from this well-reasoned line of jurisprudence.[367]

2. Discussion

116. The Appeals Chamber finds that Galić has not established that the Trial Chamber committed an "error on a question of law invalidating the decision".[368] The Trial Chamber in this case was bound to apply the *ratio decidendi* of the relevant Appeals Chamber decisions,[369] starting with the *Tadić* Jurisdiction Decision and the analysis of the *Tadić* conditions contained therein, which it did. Indeed, Galić readily admits that the Trial Chamber followed the Appeals Chamber's previous interpretation of Article 3 of the Statute.[370]

117. Unlike the Trial Chamber, the Appeals Chamber is not bound to follow its earlier decisions; however, the Appeals Chamber has repeatedly and consistently held that it will do so in the interests of certainty and predictability, except when "cogent reasons in the interests of justice" require a departure therefrom.[371] No such cogent reasons have been offered by Galić to justify a departure from the Appeals Chamber's previous – and consistent – interpretations of Article 3 of the Statute, nor do such reasons exist in this case.

118. The jurisprudence of the Appeals Chamber in this area is clear and well-settled: Article 3 of the Statute is not limited to the protection of property.[372] Contrary to Galić's submission, the text of Article 3 makes it clear that the list of violations is merely illustrative, not exhaustive.[373] Galić

[365] The Trial Chamber in fact determined it to be unnecessary to decide on the characterisation of the conflict. *See* Trial Judgement, para. 22.
[366] Prosecution Response Brief, para. 6.2.
[367] *See* Prosecution Response Brief, paras 6.5-6.8.
[368] Article 25 of the Statute. *See also Kupreškić et al.* Appeal Judgement, para. 21.
[369] *Aleksovski* Appeal Judgement, para. 113.
[370] Defence Appeal Brief, fn. 24.
[371] *Aleksovski* Appeal Judgement, para. 107; *See also Kordić and Čerkez* Appeal Judgement, para. 1040.
[372] *See Kunarac et al.* Appeal Judgement, paras 67-69.
[373] *See Tadić* Jurisdiction Decision para. 91 (stating that Article 3 confers jurisdiction "over *any* serious offence against international humanitarian law" not covered elsewhere in the Statute).

proffers no novel submissions as to why the interests of justice would require the Appeals Chamber to depart from its interpretation of Article 3 of the Statute.[374] His argument therefore fails.

119. With respect to Galić's second argument, it has repeatedly been held that crimes contrary to Article 3 common to the four Geneva Conventions are punishable under Article 3 of the Statute.[375] In any event, Galić's submission that common Article 3 to the Geneva Conventions is inapplicable by virtue of Article 2 of the Statute is misconceived. In paragraphs 16-34 of the Trial Judgement, the section that Galić attempts to impugn, the Trial Chamber explicitly premises its conclusions on Article 51(2) of Additional Protocol I,[376] the terms of which it says apply both as per the 22 May 1992 Agreement between the Parties to the conflict and under customary international law.[377] It does not premise its findings on common Article 3.[378] Galić's argument is accordingly dismissed.

120. As to Galić's third argument, it is settled that customary international law makes the offenses set out under Article 3 of the Statute,[379] including the crime of attacks on civilians, applicable to all armed conflicts, whether internal or international.[380] Galić offers negligible support to impugn this line of reasoning. His argument that the lack of express reference to the application of Article 3 of the Statute to internal armed conflicts – in juxtaposition to the language of Article 5 – makes Article 3 inapplicable to such conflicts is without merit. The Trial Chamber was therefore correct in proceeding as it did and Galić's argument is dismissed.

B. Objective and subjective elements of the crime of attack on civilians

121. Galić claims that the Trial Chamber erred in its analysis of the elements of the crime of attack on civilians as a violation of the laws or customs of war. His arguments with respect to the Trial Chamber's conclusions on the objective and subjective elements of the crime of attack on civilians can be separated into three categories: (1) arguments dealing in general terms with the qualification of the crime of attack on civilians as a violation of the laws and customs of war, as it was pleaded in the Indictment; (2) arguments relating to the Trial Chamber's findings pertaining to the *actus reus* of that crime; and (3) arguments relating to the Trial Chamber's findings on its *mens rea* requirements.

---

[374] The lineage of such jurisprudence includes: *Kordić and Čerkez* Appeal Judgement, paras 40-45; *Kunarac et al.* Appeal Judgement, paras 67-69; *Čelebići* Appeal Judgement, paras 116-139; *Tadić* Jurisdiction Decision, paras 89-94.

[375] *Kunarac et al.* Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, para. 134; *Tadić* Jurisdiction Decision, para. 89.

[376] Additional Protocol I.

[377] *See generally* Trial Judgement, paras 21-25.

[378] Trial Judgement, paras 19-33.

[379] *Tadić* Jurisdiction Decision, para. 137.

[380] *See Strugar et al.* Jurisdiction Decision, paras 9-10; *see also Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, para. 28.

1. <u>The qualification of the crime of attack on civilians as a "violation of the laws and customs of war"</u>

122. Galić makes three distinct submissions related to the qualification of the crime of attack on civilians.

123. First, he claims that the Trial Chamber erred in asserting that "the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute".[381] The Appeals Chamber notes the vagueness of this allegation and the lack of any argumentation in support thereof. Moreover, Galić appears to take the Trial Chamber's finding out of context. The relevant paragraphs of the Trial Judgement he relies upon do not simply assert that the crime is "constituted of the elements common to offences falling under Article 3", but also that there exist further specific constitutive elements of the crime: the *actus reus* and *mens rea* of the crime, respectively.[382] The crime of attack on civilians falls under Article 3 of the Statute as a "violation of the laws and customs of war" and therefore must share the elements common to offences falling under that Article. The Trial Chamber adverted to these common, or *chapeau*, elements of Article 3 crimes in paragraphs 9-11 of the Trial Judgement and found, after extensive discussion, that the elements establishing the existence of a crime under Article 3 of the Statute were present in the instant case.[383] There was no need to re-list these elements in the impugned paragraph of the Trial Judgement (para. 56), but only to refer back to the prior finding, as the Trial Chamber did. To these *chapeau* elements, the Trial Chamber correctly added the *actus reus* and *mens rea* elements of the particular crime under examination. No error can be found in such an approach or indeed in the Trial Chamber's conclusions that the elements were present. Galić's argument is accordingly dismissed.

124. Second, Galić again contends that the crime of attack on civilians is proscribed by Articles 2 and 5 of the Statute and therefore cannot be punished pursuant to Article 3 of the Statute.[384] This mirrors the argument already addressed above and does not warrant a recapitulation of the reasons already given.

---

[381] Trial Judgement, para. 56. *See* Defence Appeal Brief, para. 49.

[382] Trial Judgement, para. 56. These "specific elements" of the crime of attack on civilians are mentioned: "(1) Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population; (2) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence."

[383] Trial Judgement, paras 16-32, applying the four *Tadić* conditions to the facts of the case.

[384] Defence Appeal Brief, para. 51.

125. Finally, Galić submits that attacks on civilians cannot be qualified as criminal acts under Article 3 of the Statute on the basis of either customary international law or treaty law.[385] He claims that the crime of attack on civilians is an "expression of general nature designating unlawful action aimed at civilians as a protected category in all conflicts" since it lacks specific constitutive elements and thus cannot amount to a distinct criminal offence.[386] To the extent that this vague assertion alleges that the offence of attacks against civilians is cumulative with other offences (the interpretation by the Prosecution of this argument),[387] this issue will be dealt with under the ninth ground of appeal. To the extent that Galić's argument is founded on an assertion of vagueness, that is, that the construction of Article 3 of the Statute is too vague to enable a legitimate interpretation, this is most certainly not the case. As stated, there is a well-worn line of jurisprudence interpreting Article 3 of the Statute, and even a cursory analysis of customary international law and important international humanitarian law instruments demonstrates that the crime of attack on civilians is quite specific. Galić's argument is accordingly dismissed.

2. *Actus reus* of the crime of attack on civilians

126. Galić posits four distinct arguments with respect to the *actus reus* of the crime of attack on civilians.

(a) The alleged re-qualification of the Indictment

127. Galić argues that the Trial Chamber came to an erroneous conclusion in paragraph 43 of the Trial Judgement by "re-qualifying the Indictment" with respect to the criminal act of attack on civilians.[388] The Trial Chamber found:

> The present Indictment refers only to killing and wounding of civilians; therefore the Trial Chamber does not deem it necessary to express its opinion [on whether attacks that do not result in civilian deaths or serious casualties entail individual criminal responsibility under this charge].[389]

The Prosecution responds by pointing to the connection between the Indictment and the Trial Chamber's findings, both of which referred to the killing and wounding of civilians.[390] It points out that the Trial Chamber referred in paragraph 42 to the requirement in the *Blaškić* and *Kordić* Trial Judgements that death or injury result from unlawful attacks and notes that while the Trial Chambers in those cases did not determine whether death or serious injury was a necessary element

---

[385] Defence Appeal Brief, paras 52-53.
[386] Defence Appeal Brief, paras 52-53.
[387] Prosecution Response Brief, para. 6.23.
[388] Defence Appeal Brief, para. 44.
[389] Trial Judgement, para. 43.

of the offence, it adjudged the offence only with respect to those attacks that actually caused death or serious injury.[391] The Prosecution claims that there "was no error in declining to comment *in abstracto* upon whether unlawful attack charges could be sustained in [the] absence of serious civilian casualties" and, in any event, "no prejudice resulted".[392]

128. The Appeals Chamber finds that there is a clear connection between the Indictment and the charges as interpreted by the Trial Chamber in paragraph 43 of the Trial Judgement: the Indictment refers to killing and wounding of civilians, and the Trial Chamber made its factual and legal findings only with respect to such events. There was no obligation on the Trial Chamber to issue a purely hypothetical interpretation of the elements of attack on civilians and it did not do so. Galić's argument is accordingly dismissed.

(b) The targeting of civilians and military necessity

129. Galić submits that the Trial Chamber erred in finding that the targeting of civilians cannot be justified by military necessity.[393] The Prosecution responds that the *Blaškić* Appeal Judgement makes clear that military necessity never justifies the targeting of civilians.[394]

130. The Appeals Chamber has previously emphasized that "there is an absolute prohibition on the targeting of civilians in customary international law"[395] and that "the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity".[396] The Trial Chamber was therefore correct to hold that the prohibition of attacks against the civilians and the civilian population "does not mention any exceptions [and] does not contemplate derogating from this rule by invoking military necessity".[397] Galić's argument is accordingly dismissed.

(c) Indiscriminate and disproportionate attacks

131. Galić contends that the Trial Chamber erred in law in holding that: (1) "indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians";[398] and (2) "certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of

---

[390] Prosecution Response Brief, para. 6.11.
[391] Prosecution Response Brief, paras 6.10-6.11, referring to paragraphs 42 and 43 of the Trial Judgement.
[392] Prosecution Response Brief, para. 6.12.
[393] Defence Appeal Brief, para. 45.
[394] Defence Appeal Brief, para. 6.13.
[395] *Blaškić* Appeal Judgement, para. 109.
[396] *Kordić and Čerkez* Appeal Judgement, para. 54.
[397] Trial Judgement, para. 44.
[398] Trial Judgement, para. 57. *See* Defence Appeal Brief, para. 50.

attack".[399] He argues that neither disproportionate attacks nor indiscriminate attacks may qualify as direct attacks on civilians. The Prosecution responds that the Trial Chamber did not err in determining that indiscriminate and disproportionate attacks may qualify as making civilians the object of attack or direct attacks[400] and asserts that Galić does not specify how the Trial Chamber "erred in finding attacks against civilians to encapsulate indiscriminate attacks and attacks which violate the principle of proportionality".[401] It further argues that the Trial Chamber properly relied on the principle of distinction, which obliges those directing attacks to do so only against military objectives, as distinguished from civilian targets.[402] The Prosecution argued at the Appeal Hearing that the principle of distinction can be violated when the target selected is not limited to a military objective or when the attack is carried out using a methodology that is incapable of distinguishing between military objectives and civilians to the extent required by the principle of proportionality.[403]

132. With regard to the Trial Chamber's finding pertaining to indiscriminate attacks, the Appeals Chamber notes that the Trial Chamber did not hold that such attacks always amount to direct attacks, but rather that they "may qualify"[404] as such. It expressed its agreement with other Trial Chambers which "found that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians".[405] It referred to the *Blaškić* Trial Judgement, where the Trial Chamber inferred from the weapons used that the perpetrators of the attacks wanted to target the civilian population,[406] and to the *Martić* Rule 61 Decision, where the Trial Chamber regarded the use of a cluster bomb warhead as evidence of the Accused's intent to deliberately attack the civilian population.[407] The Appeals Chamber finds that the impugned finding does not conflate the two crimes but rather supports the view that a direct attack can be inferred from the indiscriminate character of the weapon used. In determining whether an attack was "directed against" the civilian population pursuant to Article 5 of the Statute, the Appeals Chamber has previously held that many factors were involved, including the type of weapon used:

> [T]he expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack. In order to determine whether the attack may be said to have been so

[399] Trial Judgement, para. 60. *See* Defence Appeal Brief, para. 50.
[400] Prosecution Response Brief, para. 6.17; AT 130.
[401] Prosecution Response Brief, para. 6.18.
[402] Prosecution Response Brief, para. 6.19.
[403] AT 130.
[404] Trial Judgement, para. 57.
[405] Trial Judgement, fn. 101 (emphasis added).
[406] *Blaškić* Trial Judgement, para. 512.
[407] *Martić* Rule 61 Decision, paras 23-31.

> directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, […] the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[408]

In principle, the Trial Chamber was entitled to determine on a case-by-case basis that the indiscriminate character of an attack can assist it in determining whether the attack was directed against the civilian population. Galić's argument is accordingly dismissed.

133. With regard to Galić's argument that the Trial Chamber's holding that "certain apparently disproportionate attacks *may* give rise to the inference that civilians were actually the object of attack" amounts to an error of law, the Appeals Chamber notes that the Trial Chamber made clear that such inference had to be "determined on a case-by-case basis in light of the available evidence".[409] The Trial Chamber's finding that disproportionate attacks "may" give rise to the inference of direct attacks on civilians is therefore a justified pronouncement on the evidentiary effects of certain findings, not a conflation of different crimes. The Appeals Chamber also notes in that respect that the Trial Chamber endeavoured, in its evaluation of the evidence, to consider questions such as:

> distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight.[410]

134. The Trial Chamber clearly stated that it limited itself to attacks on civilians pursuant to Article 51(2) of Additional Protocol I, which only contemplates direct attacks against the civilian population. The definition it adopted of the offence is equally clear.[411] No mention is made of indiscriminate or disproportionate attacks as the basis for conviction. Accordingly, this part of Galić's ground of appeal is dismissed.

---

[408] *Kunarac et al.* Appeal Judgement, para. 91; *see also Blaškić* Appeal Judgement, para. 106.
[409] Trial Judgement, para. 60 (emphasis added).
[410] Trial Judgement, para. 188.
[411] Trial Judgement, para. 56 : "In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements: 1. acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population. 2. The offender *wilfully* made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence."

(d) Individual combatants within the civilian population

135. Galić argues that the conclusions drawn in paragraphs 50 and 51 of the Trial Judgement are incorrect interpretations of the law.[412] The Appeals Chamber understands this to be a reference to the Trial Chamber's statement in those paragraphs that "[t]he presence of individual combatants within the population does not change its civilian character",[413] and that only military objectives may be lawfully attacked,[414] as well as the paragraphs' discussions of these two assertions. Galić founds this contention on the argument that the Trial Chamber's analysis is "based on [a] one-sided application of the provisions of the Geneva Conventions", and in particular Additional Protocol I, and that the analysis is "erroneous when taken as [a] ground for the application of Article 3 of the Statute".[415]

136. The Appeals Chamber observes that there is nothing in the Defence Appeal Brief that identifies what in particular the Trial Chamber purportedly interpreted erroneously or "one-sidedly". The Appeals Chamber notes, however, the seemingly absolute nature with which the Trial Chamber asserted that the presence of combatants within the civilian population "does not" change its otherwise civilian character.[416] The Appeals Chamber finds that the jurisprudence of the International Tribunal in this regard is clear: the presence of individual combatants within the population attacked does not *necessarily* change the fact that the ultimate character of the population remains, for legal purposes, a civilian one. If the population is indeed a "civilian population", then the presence of combatants within that population does not change that characterisation. In the *Kordić and Čerkez* Appeal Judgement, the Appeals Chamber stated:

> The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[417]
>
> The Appeals Chamber considers that Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law.[418]

137. If, however, one is discussing whether a population is civilian based on the proportion of civilians and combatants within it, that is, the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel, then the conclusion is slightly

[412] Defence Appeal Brief, para. 48.
[413] Trial Judgement, para. 50.
[414] Trial Judgement, para. 51.
[415] Defence Appeal Brief, para. 48.
[416] Trial Judgement, para. 50.
[417] *Kordić and Čerkez* Appeal Judgement, para. 50.
[418] *Kordić and Čerkez* Appeal Judgement, para. 97.

different. The *Blaškić* Appeal Judgement qualified the general proposition of the *Kordić and Čerkez* Appeal Judgement with an important addendum. It states, quoting the ICRC Commentary, that "in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population."[419] As such, the Appeals Chamber in *Blaškić* found that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".[420]

138. The strict test apparently posited by the Trial Chamber, namely that the presence of combatants within the civilian population "does not" change its status, may seem to depart from the above finding of the Appeals Chamber. However, in footnote 91 of the Trial Judgement, the Trial Chamber acknowledged the nuances of its position by referring to the above quotation of the ICRC Commentary, as referred to in the *Blaškić* Appeal Judgement. The Appeals Chamber therefore finds that the Trial Chamber was correct in its interpretation of the law in paragraphs 50 and 51 as it recognised the variable considerations with respect to determining the characterisation of a given population. Galić's argument is accordingly dismissed.

3. *Mens rea* of the crime of attack on civilians

139. Galić contends with respect to the *mens rea* of the crime of attack on civilians that the Trial Chamber erred in law by including as a subjective element of the crime the concept of "negligence or some other attitude of the person committing the action" or indeed anything other than "the wish to cause the actual consequence" of the action.[421] The Prosecution responds that this contention is based on an erroneous reading of the Trial Judgement, as the Trial Chamber found that the requisite *mens rea* for this offence was wilfulness.[422]

140. In its discussion of the *mens rea* of the crime at issue, the Trial Chamber found that the perpetrator must undertake the attack "wilfully", which it defines as wrongful intent, or recklessness, and explicitly not "mere negligence".[423] The Trial Chamber relied on the ICRC Commentary to Article 85 of Additional Protocol I, which defines intent for the purposes of Article 51(2) and clearly distinguishes recklessness, "the attitude of an agent who, without being certain of

---

[419] *Blaškić* Appeal Judgement, para. 115, citing ICRC Commentary (Additional Protocols), para. 1922.
[420] *Blaškić* Appeal Judgement, para. 115.
[421] Defence Appeal Brief, paras 46-47.
[422] Prosecution Response Brief, paras 6.15-6.16.
[423] Trial Judgement, para. 54: "the notion of 'wilfully' incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts 'wilfully'."

a particular result, accepts the possibility of its happening", from negligence, which describes a person who "acts without having his mind on the act or its consequences".[424] The Trial Chamber's reasoning in this regard is correct and Galić offers no support for his contention that the Trial Chamber committed an error of law. Thus, to the extent that Galić impugns this specific finding, his argument is without merit and accordingly dismissed. Galić's sixth ground of appeal is dismissed.

[424] ICRC Commentary (Additional Protocols), para. 3474, cited in Trial Judgement, para. 54.

IX. GROUND 8: ALLEGED ERRORS OF LAW CONCERNING CRIMES UNDER ARTICLE 5 OF THE STATUTE

141. Galić contests various legal findings of the Trial Chamber made in the context of crimes charged under Article 5 of the Statute.

A. Chapeau requirements of Article 5 of the Statute

142. Galić claims that the Trial Chamber's holdings as regards the *chapeau* requirements of Article 5 of the Statute are legally untenable, in particular as regards the Trial Chamber's definition of "civilians" in the context of an attack on a civilian population.[425] As concerns the *mens rea*, he submits that the perpetrator must know of the wider context in which the underlying crime occurred and must know that his conduct is part of an attack on civilians.[426] Galić argues that he was never informed of any deliberate unlawful attack against civilians, nor was he aware that his conduct was part of any such attack.[427] Galić further argues that there was evidence before the Trial Chamber showing that he ordered the cessation of any attack which could have caused civilian casualties as soon as he became aware of its existence, thus proving that he did not order the targeting of civilians.[428]

143. The Prosecution responds that the Trial Chamber's definition of civilian is consistent with the International Tribunal's settled jurisprudence.[429] As regards Galić's *mens rea*, it submits that Galić appears to allege errors of fact[430] and simply repeats arguments rejected at trial.[431] The Prosecution contends that the evidence presented to the Trial Chamber demonstrated Galić's knowledge of crimes committed by SRK units through evidence establishing a functioning chain of command and reports from outsiders,[432] and argues that Galić has not shown how those findings were unreasonable.[433] With regard to Galić's last argument, the Prosecution responds that the Trial Chamber found that he might have issued orders not to target civilians, but that targeting continued nonetheless.[434]

144. The Appeals Chamber notes that Galić does not contest all the findings of the Trial Chamber regarding the *chapeau* requirement of a civilian population but merely alleges an error in the Trial

[425] Defence Appeal Brief, para. 87.
[426] Defence Appeal Brief, para. 88.
[427] Defence Appeal Brief, para. 88.
[428] Defence Appeal Brief, para. 89.
[429] Prosecution Response Brief, para. 8.3.
[430] Prosecution Response Brief, para. 8.4.
[431] Prosecution Response Brief, para. 8.6.
[432] Prosecution Response Brief, para. 8.7.
[433] Prosecution Response Brief, para. 8.6.

Chamber's definition of "civilians". The Trial Chamber held, when considering the *chapeau* requirement of a "civilian population", that "[t]he definition of a 'civilian' is expansive and includes individuals who at one time performed acts of resistance, as well as persons *hors de combat* when the crime was perpetrated".[435] The Trial Chamber did not intend to give a definition of an individual civilian;[436] indeed, it would not necessarily be correct to state, as the Trial Chamber's wording seems to suggest, that a person *hors de combat* is a civilian in the context of international humanitarian law.[437] The Appeals Chamber understands the Trial Chamber to reiterate well-established jurisprudence regarding the *chapeau* element of "civilian population". As such, the Appeals Chamber has previously held that "the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic".[438] Likewise, the presence of soldiers does not necessarily deprive a civilian population of its civilian character,[439] nor does the presence of persons *hors de combat*. The Appeals Chamber, in the *Kordić and Čerkez* Appeal Judgement, stated that "[t]he civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."[440] Galić's argument in this regard is therefore rejected.

145. As regards his knowledge of the attacks on civilians, Galić submits that the Prosecution "has failed to prove the requirements in the case against [him]", that he was "never informed of an unlawful attack against civilians deliberately undertaken, and in his case one cannot claim that he was aware that his conduct was part of any such attack".[441] He reiterates arguments made at trial and does not present argumentation as to why his claim should succeed on appeal.

---

[434] Prosecution Response Brief, para. 8.8.
[435] Trial Judgement, para. 143.
[436] The Appeals Chamber notes that the *Krnojelac* Trial Judgement referred to by the Trial Chamber in its footnote reads "[t]he definition of civilian" (meaning the word civilian in the element of "civilian population"), and not "a civilian", as referred to in the *Galić* Trial Judgement.
[437] *See Blaskić* Appeal Judgement, para. 114: "If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of the crimes, does not accord him civilian status." Persons *hors de combat* are certainly protected in armed conflicts through Common Article 3 of the Geneva Conventions. This reflects a principle of customary international law. *Blaškić* Appeal Judgement, fn. 220. Even *hors de combat*, however, they would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention; as such, they are not civilians in the context of Article 50, paragraph 1, of Additional Protocol I. Common Article 3 of the Geneva Conventions supports this conclusion in referring to "[p]ersons taking no active part in the hostilities, including *members of armed forces* who have laid down their arms *and those placed hors de combat* by sickness, wounds, detention, or any other cause" (emphasis added).
[438] *Blaškić* Appeal Judgement, para. 113.
[439] *Blaškić* Appeal Judgement, para. 115: "[I]n order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined."
[440] *Kordić and Čerkez* Appeal Judgement, para. 50.
[441] Defence Appeal Brief, para. 88.

146. The Appeals Chamber considers that Galić's submission in this section is not an argument against the law applied by the Trial Chamber but rather a challenge to its findings of fact. His arguments are not further substantiated as allegations of errors of fact in this section of the Defence Appeal Brief, and they go beyond the Notice of Appeal regarding his eighth ground of appeal, which is limited to errors of law. The Appeals Chamber therefore declines to consider Galić's submissions in this regard. Moreover, the Appeals Chamber notes that Galić attacks the related findings of fact in greater detail in grounds 17 and 18 of his Defence Appeal Brief. His arguments in that respect will accordingly be dealt with under those grounds.

B. Murder

147. The Trial Chamber, relying on other Trial Chambers' findings, defined murder under Article 5 of the Statute as follows:

> The basic requirements for murder as a crime against humanity are that:
>
> (a) the victim died;
>
> (b) the victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
>
> (c) the act was done, or the omission was made, by the accused, or by a person or persons for whose acts or omissions the accused bears criminal responsibility, with an intention: (i) to kill, or (ii) to inflict serious injury, in reckless disregard of human life.[442]

148. Regarding the *actus reus* of murder under Article 5 of the Statute, Galić argues that an act cannot constitute murder if: (1) it consists of an omission, rather than a commission, especially "when there is a distance between the alleged victim and the perpetrator" or; (2) if the act of killing is carried out by another person.[443] In response, the Prosecution contends that Galić cites no authority in support of his contentions.[444] It argues first that the International Tribunal's jurisprudence establishes that an omission can constitute murder[445] and second that Article 7 of the Statute demonstrates that a crime can be attributed to one person even where another did the causative action, through forms such as ordering and superior responsibility.[446]

---

[442] Trial Judgement, para. 150 (footnotes omitted).
[443] Defence Appeal Brief, para. 91.
[444] Prosecution Response Brief, para. 8.10.
[445] Prosecution Response Brief, para. 8.11.
[446] Prosecution Response Brief, para. 8.13.

149. The Appeals Chamber has previously held that murder can be committed through an act or an omission.[447] Further, as previously held by the Appeals Chamber regarding Article 7(1) of the Statute[448] and as demonstrated by Article 7(3) of the Statute, the Appeals Chamber reiterates that the commission of a positive act is not an absolute requirement of criminal responsibility.

150. With respect to Galić's second argument, the Appeals Chamber notes that the Statute expressly contemplates attaching criminal responsibility to an accused for the acts of another, and the International Tribunal has done so on numerous occasions. Even if the physical perpetration of the act of murder was committed by another person, Article 7 of the Statute attaches criminal liability for all the crimes articulated in Articles 2 to 5 of the Statute, including murder, to those who did not actually perpetrate the physical act, but either "planned, instigated, ordered [...] or otherwise aided and abetted in the planning, preparation or execution",[449] or, in the case of superiors, "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[450] Galić's argument is therefore rejected.

151. Regarding the *mens rea* requirement of murder, Galić contends that an action cannot be murder if death is a consequence of the infliction of serious injury and the consequence is due to the perpetrator's negligence.[451] In response, the Prosecution contends that specific intent to kill is not part of the *mens rea* for murder[452] and that the Trial Chamber did not apply a negligence standard.[453] In that respect, it argues that the Trial Chamber required a finding of "an intention [...] to kill, or to inflict serious injury, in reckless disregard of human life".[454] It further claims that Stanislav Galić has confused negligence and recklessness, and that recklessness is an appropriate *mens rea* for ordering murder, as held in the *Blaškić* Appeal Judgement.[455]

152. The Appeals Chamber notes that Galić was not convicted for committing murder, but for ordering murder under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that murder would be committed in the execution of his orders.[456]

---

[447] *Kvočka et al.* Appeal Judgement, para. 261. Although this holding was made for murder under Article 3 of the Statute, the Appeals Chamber sees no reason why it would be any different for murder under Article 5 of the Statute.
[448] *Blaškić* Appeal Judgement, para. 663.
[449] Article 7(1) of the Statute.
[450] Article 7(3) of the Statute.
[451] Defence Appeal Brief, para. 92.
[452] Prosecution Response Brief, para. 8.16.
[453] Prosecution Response Brief, para. 8.17.
[454] Prosecution Response Brief, para. 8.17.
[455] Prosecution Response Brief, para. 8.18.
[456] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.

Consequently, there is no reason for the Appeals Chamber to consider on their merits Galić's arguments pertaining to the *mens rea* required for committing murder.[457]

153. For the foregoing reasons, this part of Galić's ground of appeal is dismissed.

C. Inhumane acts

154. Galić submits that the Trial Chamber erred in its definition of "other inhumane acts" pursuant to Article 5(i) of the Statute.[458] His arguments concern both the *actus reus* and the *mens rea* required for the crime of inhumane acts.

155. As regards the *actus reus*, Galić contends that an omission cannot constitute an inhumane act.[459] The Prosecution responds that the jurisprudence of the International Tribunal establishes that inhumane acts can consist of omissions.[460] In that regard, the Appeals Chamber adopts *mutatis mutandis* its above discussion on an accused's criminal responsibility for an act of omission regarding the crime of murder.[461] This part of Galić's ground of appeal is therefore dismissed.

156. As regards the *mens rea* of the crime of inhumane acts, Galić argues that the Prosecution must prove that the perpetrator had the "will to directly produce the consequence".[462] He contends that "[c]onsent to the consequence excludes the intention" and that merely accepting the consequence does not make a person responsible for crimes.[463] The Prosecution responds that Galić is positing a standard of specific intent as the minimum *mens* rea required for the crime of other inhumane acts, without proposing any authority for this view. The Prosecution argues that the jurisprudence of the International Tribunal has required lesser mental states in order to prove other inhumane acts.[464]

157. The Appeals Chamber notes that Galić was not convicted for committing inhumane acts, but for ordering inhumane acts under Article 7(1) of the Statute, which only requires that he was aware of the substantial likelihood that inhumane acts would be committed in the execution of his

---

[457] When an error has no chance of changing the outcome of a decision, it may be rejected on that ground. *See Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16; *Krnojelac* Appeal Judgement, para. 10.
[458] Defence Appeal Brief, para. 93.
[459] Defence Appeal Brief, para. 94.
[460] Prosecution Response Brief, para. 8.19.
[461] *See also* the definition of inhumane acts given at paragraph 234 of the *Vasiljević* Trial Judgement, confirmed at paragraph 165 of the *Vasiljević* Appeal Judgement. *See supra* para. 149.
[462] Defence Appeal Brief, para. 95.
[463] Defence Appeal Brief, para. 96.
[464] Prosecution Response Brief, paras 8.21-8.22.

orders.[465] Consequently, there is no reason for the Appeals Chamber to consider Galić's arguments pertaining to the *mens rea* required for committing inhumane acts.

158. The Appeal Chamber further notes that the Trial Chamber did not expressly determine which acts constituted other inhumane acts (the *actus reus*). Although the Trial Chamber did not do so, the Appeals Chamber finds that it did point, in its analysis of the scheduled incidents, to numerous acts that qualify as such. For the scheduled sniping incidents, the Trial Chamber pointed to the serious injuries inflicted and held that those injuries were the result of deliberate sniping by members of the SRK forces for whose acts Galić bore criminal responsibility.[466] The same applies to the scheduled shelling incidents, for which the Trial Chamber made specific findings related to serious injuries and found that the shells were deliberately fired at areas where civilians would be seriously injured as a result.[467]

159. The Appeals Chamber accordingly dismisses Galić's eighth ground of appeal.

[465] *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[466] *See, e.g.*, Trial Judgement, paras 258, 271, 276, 289, 317, 321, 360, 367, 518, 537, 551, 555.
[467] *See, e.g.*, Trial Judgement, paras 397, 496.

X. GROUND 9: ERRORS OF LAW IN CONNECTION WITH CUMULATIVE CHARGES AND CONVICTIONS

160. Under his ninth ground of appeal, Galić challenges the finding of the Trial Chamber that the charges against him and his convictions for murder, inhumane acts, and attacks on civilians were permissible in light of the law on cumulative charging and cumulative convictions.[468]

A. Cumulative charges

161. Galić reiterates the argument he raised at trial that an accused cannot be cumulatively charged with different crimes on the basis of the same set of acts.[469] As correctly noted by the Trial Chamber, the Appeals Chamber has consistently held that "cumulative charging constitutes the usual practice of both this Tribunal and the ICTR" and "is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven".[470] This part of Galić's ninth ground of appeal is accordingly dismissed.

B. Cumulative convictions

162. Galić was convicted of one count of acts of violence the primary purpose of which is to spread terror among the civilian population pursuant to Article 3 of the Statute (Count 1), two counts of murder pursuant to Article 5(a) of the Statute, one based on sniping (Count 2) and one based on shelling (Count 5), and two counts of inhumane acts pursuant to Article 5(i) of the Statute, one based on sniping (Count 3), and one based on shelling (Count 6).[471] The Trial Chamber considered that the finding of guilt on Count 1 necessitated dismissal of two counts of attacks on civilians under Article 3 of the Statute (Counts 4 and 7) for the same acts.[472] Galić makes several arguments that the convictions entered against him are impermissibly cumulative. His arguments pertain to cumulative convictions under Articles 3 and 5 of the Statute and cumulative convictions under Article 5 of the Statute.

163. Before addressing Galić's arguments, the Appeals Chamber notes that the International Tribunal's established jurisprudence is that multiple convictions entered under different statutory

---

[468] Defence Appeal Brief, paras. 97-106.
[469] Defence Appeal Brief, para. 97, fn. 64. *See also* Trial Judgement, para. 156, fn. 268, referring to Defence Pre-Trial Brief, paras 8.18, 8.19, 8.24, and Defence Final Trial Brief, paras 1099, 1101, 1102, 1104.
[470] Trial Judgement, para. 156, citing paragraph 400 of the *Čelebići* Appeal Judgement. *See also Kupreškić et al.* Appeal Judgement, para. 385; *Kunarac et al.* Appeal Judgement, para. 167; *Naletilić and Martinović* Appeal Judgement Appeal Judgement, para. 103.
[471] Trial Judgement, para. 769.
[472] Trial Judgement, para.162.

provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other.[473] An element is materially distinct from another if it requires proof of a fact not required by the other.[474] Where this test is not met, only the conviction under the more specific provision will be entered.[475] The Appeals Chamber has noted that in such circumstances "[t]he more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter".[476]

1. Cumulative convictions under Articles 3 and 5 of the Statute

164. Galić argues that the Trial Chamber erred in law by entering convictions under Article 3 of the Statute (intent to spread terror among the civilian population) and Article 5 of the Statute (murder and inhumane acts) for the same acts.[477] He argues that the Trial Chamber must have considered an act to be "two (or more) different criminal acts" in order to enter multiple convictions for that act, and argues that this would be "untenable in criminal law".[478]

165. The Appeals Chamber concurs with the Trial Chamber that convictions for the same conduct under Article 3 of the Statute (violations of the laws or customs of war) and Article 5 of the Statute (crimes against humanity) are permissible since Articles 3 and 5 of the Statute require proof of distinct, non-cumulative elements.[479] It agrees with the Trial Chamber that the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population under Article 3 of the Statute requires proof of a close link between the acts of the accused and the armed conflict, which is an element not required for the crimes charged under Article 5 of the Statute. Similarly, the crimes of murder and inhumane acts under Article 5 of the Statute require proof that the act of the accused formed part of a widespread or systematic attack against a civilian population, which is not required for the crime charged under Article 3 of the Statute.[480] Accordingly, this part of Galić's ninth ground of appeal is dismissed.

---

[473] *Čelebići* Appeal Judgement, para. 412; *see also Naletilić and Martinović* Appeal Judgement, para. 584; *Stakić* Appeal Judgement, para. 355; *Krstić* Appeal Judgement, para. 218; *Kunarac et al.* Appeal Judgement, para. 168; *Kupreškić et al.* Appeal Judgement, para. 387; *Jelisić* Appeal Judgement, para. 78.
[474] *Čelebići* Appeal Judgement, para. 412; *see also Naletilić and Martinović* Appeal Judgement, para. 584; *Stakić* Appeal Judgement, para. 355; *Krstić* Appeal Judgement, para. 218; *Kunarac et al.* Appeal Judgement, paras 168, 173; *Kupreškić et al.* Appeal Judgement, para. 387; *Jelisić* Appeal Judgement, para. 78.
[475] *Čelebići* Appeal Judgement, para. 413; *see also Stakić* Appeal Judgement, para. 355; *Krstić* Appeal Judgement, para. 218; *Kunarac et al.* Appeal Judgement, para. 168; *Kupreškić et al.* Appeal Judgement, para. 387; *Jelisić* Appeal Judgement, para. 79.
[476] *Krstić* Appeal Judgement, para. 218.
[477] Defence Appeal Brief, para. 100.
[478] Defence Appeal Brief, para. 101, referring to *Čelebići* Appeal Judgement, paras 410-420.
[479] Trial Judgement, para. 163, citing *Jelisić* Appeal Judgement, para. 82.
[480] *Vasiljević* Appeal Judgement, para. 145; *Kunarac et al.* Appeal Judgement, para. 176; *Kupreškić et al.* Appeal Judgement, para. 387; *Jelisić* Appeal Judgement, para. 82.

2. Cumulative convictions under Article 5 of the Statute

166. Galić argues that the Trial Chamber erred when entering convictions under Article 5(a) of the Statute (murder) and Article 5(i) of the Statute (inhumane acts) for the same conduct when that conduct resulted in the death of the victim.[481] He states that he "does not contest" the possibility of conviction under Article 5(i) of the Statute when the conduct charged did not result in the death of the victim,[482] but argues that if the victim died and a conviction was entered for murder under Article 5(a) of the Statute then a conviction for inhumane acts under Article 5(i) of the Statute could not also be entered because the latter would be "absorb[ed]" in the former.[483]

167. As the Trial Chamber correctly noted, the issue of cumulative convictions does not arise in the present case:

> The counts of murder and inhumane acts as crimes against humanity are not based upon the same criminal conduct. They seek to punish, respectively, murder of civilians through sniping and shelling attacks (Article 5(a) of the Statute), and other harm suffered by civilians through sniping and shelling attacks, in particular serious injury (Article 5(i) of the Statute).[484]

The Appeals Chamber agrees with the Trial Chamber that separate convictions are permissible for murder and inhumane acts, which relate to distinct victims, as they do here. Galić does not demonstrate that the Trial Chamber convicted him twice for injuring and killing the same victims. The Trial Chamber, for example, found that separate incidents of sniping resulted in the death of some victims[485] and serious mental or physical suffering or injury of others.[486] This part of his ninth ground of appeal is accordingly dismissed.

168. Galić also argues that the Trial Chamber erred by convicting him separately on two counts of murder and two counts of inhumane acts, when he claims the counts were distinguished only by the means of perpetration, to wit, murder by sniping and murder by shelling, and inhumane acts by sniping and inhumane acts by shelling.[487] As the Prosecution rightly notes, the two counts for murder and two counts for inhumane acts relate to separate conduct: "Neither the victims nor the

---

[481] Defence Appeal Brief, para. 103.
[482] Defence Appeal Brief, para. 102.
[483] Defence Appeal Brief, paras 103-104.
[484] Trial Judgement, para. 164.
[485] *See* Trial Judgement, paras 247-253 ("Scheduled Sniping Incident 5"); *ibid.*, paras 277-284 ("Scheduled Sniping Incident 20"); *ibid.*, paras 352-356 ("Scheduled Sniping Incident 6").
[486] *See* Trial Judgement, paras 254-258 ("Scheduled Sniping Incident 24"); *ibid.*, paras 267-271 ("Scheduled Sniping Incident 10"); *ibid.*, paras 272-276 ("Scheduled Sniping Incident 15"); *ibid.*, paras 285-289 ("Scheduled Sniping Incident 27"); *ibid.*, paras 311-317 ("Scheduled Sniping Incident 23"); *ibid.*, paras 318-327 ("Scheduled Sniping Incident 25"); *ibid.*, paras 357-361 ("Scheduled Sniping Incident 18").
[487] Defence Appeal Brief, para. 106; Defence Reply Brief, paras 77-78.

injury inflicted were the same."[488] As such, Galić's argument is misplaced in a ground of appeal challenging cumulative convictions, which should only be concerned with convictions for the same underlying conduct. Galić's ninth ground of appeal is dismissed.

[488] Prosecution Response Brief, para. 9.2.

XI. GROUND 10: ERROR OF LAW IN DETERMINING CRIMINAL RESPONSIBILITY

169. Galić contests certain holdings of the Trial Chamber made in the context of the law relating to determining criminal responsibility under Articles 7(1) and 7(3) of the Statute.

A. Challenges relating to Article 7(1) responsibility

1. The Trial Chamber's reliance on circumstantial evidence

170. Galić challenges the alleged holding of the Trial Chamber "that the proof of all forms of criminal responsibility can be proved by direct or circumstantial evidence".[489] He claims that "ordering" cannot be established by circumstantial evidence and certainly not in the manner adopted by the Trial Chamber.[490] He further argues that the *mens rea* of an accused cannot be inferred but must be proved "in a clear manner and must clearly point [to] the will of the accused to act in the manner in which he did in order to produce the foreseen consequence".[491] The Prosecution responds that Galić provides no reasons in support of this argument and that it should therefore be dismissed. In addition, it considers that circumstantial evidence is sufficient in general, sufficient in relation to establishing the *mens rea*, and sufficient with respect to establishing the mode of liability of ordering.[492]

171. The Appeals Chamber notes that it is well established that facts can be proven by either direct or circumstantial evidence. The Appeals Chamber reiterates its earlier statement in the *Kupreškić et al.* Appeal Judgement that in principle a conviction may be based upon circumstantial evidence alone.[493]

172. Accordingly, Galić's argument is dismissed.

2. The omissions of an accused and the Trial Chamber's finding that Galić ordered the crimes

173. Galić asserts that acts of persons accused under Article 7(1) of the Statute may not be acts committed by culpable omission and that the Trial Chamber made an erroneous legal finding in this regard.[494] He argues that a positive action "which clearly indicates the participation in the unlawful

[489] Defence Appeal Brief, para. 111.
[490] Defence Appeal Brief, para. 111.
[491] Defence Appeal Brief, paras 112, 546.
[492] Prosecution Response Brief, paras 10.9-10.10.
[493] *Kupreškić et al.* Appeal Judgement, para. 303. *See also Stakić* Appeal Judgement, para. 219; *Ntagerura et al.* Appeal Judgement, paras 304-306.
[494] Defence Appeal Brief, para. 108, referring to Trial Judgement, para. 168.

action" is required for responsibility under Article 7(1) of the Statute.[495] He also challenges the holding of the Trial Chamber that "a superior may be found responsible under Article 7(1) [of the Statute] where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met".[496]

174. In response, the Prosecution argues that omissions are an accepted form of liability under the Statute.[497] It also argues that the actual findings of the Trial Chamber indicate active conduct and active ordering.[498] The Prosecution considers that the reference of the Trial Chamber to Galić's failure to act was relevant to his *mens rea,* and could have supported the *actus reus* for ordering.[499] It claims, "The Chamber did not rely on [Galić]'s failure to take certain steps but on all his conduct to find that he ordered the campaign of sniping and shelling. The Chamber's findings on his inaction support its findings regarding [his] *mens rea*."[500] The Prosecution further argues that ample Tribunal jurisprudence supports the Trial Chamber's proposition that any conduct, whether active or passive, which contributes to or facilitates the commission of a crime, may result in liability under Article 7(1) of the Statute.[501]

175. The Appeals Chamber affirms that the omission of an act where there is a legal duty to act,[502] can lead to individual criminal responsibility under Article 7(1) of the Statute.[503] Galić's argument in this regard is therefore dismissed. Nevertheless, the Appeals Chamber clarifies several points with regard to the mode of responsibility of ordering pursuant to Article 7(1) of the Statute.

176. The Appeals Chamber recalls that the *actus reus* of ordering has been defined as a person in a position of authority instructing another person to commit an offence; a formal superior-subordinate relationship between the accused and the actual physical perpetrator not being required.[504] The Appeals Chamber finds that the very notion of "instructing" requires a positive action by the person in a position of authority.[505] The failure to act of a person in a position of

[495] Defence Appeal Brief, para. 109.
[496] Defence Appeal Brief, para. 110, citing paragraph 169 of the Trial Judgement. The Trial Chamber continued: "[A] superior with a guilty mind may not avoid Article 7(1) responsibility by relying on his or her silence or omissions […] where the effect of such conduct is to commission crimes by subordinates." Trial Judgement, para. 169.
[497] Prosecution Response Brief, paras 8.11, 10.1.
[498] Prosecution Response Brief, paras 10.2-10.3.
[499] Prosecution Response Brief, para. 10.4.
[500] Prosecution Response Brief, para. 10.5.
[501] Prosecution Response Brief, paras 10.7-10.8.
[502] *See Ntagerura et al.* Appeal Judgement, paras 334-335.
[503] *Blaškić* Appeal Judgement, para. 663. *See also Tadić* Appeal Judgement, para. 188: "This provision [Article 7(1) of the Statute] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."
[504] *Kordić and Čerkez* Appeal Judgement, para. 28; *Semanza* Appeal Judgement, para. 361.
[505] *See Blaškić* Appeal Judgement, para. 660.

authority, who is in a superior-subordinate relationship with the physical perpetrator, may give rise to another mode of responsibility under Article 7(1) of the Statute or superior responsibility under Article 7(3) of the Statute.[506] However, the Appeals Chamber cannot conceive of a situation in which an order would be given by an omission, in the absence of a prior positive act.[507] The Appeals Chamber concludes that the omission of an act cannot equate to the mode of liability of ordering under Article 7(1) of the Statute.[508]

177. In the present case, the Appeals Chamber notes that Galić conflates two separate issues: (1) whether an omission can constitute an act of ordering; and (2) whether an act of ordering can be *proven* by taking into account omissions. The Trial Chamber here employed the latter approach, which does not constitute a legal error. It did not find Galić guilty for having ordered the crimes by his failure to act or culpable omissions. That is, it did not infer from the evidence the fact that he omitted an act and that this omission constituted an order. Rather, where the Trial Chamber mentions failures to act, it took those failures into account as circumstantial evidence to prove the mode of liability of ordering. The Trial Chamber inferred from the evidence adduced at trial, which included, *inter alia*, acts and omissions of the accused, that Galić had given the order to commit the crimes.[509]

178. The Appeals Chamber thus concludes that the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused. The Trial Chamber must be convinced beyond reasonable doubt from the evidence adduced at trial that the accused ordered the crime.[510] Whether or not the Trial Chamber could have inferred from the evidence adduced at trial that Galić had ordered the crimes is a question of fact and will be addressed as part of his eighteenth ground of appeal.

179. For the foregoing reasons, Galić's argument is dismissed.

B. Challenges relating to Article 7(3) responsibility

180. While he does not contest the conditions that must be met before a person can be held responsible pursuant to Article 7(3) of the Statute,[511] Galić raises three challenges to the Trial

[506] When, for example, a person is under a duty to give an order but fails to do so, individual criminal responsibility may incur pursuant to Article 7(1) or Article 7(3) of the Statute.
[507] The Appeals Chamber, however, notes that this has to be distinguished from the fact that a superior may be criminally liable if he orders an omission. The Appeals Chamber has held that a "person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order" has the requisite *mens rea* for ordering. *Blaškić* Appeal Judgement, para. 42; *Kordić and Čerkez* Appeal Judgement, para. 30.
[508] It would thus be erroneous to speak of "ordering by omission".
[509] Trial Judgement, para. 749: "General Galić is guilty of having ordered the crimes proved at trial."
[510] *Stakić* Appeal Judgement, para. 219.
[511] Defence Appeal Brief, para. 113, referring to paragraph 173 of the Trial Judgement.

Chamber's findings on his Article 7(3) responsibility. First, he contests the Trial Chamber's holding that the superior's actual knowledge of offences committed by his subordinates may be established through circumstantial evidence.[512] Second, he argues that the UN Commission of Experts Report may not "be taken into consideration when determining whether the requirements for responsibility under Article 7(3) [of the Statute] have been met" as the Report is based on "assumptions and superficial information".[513] Third, he contests the Trial Chamber's position on the manner in which the requirement that the accused "had reason to know" may be determined, arguing that "[i]nformation about the conduct of the subordinates must be sufficient for a superior to order an investigation, which is conducted for precisely determined misconducts and according to precisely designated persons, or at least, against a circle of persons", and that "General Galić never received such information".[514]

181. In response to Galić's first argument, the Prosecution refers to its submissions on his Article 7(1) responsibility.[515] It claims that his second argument is based on a misunderstanding. It claims that the Trial Chamber did not rely on factual findings contained in the Report; rather it relied on propositions of a legal nature and certain indicia from which a Trial Chamber may infer knowledge of a superior.[516] The Prosecution claims that Galić provides no reasoning in support of his third argument and fails to consider the jurisprudence of the International Tribunal on this point.[517]

182. In relation to Galić's first argument, the Appeals Chamber adopts *mutatis mutandis* its above holdings made with respect to this same argument advanced in relation to Galić's Article 7(1) responsibility.[518] This argument is therefore dismissed.

183. Turning to Galić's second argument, the Appeals Chamber notes that the Trial Chamber held that it may consider, *inter alia*, the indicia given by the UN Commission of Experts Report.[519] The factors mentioned in the Report are not factual findings, they are indicia that can be used along with other factors. These indicia were not considered by the Trial Chamber to be in any way binding upon it because they were contained in the Report. Galić's argument is therefore dismissed.

184. As to Galić's third argument, the Appeals Chamber notes that the jurisprudence of the International Tribunal indicates that the "had reason to know" standard will only be satisfied if information was available to the superior which would have put him on notice of offences

[512] Defence Appeal Brief, para. 114.
[513] Defence Appeal Brief, para. 114. *See also* Defence Reply Brief, para. 85.
[514] Defence Appeal Brief, para. 115.
[515] Prosecution Response Brief, para. 10.13.
[516] Prosecution Response Brief, para. 10.14.
[517] Prosecution Response Brief, paras 10.16-10.17.
[518] *See supra* para. 171.

committed by his subordinates.[520] The information in question need not, however, "have the form of specific reports submitted pursuant to a monitoring system" and "does not need to provide specific information about unlawful acts committed or about to be committed".[521] Here, the Trial Chamber properly found that Galić was "fully appraised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings".[522] Accordingly, his argument is dismissed.

C. Challenge to concurrent application of Articles 7(1) and 7(3) of the Statute

185. Galić argues that the Trial Chamber erred in holding that the concurrent application of Article 7(1) and 7(3) of the Statute is possible, claiming that one form of responsibility excludes the other. Accordingly, Galić considers the Trial Chamber made an error invalidating the Trial Judgement.[523] The Prosecution responds that the Trial Chamber did not claim that concurrent conviction under Article 7(1) and 7(3) of the Statute is possible and that it convicted Galić only under Article 7(1) of the Statute.[524]

186. The Appeals Chamber notes that the holding of the Trial Judgement challenged by Galić reads: "[I]n cases where concurrent application of Articles 7(1) and 7(3) [of the Statute] is possible because the requirements of the latter form of responsibility are satisfied alongside those of the former, the Trial Chamber has the discretion to choose the head of responsibility most appropriate to describe the criminal responsibility of the accused."[525] It is evident from this passage that the Trial Chamber did not hold that concurrent convictions under Articles 7(1) and 7(3) of the Statute are possible, but rather that the facts of any given case may satisfy both articles, in which case a Trial Chamber may then choose between them. As noted in the *Blaškić* Appeal Judgement, a conviction should be entered under Article 7(1) of the Statute only, while treating the accused's superior position as an aggravating factor in sentencing.[526] Accordingly, there was no error on the part of the Trial Chamber. Galić's tenth ground of appeal is dismissed.

---

[519] Trial Judgement, para. 174.
[520] *Čelebići* Appeal Judgement, para. 241.
[521] *Čelebići* Appeal Judgement, para. 238.
[522] Trial Judgement, para. 705.
[523] Defence Appeal Brief, para. 116. *See also* Defence Reply Brief, paras 88-89.
[524] Prosecution Response Brief, para. 10.18.
[525] Trial Judgement, para. 177.
[526] *Blaskić* Appeal Judgement, para. 91.

XII. GROUND 12: COLLATERAL DAMAGE

187. Galić argues under his twelfth ground of appeal that the issue of collateral damage was not examined by the Trial Chamber. He contends that by not doing so, the Trial Chamber denied him a fair trial pursuant to Article 21 of the Statute,[527] and that the Appeals Chamber should either order a retrial or acquit him on all counts.[528] He argues that the SRK military actions would always be preceded by an assessment of the possible civilian casualties and that such potential casualties would be weighed against the possible military advantage.[529] He argues that the Trial Chamber failed to assess properly whether the SRK actions were conducted in accordance with the principles of distinction and proportionality.[530] Further, Galić claims that the Trial Chamber, in reaching its determination of these issues, failed to consider: (1) "dual use" objects – objects used concurrently for civilian and military purposes;[531] (2) the possibility of artillery errors;[532] (3) the use of civilians as "human shields";[533] and (4) the position of the confrontation line.[534]

188. The Prosecution responds that Galić's arguments are "not proper submissions on appeal and must be dismissed *in limine*".[535] It contends that "aside from expressing general dissatisfaction with the Chamber's approach, [Galić] fails to specify which findings of the Chamber he alleges to be in error or to advance arguments in support of this contention [and does not] demonstrate that such alleged errors require the Appeals Chamber's corrective intervention".[536] However, should the Appeals Chamber consider the arguments raised by Galić, the Prosecution submits that "the [Trial] Chamber undertook, both in relation to each scheduled incident and more generally, a careful analysis of the possibility that the civilian victims in question were the unintended victims of combat" and that, in doing so, the Trial Chamber "satisfied itself that no reasonable possibility existed that the victim or victims could have been mistaken for combatants or unintentionally killed or injured by nearby fighting".[537] It also notes that the Trial Chamber declined to consider incidents where victims could have been killed or injured as a result of an incidental effect of warfare.[538] In

---

[527] Defence Notice of Appeal, para. 79.
[528] Defence Notice of Appeal, para. 81.
[529] Defence Appeal Brief, para. 142.
[530] Defence Appeal Brief, para. 144.
[531] Defence Appeal Brief, para. 145.
[532] Defence Appeal Brief, paras 148, 402; Defence Reply Brief, paras 105, 107.
[533] Defence Appeal Brief, paras 151-152, 156.
[534] Defence Appeal Brief, para. 155. Galić also refers at paragraphs 159-160 of the Defence Appeal Brief to the "recent war in Iraq" as "a clear indication that unfortunately it is absolutely impossible to avoid collateral damage when war is waged in urban theatres". He claims that the Trial Chamber should have considered his arguments in that respect. However, no such argument was brought before the Trial Chamber nor was any additional evidence admitted on appeal.
[535] Prosecution Response Brief, para. 12.2.
[536] Prosecution Response Brief, para. 12.4.
[537] Prosecution Response Brief, para. 12.5.
[538] Prosecution Response Brief, para. 12.6.

sum, the Prosecution submits that Galić's contention that the Trial Chamber did not properly consider the issue of collateral damage cannot be sustained.[539]

189. The Appeals Chamber notes that Galić did not refer to any specific finding of the Trial Judgement to support his argument and as a result did not meet his obligation to clearly set out his ground of appeal. The Appeals Chamber will therefore not engage in an assessment of each scheduled incident but will rather assess whether the Trial Chamber correctly understood its obligations in assessing the legality of the attacks and the evidence in respect thereof.

A. Assessment of the legality of the attacks

190. One of the fundamental principles of international humanitarian law is that civilians and civilian objects shall be spared as much as possible from the effects of hostilities. This principle stems from the principles of distinction and the principle of protection of the civilian population, "the cardinal principles contained in the text constituting the fabric of humanitarian law", constituting "intransgressible principles of international customary law".[540] According to the principle of distinction, warring parties must at all times distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives.[541] These principles establish an absolute prohibition on the targeting of civilians in customary international law[542] but do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality).

191. In Part II of the Trial Judgement (Applicable Law), the Trial Chamber considered that Article 51(2) of Additional Protocol I "states in a clear language that civilians and the civilian population as such should not be the object of attack", that this principle "does not mention any exceptions", and in particular that it "does not contemplate derogating from this rule by invoking military necessity."[543] It then held that Article 51(2) "explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities" and "stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants

---

[539] Prosecution Response Brief, para. 12.6.
[540] *Nuclear Weapons* Case, para. 78, cited in *Kordić and Čerkez* Appeal Judgement, para. 54.
[541] *Kordić and Čerkez* Appeal Judgement, para. 54.
[542] *Blaškić* Appeal Judgement, para. 109.
[543] Trial Judgement, para. 44.

and between civilian objects and military objectives and accordingly to direct their operations only against military objectives".[544] The Trial Chamber also considered that:

> [o]nce the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[545]

192. The Appeals Chamber is satisfied that the Trial Chamber correctly assessed the legality of the incidents.

B. Assessment of evidence in relation to those attacks

193. The Trial Chamber clearly explained the methodology it used to assess the legality of the attacks for the scheduled incidents and more generally. It held:

> [T]he Trial Chamber gave particular attention to questions of distance between the victim and the most probable source of fire; distance between the location where the victim was hit and the confrontation line; combat activity going on at the time and the location of the incident, as well as relevant nearby presence of military activities or facilities; appearance of the victim as to age, gender, clothing; the activity the victim could appear to be engaged in; visibility of the victim due to weather, unobstructed line of sight or daylight. The Trial Chamber was hence in a position to assess in each case, in accordance with the law set out in Part II of this Judgement and in fairness to the Accused, whether a scheduled incident is beyond reasonable doubt representative of the alleged campaign of sniping and shelling or whether it is reasonable to believe that the victim was hit by ABiH forces, by a stray bullet, or taken for a combatant.[546]

The Appeals Chamber finds that the approach of the Trial Chamber is indeed in accordance with its enunciation of the applicable law. Galić does not point to any specific finding of the Trial Chamber in which it departed from a correct application of the law applicable to the assessment of the legality of the attacks. To the contrary, for example, the Trial Chamber determined with regard to the attacks at Grbavica that there was no military activity in the vicinity.[547] For Scheduled Sniping Incident number 24, the attack of a tram near the Holiday Inn Hotel, the Trial Chamber determined that the tram "could not have been confused for a military objective",[548] and that there was neither

[544] Trial Judgement, para. 45.
[545] Trial Judgement, para. 58, citing Article 51(5)(b) of Additional Protocol I (footnote omitted).
[546] Trial Judgement, para. 188.
[547] Trial Judgement, paras 230-231.
[548] Trial Judgement, para. 255.

military activity nor military objectives in the area;[549] it thus concluded that "a civilian vehicle was deliberately targeted from SRK-controlled territory".[550]

194. With regard to Galić's arguments that the Trial Chamber ignored the issue of "dual use" objects, the Appeals Chamber notes that, for the attack on the front-end loader collecting garbage on Brace Ribara Street (Scheduled Sniping Incident 15), for example, the Trial Chamber considered the arguments of the Defence that this vehicle could have been used for a military purpose but rejected them based on the circumstances of the incident.[551] With respect to Galić's argument that the Trial Chamber failed to assess the possibility of artillery errors, the principles of protection, distinction and proportionality apply, and Galić does not point to any part of the Trial Judgement in which the Trial Chamber erred in applying those principles. With regard to his argument that the question of the use of civilians as "human shields" was not considered by the Trial Chamber, the Appeals Chamber underlines that the Trial Chamber noted the following:

> As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas [but] the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.[552]

Galić's argument is therefore without merit. With regard to his arguments pertaining to the alleged failure of the Trial Chamber to define the confrontation line and its depth, the Appeals Chamber notes that those arguments are merely repetitive of those made in his fourteenth ground of appeal and will accordingly be dealt with under that ground.

195. For the foregoing reasons, Galić's twelfth ground of appeal is dismissed.

[549] Trial Judgement, para. 256.
[550] Trial Judgement, para. 258.
[551] Trial Judgement, para. 274
[552] Trial Judgement, para. 61.

XIII. GROUND 14: DEFINITION OF TERMS

196. Under his fourteenth ground of appeal, Galić asserts that the Trial Chamber's definitions of the terms "campaign",[553] "sniping",[554] and "civilians"[555] are "erroneous". He complains that the Trial Chamber did not determine where legitimate military targets were situated in Sarajevo and "[w]hat is considered a civilian area in a large city, and what a military area"[556]. Galić argues that the Trial Chamber failed to engage in defining the terms "at a distance",[557] "shelling"[558] and "protest"[559]. Moreover, Galić contends that the Trial Chamber erred by failing to explicitly define the length and depth of the confrontation line.[560] He further asserts that the "Prosecution has failed to prove that […] any special sniper units were either organized and/or located along the entire front line".[561] The Prosecution responds that the Trial Chamber was not obliged to adopt the definitions proposed by Galić and that the definitions it adopted do not in any way prejudice him.[562] The Prosecution further asserts that Galić never "explain[s] how the Judgement is affected by"[563] the Trial Chamber's failure to define terms.

197. The Appeals Chamber understands Galić to challenge: (1) the failure of the Trial Chamber to define certain terms; and (2) the definition of certain terms provided by the Trial Chamber. As to these arguments, the Appeals Chamber sees no legal error in the Trial Chamber's findings. Galić has failed to meet his burden on appeal to demonstrate an error on the part of the Trial Chamber that invalidates the decision. He does not explain why a specific definition is required, or how the Trial Chamber erred by not providing a definition. Moreover, he fails to explain how these alleged errors would have changed the outcome of the Trial Judgement.

198. The Appeals Chamber further finds that the Trial Chamber did not err in failing to examine the location of additional legitimate military targets and in not determining the depth of the confrontation line at any specific point around the city. Galić does not explain how identifying other legitimate targets would undermine the Trial Chamber's conclusion – based on scheduled incidents

[553] According to Galić, the word campaign should be defined, in the military sense, as "to wage war". *See* Defence Appeal Brief, para. 166, fn. 106. The arguments he proffers, however, only outline those he makes under his fifteenth ground of appeal and will accordingly be dealt with below.
[554] According to Galić, the word sniping should be defined as an action from a weapon equipped with an optical sight. *See* Defence Appeal Brief, para. 168.
[555] Defence Appeal Brief, para. 186.
[556] Defence Appeal Brief, para. 191.
[557] Defence Appeal Brief, para. 169.
[558] Defence Appeal Brief, para. 176. Galić merely uses the same arguments as those he proffers under his eighteenth ground of appeal and they will accordingly be dealt with below.
[559] Defence Appeal Brief, para. 183. The arguments Galić proffers outline those he makes under his eighteenth ground of appeal and will accordingly be dealt with below.
[560] Defence Appeal Brief, para. 193.
[561] Defence Appeal Brief, para. 174; s*ee also* AT 97-98.
[562] Prosecution Response Brief, para. 14.2.

and other evidence, including evidence of statements made by SRK officers – that the SRK conducted a campaign of sniping and shelling not aimed at legitimate objectives. He also neglects to point to specific findings where the Trial Chamber's failure to define the terms "campaign", "sniping" and "civilians" led to error, nor does he show how this omission led to an incorrect finding about the intended target of a shell or bullet.

199. With regard to Galić's argument that the Trial Chamber lacked evidence of SRK sniper units along the front line, the Appeals Chamber notes that there are numerous examples in the Trial Judgement of evidence pointing to such units.[564]

200. For the foregoing reasons, Galić's fourteenth ground of appeal is dismissed.

---

[563] Prosecution Response Brief, para. 14.11.
[564] Trial Judgement, paras 236-240.

XIV. GROUND 15: ALLEGED ERRORS OF LAW AND FACT REGARDING THE EXISTENCE OF A CAMPAIGN

201. Under his fifteenth ground of appeal, Galić challenges the Trial Chamber's approach to the evaluation of evidence, particularly in relation to the finding of a campaign of attacks against civilians, arguing that it is contradictory and erroneous,[565] and challenges specific findings of fact "for every scheduled incident".[566]

A. Background on the Trial Chamber's findings regarding the existence of a campaign

202. The Indictment charged Galić with individual criminal responsibility pursuant to Article 7(1) of the Statute for "planning, instigating, ordering, committing, or otherwise aiding and abetting, in the planning, preparation or execution of *the campaign* of shelling and sniping against the civilian population of Sarajevo *and the acts set forth*" in two Schedules annexed to the Indictment ("Schedules").[567] As such, Galić was indicted for both specific incidents of shelling and sniping against civilians and for a campaign of shelling and sniping against civilians, and the trial proceeded on that understanding.[568]

203. In order to make findings on both the scheduled incidents and the campaign, the Trial Chamber first considered evidence related to the scheduled incidents and made factual determinations beyond a reasonable doubt regarding their criminality and Galić's responsibility. The Appeals Chamber has previously found this systematic approach, of making factual findings in relation to each incident contained in the schedules and underlying the crimes contained in the Indictment, to be an appropriate approach.[569] In this way, the Trial Chamber ensured that Galić knew that he had been found guilty of a crime in respect of the alleged scheduled incidents, in accordance with his right to a fair trial.

204. To reach a finding on the alleged campaign, the Trial Chamber deduced the definition of the term "campaign" from the Indictment and determined that, in the context of the Indictment, the term covered military actions in the area of Sarajevo during the Indictment period involving widespread and systematic shelling and sniping of civilians resulting in their death or injury.[570] For

[565] Defence Appeal Brief, paras 195-196.
[566] Defence Appeal Brief, para. 195.
[567] Indictment, para. 10 (emphasis added).
[568] Trial Judgement, paras 181-189.
[569] *See Kvočka et al.* Appeal Judgement, para. 73.
[570] Trial Judgement, para. 181.

the purposes of specificity of the Indictment, however, the Trial Chamber considered that the scheduled incidents "were representative of a campaign".[571]

205. The Trial Chamber considered that even if all scheduled incidents were proved, they would not amount to a campaign in the absence of further evidence, as the scheduled incidents did not establish a "'widespread' or 'systematic' manifestation of sniping and shelling of civilians".[572] The Trial Chamber considered that the scheduled incidents were "representative of a campaign"[573] but decided to examine evidence of unscheduled incidents and evidence regarding the general situation in Sarajevo in order to establish a pattern of conduct that equated with the alleged campaign.[574] After doing so, the Trial Chamber made no findings on Galić's criminality with respect to specific unscheduled incidents, but relied, *inter alia*, on evidence regarding those incidents to support factual findings on the campaign.

B. Alleged error in the evaluation of evidence

1. Arguments of the Parties

206. Galić alleges legal errors in the Trial Chamber's approach to finding the existence of a campaign. He argues that the Trial Chamber could only properly find the existence of a campaign by establishing individual criminal responsibility for a sufficient number of incidents proved beyond a reasonable doubt.[575] The Appeals Chamber understands Galić to make four claims related to the Trial Chamber's approach to proof of a campaign.

207. First, Galić asserts that "the scheduled incidents cannot serve as confirmation of the overall state of facts in Sarajevo"[576] because, in part, "the failure to prove so few incidents could only mean [...] that there was no campaign".[577] He submits that the trial "must be conducted solely on the basis of established facts, and never on the basis of allegations of [a] general nature about certain incidents".[578] He argues that the Trial Chamber erred by inferring the existence of a campaign from

[571] Trial Judgement, para. 208.
[572] Trial Judgement, para. 208.
[573] Trial Judgement, para. 208.
[574] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-PT, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considered as the Amended Indictment, 19 October 2001 ("Trial Decision on Indictment Schedules"), para. 23.
[575] Defence Appeal Brief, paras 196-199.
[576] Defence Appeal Brief, para. 206.
[577] Defence Reply Brief, para. 119.
[578] Defence Appeal Brief, para. 204.

events that were not each separately proved beyond a reasonable doubt to constitute criminal conduct.[579]

208. Second, Galić argues that the only conclusion that can be made from the scheduled incidents regarding the general situation is that no campaign existed.[580] In support of his argument, he claims that only one-third of the twenty-seven scheduled sniping incidents were proved beyond a reasonable doubt by a unanimous Trial Chamber and that as a result only these incidents could be used to draw conclusions on the existence of a campaign.[581]

209. Third, Galić contends that the Trial Chamber failed to give sufficient weight to evidence that supposedly negates other evidence relied upon by the Trial Chamber through application of the principle of *in dubio pro reo*.[582] He points to the following:

- "orders given not to open fire on civilians";[583]
- "the fact that the vast majority of the victims were men and soldiers";[584] and that according to the Prosecution the "ratio of the civilian victims (deaths) compared with the military ones is of more than 750%";[585]
- "if there were a campaign, one would have expected from '*an army characterized by the level of competence and professionalism ascribed to the SRK*' that a significantly higher number of victims would have been caused during this allegedly uninterrupted campaign";[586]
- "the fact that the main destructions occurred on the [confrontation line]";[587]
- "the fact […] that even if the Serbian [Neđarići] was nearly razed [to] the ground […] no Muslim settlement was ever destroyed to that extent";[588]
- "the fact that the Serbs wanted a demilitarisation of Sarajevo which was refused by the other belligerent party";[589]

[579] Defence Appeal Brief, paras 197, 204.
[580] Defence Reply Brief, paras 123-126.
[581] Defence Reply Brief, paras 123-124.
[582] Defence Reply Brief, para. 126.
[583] Defence Reply Brief, para. 126.
[584] Defence Reply Brief, para. 126; *see also* Defence Appeal Brief, paras 211, 217.
[585] Defence Appeal Brief, para. 217.
[586] Defence Reply Brief, para. 126.
[587] Defence Reply Brief, para. 126.
[588] Defence Reply Brief, para. 126.

- "the fact that the Serbs wilfully and freely handed over the airport to the UN forces in order to make the humanitarian assistance possible […] throughout the Indictment Period";[590]
- "the fact [that he] himself implemented the [total exclusion zone]";[591]
- "the fact that [the] number of [...] victims dropped significantly [under his command]";[592]
- "the fact that [he] tried to implement blue roads for the safety of the local population";[593]
- "the fact that the SRK did not open fire on the civilians used by the [ABiH] as human shields for the construction of military works".[594]

210. Fourth, Galić states that "no other incidents [were] discussed before the Trial Chamber in a manner guaranteeing the rights of the Accused and which would have led the [Trial] Chamber to a correct appraisal of evidence".[595] He claims that the Trial Chamber adopted "an erroneous and legally untenable stand that the scheduled incidents confirm the general situation in Sarajevo"[596] and that "[c]onclusions can not be drawn on the basis of a small number of examples leading to the finding [of] illegitimate conducts and actions."[597] His argument is that the Trial Chamber erred by relying on its findings regarding the scheduled incidents to make findings of fact about the general situation in Sarajevo, including the existence of the campaign.

211. In response to his first and second arguments, that a campaign could only be established by proving a sufficient number of incidents beyond a reasonable doubt, the Prosecution claims that Galić fails to acknowledge that the Trial Chamber in fact relied on a "voluminous" crime base made up of scheduled incidents, unscheduled incidents, and evidence of the general situation in Sarajevo.[598] It argues that the Trial Chamber relied upon "the *totality* of this evidence" to draw its conclusion.[599]

212. Further, the Prosecution argues that Galić has failed to demonstrate that the Trial Chamber's approach was unreasonable, and points out that the same argument was raised in his eleventh

[589] Defence Reply Brief, para. 126.
[590] Defence Reply Brief, para. 126.
[591] Defence Reply Brief, para. 126.
[592] Defence Reply Brief, para. 126.
[593] Defence Reply Brief, para. 126.
[594] Defence Reply Brief, para. 126.
[595] Defence Appeal Brief, para. 206.
[596] Defence Appeal Brief, para. 205.
[597] Defence Appeal Brief, para. 205.
[598] Prosecution Response Brief, para. 15.10.
[599] Prosecution Response Brief, para. 15.10.

ground of appeal.[600] Incorporating arguments from its response to his eleventh ground,[601] the Prosecution argues that the Trial Chamber did not arrive at factual conclusions by first accepting evidence of generalisations and subsequently making determinations regarding particular incidents.[602] Rather, the Trial Chamber found that the Schedules served the procedural requirement of giving proper notice to Galić, recognised that the Schedules "should not be understood as reducing the Prosecution's case to the scheduled incidents",[603] and "considered the evidence of the scheduled incidents alongside more general evidence, and evidence of unscheduled incidents".[604] Without discussing how or providing precise citations, the Prosecution suggests that the approaches taken in the post-World War II *Belsen* Trial and *Dachau* Trial are similar to the present case.[605]

213. The Prosecution argues that the Trial Chamber considered the scheduled incidents "within a more general evidentiary context, *reflecting how the great number of witnesses in the case understood and explained them*".[606] It also says that it provided particulars of the evidence regarding unscheduled incidents in Rule 65*ter* summaries before the evidence was adduced at trial.[607] It claims that the Trial Chamber's approach was entirely consistent with the use of evidence of unscheduled incidents as evidence corroborating a consistent pattern of conduct.[608] As such, evidence of unscheduled incidents and of the general situation in Sarajevo was used as both evidence of context and to corroborate a consistent pattern of conduct.[609]

214. In response to the list of evidence that Galić argues the Trial Chamber insufficiently considered, the Prosecution submits the following:

- Regarding orders allegedly given by Galić not to target civilians, "[t]here was no evidence that there were intercepts available to the Prosecution of any orders, or other oral communication […] given within the SRK in the indictment period".[610]

- Regarding the claim that the main destruction occurred along the confrontation line, the Trial Chamber noted that the "Defence repeatedly proposed to witnesses who served the UN

---

[600] Prosecution Response Brief, para. 15.2 (relying on the Prosecution's response to Galić's eleventh ground of appeal). *See* Defence Appeal Brief, paras 117-118 (challenging the Trial Chamber's alleged method of fact finding "from the general to the particular" and not from "the particular to the general"); *ibid.*, paras 124-126 (challenging the Trial Chamber's ability to support findings of fact with evidence from unproved unscheduled incidents).
[601] Prosecution Response Brief, para. 15.2
[602] Prosecution Response Brief, para. 11.4.
[603] Prosecution Response Brief, para. 15.3, quoting Trial Judgement, para. 188.
[604] Prosecution Response Brief, para. 11.4.
[605] Prosecution Response Brief, para. 15.10.
[606] Prosecution Response Brief, para. 15.6, quoting Trial Judgement, para. 189.
[607] *See* Prosecution Response Brief, para. 15.5.
[608] Prosecution Response Brief, para. 15.6.
[609] Prosecution Response Brief, para. 15.7.
[610] Prosecution Response Brief, para. 15.19.

in Sarajevo that the physical damage was greater on the front line than in the city, implying that the casualties inflicted in the city were unintentional. The Trial Record shows however that there was more shelling going *into* the city and that civilians, and the civilian population as such, in ABiH-held areas of Sarajevo were targeted from SRK controlled territory".[611]

- The ratio of civilian deaths to military deaths during the Indictment period is not 750% as stated by Galić. Rather, according to the Prosecution expert witness Ewa Tabeau, during that period 3,798 persons were killed, of whom 1,399 were civilians, equalling a ratio of civilian to military fatalities of 36.8% and of military to civilian fatalities of 171%.[612]

- The handover of Sarajevo airport happened prior to Galić's command, "therefore he is in no position to take credit for that decision", and the Trial Chamber found that "the episodes of indiscriminate firing against people crossing the runway relevant to establishing that indiscriminate fire against civilians by SRK forces was an accepted and known fact".[613]

- Regarding the alleged decline in civilian casualties during Galić's command, the Trial Chamber considered that the average number of civilian casualties fell during that period.[614] The Trial Chamber noted that this was in part the result of measures "taken to minimise the exposure of civilians to the sniping and shelling, such as the erection of anti-sniping barricades, the development of alternative and safer pedestrian routes, shifting the distribution points of humanitarian aid, closing and moving schools, and the holding of funerals at night".[615] Nonetheless, the Trial Chamber found that civilians remained unsafe.[616] Additionally, the low monthly figure for 1994 reflects a dramatic cessation in attacks for at least several weeks after the Markale market incident of 5 February 1994.[617]

- Regarding the "blue roads" claimed to have been supported by Galić, some routes for civilian travel were established after the Markale market incident, but "targeting of civilians continued during this phase".[618]

215. In response to Galić's fourth argument, the Prosecution points to the Trial Chamber's explanation that "evidence which demonstrates whether the alleged scheduled incidents, if proved

[611] Prosecution Response Brief, para. 15.46, quoting Trial Judgement, para. 209.
[612] Prosecution Response Brief, para. 15.34.
[613] Prosecution Response Brief, para. 15.27, quoting Trial Judgement, para. 416.
[614] Prosecution Response Brief, para. 15.21.
[615] Prosecution Response Brief, para. 15.22.
[616] Prosecution Response Brief, para. 15.22.
[617] Prosecution Response Brief, para. 15.23.
[618] Prosecution Response Brief, para. 15.26.

attacks, were not isolated incidents but representative of a campaign of sniping and shelling as alleged by the Prosecution is examined with no less due attention”.[619]

2. Discussion

(a) Alleged failure to prove the material facts of a campaign beyond a reasonable doubt

216. Galić contends that the Trial Chamber failed to properly establish the crime underlying the charges of criminal responsibility for a campaign. He takes issue with the Trial Chamber’s use of general evidence about the situation in Sarajevo and evidence regarding unscheduled incidents of sniping and shelling, in combination with evidence of the scheduled incidents. He argues that the Trial Chamber erred by failing to establish beyond a reasonable doubt a sufficient number of incidents to constitute a campaign, and thus had an insufficient factual basis for finding beyond a reasonable doubt that he was criminally responsible for the campaign.[620]

217. The Trial Chamber’s approach to finding the existence of a campaign, however, is well-grounded in the International Tribunal’s jurisprudence and practice. First, the Trial Chamber located in the Indictment the elements of the offence of a campaign of shelling and sniping attacks against civilians. The Trial Chamber determined those elements to be the widespread or systematic shelling and sniping of civilians resulting in their death or injury.[621] Next, the Trial Chamber examined voluminous evidence presented at trial by the Prosecution in an attempt to prove the elements of the offence.[622] The Trial Chamber permissibly considered direct and circumstantial evidence going towards proving the material facts. Finally, the Trial Chamber made permissible findings on the material facts, and then concluded that the only reasonable explanation was that there was a campaign to attack civilians.[623]

218. Galić appears to be particularly troubled by the Trial Chamber’s reliance on direct and indirect evidence regarding unscheduled incidents, which it then used as circumstantial evidence going to prove the existence of a campaign. But, there is nothing intrinsically erroneous about a criminal case being established through proof by circumstantial evidence,[624] and it is well grounded

[619] Prosecution Response Brief, para. 15.9, quoting Trial Judgement, para. 208.
[620] Defence Appeal Brief, paras 196-199.
[621] Trial Judgement, para. 181.
[622] *See infra* para. 221.
[623] Trial Judgement, paras 582-594.
[624] *Kupreškić et al.* Appeal Judgement, para. 303: “The Appeals Chamber first notes that there is nothing to prevent a conviction being based upon [circumstantial] evidence. Circumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt.” *See also Stakić* Appeal Judgement, para. 219.

in the International Tribunal's practice.[625] A circumstantial case consists of "evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him".[626] Contrary to Galić's suggestion that the trial should be "conducted solely on the basis of established facts",[627] each piece of circumstantial evidence need not be, nor rarely is, proved beyond a reasonable doubt since that would involve trials within trials, *ad infinitum*. Instead, the accused's rights are protected by requiring that findings at trial based on circumstantial evidence must be the only reasonable conclusions available from that evidence.[628] If there is another conclusion which is also reasonably open from the circumstantial evidence, and which is consistent with the innocence of the accused, he must be acquitted.[629]

219. This approach has been supported by the Appeals Chamber. A three-judge bench of the Appeals Chamber affirmed that the scheduled incidents served the procedural requirement of proper notice of a campaign.[630] The Trial Chamber proposed that evidence regarding additional, unscheduled incidents could be introduced at trial pursuant to Rule 93 of the Rules in order to prove a consistent pattern of conduct relevant to the charges in the Indictment, including a campaign.[631] Use of this type of evidence has been endorsed by the Appeals Chamber in other cases.[632] In sum, the Trial Chamber properly used evidence regarding unscheduled incidents and the general situation in Sarajevo to support conclusions on the existence of a pattern of conduct: the campaign of shelling and sniping attacks against civilians.

(b) Alleged error in consideration of evidence

220. Galić provides a list of evidence to be considered in light of the maxim *in dubio pro reo*, which he describes as "facts" that should have been considered by the Trial Chamber to introduce reasonable doubt as to the existence of a campaign. This evidence is listed in the Defence Appeal Brief and Defence Reply Brief without further argument as to how the Trial Chamber may have accorded it insufficient weight. As stated earlier in this Judgement, the Appeals Chamber gives a

---

[625] *See, e.g.*, *Kordić and Čerkez* Appeal Judgement, para. 276 (circumstantial evidence can be corroborative); *Blaškić* Appeal Judgement, para. 56 (leaving intact the Trial Chamber's use of circumstantial evidence to establish superior knowledge); *Krstić* Appeal Judgement, para. 83 (approving trial approach based on circumstantial evidence).
[626] *Čelebići* Appeal Judgement, para. 458.
[627] Defence Appeal Brief, para. 204.
[628] *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.
[629] *Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.
[630] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("Appeal Decision on Indictment Schedules"). para. 16.
[631] *Galić* Trial Decision on Indictment Schedules, para. 23.
[632] *See, e.g.*, *Kvočka et al.* Appeal Judgement, para. 71; *Kupreškić et al.* Appeal Judgement, para. 321 (comparing Rule 93 evidence with similar fact evidence in common law legal systems).

broad margin of deference to findings of fact reached by a Trial Chamber.[633] The Appeals Chamber can see no reason why it should simply substitute evidence preferred by Galić for that accepted by the Trial Chamber. Galić was required to demonstrate that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous.[634] Since he has not made this argument, this part of his ground of appeal is dismissed.

(c) Alleged error in drawing conclusions on the existence of a campaign from scheduled incidents

221. Galić does not point to any specific findings of fact reached in error by the Trial Chamber, but alleges error in its ultimate finding of the existence of the campaign. The Appeals Chamber is satisfied that, in finding Galić criminally responsible for the campaign, the Trial Chamber considered a large body of evidence which formed a sufficient basis for the Trial Chamber to reach a factual finding on the existence of the alleged campaign.[635]

222. In examining the situation in Sarajevo, the Trial Chamber made clear that its findings were not based solely on the evidence adduced relating to the scheduled incidents.[636] It noted that the scheduled incidents served the purpose of providing specificity of pleading so that Galić was notified of the nature of the case he had to meet,[637] and thus, in the context of the Indictment, the scheduled incidents were "representative" of the campaign.[638]

---

[633] *Kupreškić et al.* Appeal Judgement, para. 30.
[634] *Stakić* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 41.
[635] *See* Trial Judgement, paras 210-225 (general evidence of sniping and shelling civilians in urban ABiH-held areas of Sarajevo); *ibid.*, paras 226-246 (evidence of sniping and shelling civilians in general Grbavica area); *ibid.*, paras 259-266 (evidence of sniping and shelling civilians in Hrasno area); *ibid.*, para. 290 (evidence of sniping and shelling civilians in Alipašino Polje area); *ibid.*, paras 291-297 (evidence of sniping and shelling civilians from Neđarići and the School for the Blind); *ibid.*, paras 347-351 (evidence of sniping and shelling civilians from the Orthodox Church and School of Theology); *ibid.*, paras 368-371 (evidence of shelling civilians in Dobrinja area); *ibid.*, paras 411-416 (evidence regarding the situation at Sarajevo airport); *ibid.*, paras 417-420 (evidence of sniping and shelling civilians in Briješko Brdo area); *ibid.*, paras 434-437 (evidence of indiscriminate shelling in Stari Grad); *ibid.*, para. 510 (evidence of sniping and shelling civilians in Sedrenik area); *ibid.*, paras 511-514, 524-526 (evidence of sniping and shelling civilians from Špicasta Stijena); *ibid.*, paras 527-531 (evidence of sniping and shelling civilians in the Širokača area); *ibid.*, paras 544-546 (evidence of sniping and shelling civilians in the Vogošća area); *ibid.*, paras 558-560 (evidence of sniping and shelling civilians in Kobilja Glava); *ibid.*, paras 561-563 (evidence about the pattern of fire into ABiH-held territory); *ibid.*, paras 578-581 (evidence regarding the number of civilians killed in Sarajevo during the Indictment period).
[636] Trial Judgement, para. 188 (stating that the Schedules "should not be understood as reducing the Prosecution's case to the scheduled incidents, and the trial was not conducted on that understanding").
[637] Trial Decision on Indictment Schedules, paras 3, 15-17 (noting that the Indictment charged a campaign, holding that as part of the Prosecution's obligation to plead the material facts of the charges in the Indictment, "the Prosecution was bound to provide details about some of the sniping and shelling incidents in the Indictment, [but] it was under no obligation to list all of the specific incidents"). *See also* Appeal Decision on Indictment Schedules, para. 16 (finding that it was unnecessary to plead as material facts all the details in the schedules, but that the schedules served the purpose of providing "specificity of pleading" and thus adequate notice to Galić of the nature of the case he had to meet).
[638] Trial Judgement, paras 188-189; *see* Indictment, para. 15.

223. Although some confusion may result from the Trial Chamber's phrasing that it was determining whether incidents "exemplif[ied] the overall situation in Sarajevo"[639], were "representative of"[640], or "exemplary of"[641] the campaign, a review of the Trial Judgement clearly indicates that the Trial Chamber's approach is better understood as an assessment of whether the incidents were *part of* the campaign. Because Galić fails to point to any specific findings that were insufficiently supported by corroborating evidence, and the Trial Judgement is replete with factual findings based on a substantial volume of corroborating evidence, the Appeals Chamber declines to engage in an exhaustive, undirected review of the Trial Judgement.

3. Conclusion

224. The Appeals Chamber finds no error in the Trial Chamber's approach to finding the existence of a campaign. First, the Appeals Chamber accepts the Trial Chamber's definition of "campaign",[642] and the elements of the offence. Second, the Appeals Chamber finds no error in the Trial Chamber's holding that the scheduled incidents proved at trial do not, in themselves, constitute a campaign, as it is understood in the context of the Indictment,[643] but that the proof of a campaign could be established by adducing a large body of additional direct and indirect evidence to build a circumstantial case regarding the campaign.

C. Alleged error of law

225. Galić disputes the Trial Chamber's conclusions on 12 of the 23 scheduled sniping incidents and three of the five shelling incidents, arguing that they could not have been proved beyond a reasonable doubt when the dissent expresses such reasonable doubt.[644] The Prosecution does not respond to this argument.

226. The Appeals Chamber understands Galić to argue that the Trial Chamber could not have been satisfied of his guilt beyond reasonable doubt because one of its Judges was not himself satisfied of Galić's guilt beyond reasonable doubt. However, the presence of a dissenting opinion on questions of fact does not negate the validity of a trial judgement since verdicts at trial need only to be reached by a majority of the Trial Chamber.[645]

---

[639] Trial Judgement, para. 188.
[640] *See, e.g.*, Trial Judgement, paras 416, 420, 437, 514, 557, 558.
[641] *See, e.g.*, Trial Judgement, paras 302, 309, and 327.
[642] *See* Trial Judgement, para. 181.
[643] *See* Trial Judgement, para. 208.
[644] Defence Appeal Brief, paras 214, 215.
[645] Rule 98*ter*(C) of the Rules (stating in relevant part that "[t]he judgement shall be rendered by a majority of the Judges").

227. By merely pointing to the existence of a dissenting opinion, Galić fails to meet his burden on appeal because he has not demonstrated the unreasonableness of the majority's assessment of the evidence. Consequently, the Appeals Chamber dismisses this part of Galić's ground of appeal.

D. Alleged errors of fact

228. In the remainder of his fifteenth ground of appeal, Galić submits numerous allegations of factual error in the Trial Judgement. His submissions are summarised and discussed below. However, for the most part they consist of bare assertions that are dismissed without substantial reasoning as they do not meet the requirements for appeal.[646]

1. Alleged failure to prove the "widespread" nature of the attacks.

229. Galić states that the Prosecution "failed to prove that the incidents were widespread".[647] He argues that the "[u]nscheduled incidents which [were] only mentioned, have not been proved and cannot serve as confirmation of the existence of a 'widespread' campaign".[648] He also separately states that the Prosecution failed to prove the existence of a plan.[649] The Prosecution does not respond to this argument.

230. The Trial Chamber considered a campaign to be "military actions in the area of Sarajevo during the Indictment period involving *widespread or systematic* shelling and sniping of civilians resulting in their death or injury".[650] Accordingly, the widespread or systematic nature of the military actions constitutes an element of the campaign. This element could not be proved by the scheduled incidents alone because, as the Trial Chamber noted, the 24 scheduled sniping and five scheduled shelling incidents, spread out over two years, could not "represent a convincing widespread or systematic manifestation of sniping and shelling of civilians".[651] As noted above, the Trial Chamber therefore examined additional evidence regarding unscheduled incidents, and general evidence regarding the situation in Sarajevo in order to determine whether together these incidents amounted to a campaign.[652]

231. In this part of his ground of appeal, Galić reiterates his previous argument that the Trial Chamber erred by finding the existence of a campaign partly on the basis of evidence regarding the unscheduled incidents. Here, the argument is simply that the Trial Chamber erred by finding an

---

[646] *Naletilić and Martinović* Appeal Judgement, paras 176, 181, 282, 327, and 511.
[647] Defence Appeal Brief, para. 200.
[648] Defence Appeal Brief, para. 200.
[649] Defence Appeal Brief, para. 215.
[650] Trial Judgement, para. 181 (emphasis added).
[651] Trial Judgement, para. 208.
[652] Trial Judgement, para. 208.

element of a campaign (the widespread nature of attacks) partly on the basis of that evidence. As discussed above, the Appeals Chamber finds no error in the Trial Chamber's approach to proving the existence of a campaign through the use of this evidence.[653] Accordingly, this part of Galić's ground of appeal is dismissed.

2. Alleged errors in the application of the principles of distinction and proportionality

(a) Submissions of the Parties

232. Galić argues that the Trial Chamber erred by failing to consider several factors relevant to the determination that attacks resulting in civilian casualties violated the principles of distinction and proportionality. He submits that "the Trial Chamber (or the Majority) should have paid […] specific attention to the real difficulties [of urban warfare]", which gave rise to the "pivotal issue of […] collateral damage".[654] He further argues that, before determining whether specific incidents constituted an indiscriminate shelling against civilians, the Trial Chamber needed to determine the precise location of all ABiH military locations,[655] and that the Trial Chamber failed to determine "whether an apparently indiscriminate or illicit shelling was linked or not to other events like the presence of mobile mortars, troops, the presence of other military or strategic objective[s]".[656]

233. Galić points to additional factors that he believes support his claim that the Trial Chamber erred in its application of the principles of distinction and proportionality:

- Galić claims there was "overabundant evidence according to which many [ABiH military targets] were spread all over Sarajevo", and that this fact was "never fairly considered" by the Trial Chamber.[657]

- Relatedly, Galić claims that many witnesses were unaware of the location of ABiH military targets and therefore were incapable of testifying to the civilians targeted or indiscriminate nature of sniping and shelling incidents.[658]

- Galić refers to two maps "tendered [into] evidence" that establish the "presence of military – therefore legitimate – targets in Sarajevo" and the "so-called security zone or danger-radius" around those targets.[659]

[653] *See supra* paras 217-224.
[654] Defence Appeal Brief, para. 207.
[655] Defence Appeal Brief, para. 240.
[656] Defence Appeal Brief, para. 227.
[657] Defence Reply Brief, para. 121.
[658] Defence Reply Brief, para. 121.

- Galić repeatedly points to the "situation of Bistrik – the Old Brewery – [as] a good example" of an incident that appeared to be civilian targeting, but which he contends was a legitimate military target because "the ABiH had a repair and production workshop for their weapons in the complex".[660] He argues that "[b]asically, the same is true for the whole theatre of Sarajevo".[661]

234. The Prosecution responds that it would not matter if the city was replete with military targets since it would not make them legitimate in all circumstances.[662] Instead, the Prosecution suggests that the Trial Chamber must examine the evidence of each specific incident, whether scheduled or unscheduled, in order to determine whether the principles of distinction and proportionality were respected. It argues that Defence Witness Radinović, preparer of the map of ABiH military targets in Sarajevo (D1913), did not determine whether attacking the military targets on that map would have violated the principles of distinction or proportionality.[663] The Prosecution further argues that map D1913 was demonstrated to be unreliable by comparing tendered source documents with numbered positions marked on the map. The Prosecution provides a list of numbered positions it argues demonstrate error[664] and render the map without "value in determining the issues of fact in the trial".[665] With regard to Galić's arguments that the weapons used increased the likelihood of collateral damage because they were error-prone, the Prosecution rebuts that this fails to "explain how such errors could be acceptable in the context of international humanitarian law when these problems are known in advance".[666] Further, it contests the claim that error could account for the high frequency of civilian casualties, particularly for incidents the Trial Chamber found to be a result of deliberate targeting.[667]

(b) Discussion

235. In this part of his ground of appeal, Galić fails to specify which findings of the Trial Chamber he alleges to be in error. Rather than challenging specific findings, and demonstrating how the Trial Chamber's failure to properly consider the principles of distinction and proportionality make its finding one that no reasonable trier of fact could make, he essentially argues that these factors were "never really examined by the Trial Chamber".[668] In fact, this

[659] Defence Appeal Brief, para. 209, referring to D1913, prepared by Defence Witness Radinović.
[660] Defence Reply Brief, para. 121.
[661] Defence Reply Brief, para. 122.
[662] Prosecution Response Brief, para. 15.15.
[663] Prosecution Response Brief, para. 15.15.
[664] Prosecution Response Brief, para. 15.16.
[665] Prosecution Response Brief, para. 15.17.
[666] Prosecution Response Brief, para. 15.13.
[667] Prosecution Response Brief, para. 15.13.
[668] Defence Appeal Brief, para. 207.

statement is inaccurate. For each of the scheduled incidents, the Trial Chamber carefully considered whether the civilian victims were the unintended victims of combat, and only reached a conclusion on the deliberateness of sniper targeting or the indiscriminate nature of shelling after determining that no reasonable possibility existed that the victims were mistaken for combatants or were unintentionally harmed by combat in their vicinity.

236. The Appeals Chamber need not further examine the merits of Galić's arguments regarding distinction and proportionality in detail in this ground of appeal because they fail to meet the above-mentioned requirements on appeal, and largely reiterate arguments made in his twelfth ground of appeal.

3. Alleged failure to prove that Galić ordered a campaign of shelling and sniping against civilians

(a) The Trial Chamber's findings

237. The Trial Chamber found that Galić ordered the campaign of shelling and sniping against civilians.[669] It based its conclusion on the following findings of fact:

- The pattern of shelling and sniping against civilians in Sarajevo[670] revealed a "strikingly similar pattern";[671] the temporal and spatial pattern indicated it was ordered by the SRK chain of command[672] and relayed down the chain of command,[673] leading the Trial Chamber to conclude that the criminal acts were not solely the result of "sporadic acts of soldiers out of control", but constituted a "deliberate campaign of attacking civilians".[674]

- Testimony related to the speed of implementation of cease-fire agreements that indicated to high-ranking UN personnel that the SRK command had "total and absolute control" over their subordinates,[675] that the Bosnian Serb troops positioned around Sarajevo were under Galić's command,[676] that he had actual knowledge of their criminal conduct which he

[669] Trial Judgement, paras 733-753.
[670] Trial Judgement, paras 733-734.
[671] Trial Judgement, para. 741.
[672] Trial Judgement, paras 736-737.
[673] Trial Judgement, para. 738.
[674] Trial Judgement, para. 741.
[675] Trial Judgement, para. 734 (citing testimony of General Michael Rose, commander of UNPROFOR in Bosnia-Herzegovina from February 1993 to January 1994, and testimony of James Fraser, an UNPROFOR representative in Sarajevo from April 1994 onwards).
[676] Trial Judgement, para. 742.

neither prevented nor punished,[677] and that the "widespread and notorious attacks against the civilian population of Sarajevo could not have occurred without it being [his] will".[678]

- Testimony that sniping of civilians increased when Serb military demands were not met, indicated to the Trial Chamber that orders to resume or increase sniper fire were given.[679]

(b) Alleged failure to provide direct evidence of Galić's orders

238. Galić claims that the Prosecution's failure to produce direct evidence of orders to attack civilians demonstrates that none was given, particularly in light of the volume of "intercepted communications" to which Galić claims the Prosecution had access.[680] The Prosecution responds that there "was no evidence that there were intercepts available to the Prosecution of any orders, or other oral communication […], given within the SRK in the indictment period".[681]

239. The Appeals Chamber notes that this argument was advanced at trial, and the Trial Chamber determined that an order need not be in a particular form, that evidence established that oral orders were issued on a daily basis by Galić or the SRK chain of command, and ultimately that the Prosecution's burden of proof was established by circumstantial evidence of his knowledge of the crimes committed by his forces, the high degree of discipline he had over his subordinates, and his failure to act upon his knowledge of the commission of crimes.[682]

240. The Appeals Chamber is not satisfied that no reasonable trier of fact could have reached the Trial Chamber's conclusion and therefore dismisses the argument.

(c) Alleged response to protests

241. Galić claims that he responded to protests regarding civilian casualties that were "effectively delivered" to him and were shown to be caused by his Serb forces.[683]

242. The Appeals Chamber notes that the Trial Chamber determined that Galić was put on notice of the criminal activity of his subordinates by protests delivered to him by UN personnel[684] and that he largely failed to respond.[685] In the course of reaching this determination, the Trial Chamber

---

[677] Trial Judgement, para. 742.
[678] Trial Judgement, para. 742.
[679] Trial Judgement, para. 735 (citing testimony of General Van Baal, UNPROFOR Chief of Staff in Bosnia-Herzegovina in 1994).
[680] Defence Appeal Brief, para. 210.
[681] Prosecution Response Brief, para. 15.19.
[682] Trial Judgement, paras 739-741.
[683] Defence Appeal Brief, para. 212 (citing Witness Hamill, T. 6067, and Witness Magnusson, T. 8133-34).
[684] Trial Judgement, paras 667-675 (discussing protests delivered in person to Galić).
[685] Trial Judgement, paras 676-684 (discussing Galić's response to protests delivered directly to him).

received "consistent evidence that a considerable number of knowledgeable United Nations' representatives and other intermediaries" protested against indiscriminate firing on civilians to Galić directly.[686] The Trial Chamber found that his response to these protests was "varied",[687] and considered the testimony from at least seven witnesses regarding his response to the protests in reaching its conclusion that he failed to prevent or punish the criminal conduct of his subordinates.[688]

243. The Appeals Chamber finds that Galić has failed to establish how the Trial Chamber erred in its reasoning and dismissses this part of his ground of appeal.

(d) Alleged evidence that Galić ordered subordinates not to target civilians

244. Galić points to the testimony of Witness AD, an SRK section commander in a mortar unit posted on the so-called external ring of the confrontation lines, stating that he was repeatedly ordered by his commander to target civilians.[689] Galić points to several aspects of the testimony as exculpatory. According to him, the fact that Witness AD knew the orders were illegal and protested against them demonstrates that he was instructed or informed not to fire on civilians.[690] Further, the fact that Witness AD either did not execute the orders or did so in such a way that no civilian casualties resulted, demonstrates that the instruction not to fire on civilians was not merely *pro forma*.[691] He also claims that the fact that Witness AD was not punished for his failure to obey the order demonstrates that his commander did not report the incident up the chain of command because he knew he would be punished for giving the order.[692] The Prosecution responds that the "powerful and direct" testimony of Witness AD demonstrated that his Brigade Commander directly ordered him to target civilians,[693] and although Witness AD could not say that the orders emanated from Galić, the Trial Chamber nonetheless found that evidence from Witness AD supported the conclusion that oral orders passing down through the SRK chain of command were not unusual.[694]

245. The Appeals Chamber finds that whereas Galić claims that his line of reasoning in this argument involves "simple factual deductions",[695] it in fact concerns interpretive inferences drawn from the witness testimony. Although Galić may prefer his interpretation of the witness's testimony

---

[686] Trial Judgement, para. 667; *see ibid.*, paras 667-675.
[687] Trial Judgement, para. 676.
[688] *See* Trial Judgement, paras 676-684 and 722.
[689] The Trial Chamber noted that "Witness AD, an SRK soldier, testified that the Commander of the Ilijas Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo." Trial Judgement, para. 219.
[690] Defence Appeal Brief, para. 228.
[691] Defence Appeal Brief, para. 228, citing Trial Judgement, para. 717.
[692] Defence Appeal Brief, para. 228.
[693] Prosecution Response Brief, para. 15.132.
[694] Prosecution Response Brief, para. 15.133, citing Trial Judgement, para. 740.

to that of the Trial Chamber, the Appeals Chamber will not lightly substitute his view for the Trial Chamber's findings without a demonstration that no reasonable trier of fact could have reached the conclusion reached by the Trial Chamber. Objections will be dismissed without detailed reasoning where an appellant unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber.[696] Accordingly, this part of Galić's ground of appeal is dismissed.

E. Alleged errors in evaluation of witness testimony

246. In the remainder of Galić's fifteenth ground of appeal, he disputes the interpretations of the testimony of 14 witnesses, arguing that the testimony of these witnesses was "simply misstated by the Trial Chamber" and therefore the "trial was not conducted in a fair and true manner".[697] Galić's substantial submissions in this part of his fifteenth ground of appeal are almost entirely redundant with those advanced in his seventeenth ground of appeal. Further, they suffer from such substantial defects in form that their consideration on the merits is either impossible or not required. Accordingly, these arguments are dismissed without analysis because they fail to meet the formal requirements of an appeal, and frequently merely propose to substitute Galić's interpretation of testimony for the Trial Chamber's. Moreover, these arguments were each advanced at trial, and are dismissed here because Galić fails to demonstrate that rejecting them at trial constituted such error as to warrant the intervention of the Appeals Chamber.[698] Accordingly, this part of Galić's ground of appeal is dismissed.

247. For the foregoing reasons, the Appeals Chamber dismisses Galić's fifteenth ground of appeal.

---

[695] Defence Appeal Brief, para. 229.
[696] *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, para. 48.
[697] Defence Appeal Brief, para. 223.
[698] *See Kordić and Čerkez* Appeal Judgement, para. 21.

XV. GROUND 17: ALLEGED ERRORS CONCERNING SNIPING AND SHELLING INCIDENTS

248. In his seventeenth ground of appeal, Galić alleges various erroneous factual findings and evaluations of evidence with regard to the Trial Chamber's findings related to the alleged campaign of sniping and shelling against the civilian inhabitants of Sarajevo.[699]

249. With two exceptions, it would not be useful to go through this ground incident by incident, as Galić did not present allegations that would lead the Appeals Chamber to consider reversing or revising the Trial Chamber's findings. The Appeals Chamber will demonstrate, by looking at the allegations categorically, why these allegations do not meet the test for overturning findings of fact. However, the Appeals Chamber will inquire separately into the Trial Chamber's findings with regard to the attacks on the Markale Market[700] and the Koševo Hospital.[701]

250. Further, a large number of Galić's arguments on appeal, especially in this ground, have been made in the footnotes to the main text. In light of the great length granted to Galić for his appeal,[702] there is no reason why all substantive arguments could not have been expressed in the main text, with the footnotes used for citation and clarification only. The Appeals Chamber ruled in *Prosecutor v. Kordić and Ćerkez* that grounds of appeal must be dealt with in the main text, not the footnotes.[703] Therefore, where a new argument is made in a footnote, the Appeals Chamber will ordinarily not address that argument. For similar reasons, the Appeals Chamber will not look at the Defence Notice of Appeal or at Judge Nieto-Navia's Dissent when Galić tries to incorporate arguments by reference to them; the arguments should have been made in the appeal.

251. Some of Galić's allegations raised under this ground of appeal allege legal errors rather than factual errors. In this section, the Appeals Chamber will identify the alleged legal errors and indicate in which section of the Appeal Judgement they are addressed. It will then investigate Galić's allegations of factual error category by category, describe each category in detail, explain

[699] *See* Defence Appeal Brief, paras 252-483.
[700] *See* Trial Judgement, paras 438-496.
[701] *See* Trial Judgement, paras 497-509.
[702] *See Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p.3 (granting an extension of the allowable page limit from 100 to 145 pages). Indeed, based on a word count, the appeal is twice as long as the standard. Under the Practice Direction in force at the time Galić filed his appeal, an appeal from a final judgement could not exceed 100 pages or 30,000 words, whichever was greater. *See* Practice Direction on the Lengths of Briefs and Motions, IT/184/Rev.1, 5 March 2002, para. (C)(1)(a). The appeal is 69,516 words long (*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on "Urgent Prosecution Motion for an Order Requiring the Appellant to Re-File His Appeal Brief and Request for Leave to Exceed Word-Limit for Motion", 2 September 2004, p. 2).
[703] *See Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Order to File Amended Grounds of Appeal, 18 February 2002, p. 3.

what the Appeals Chamber's responsibility is with regard to each type of allegation, and address each type of allegation accordingly.

252. The Appeals Chamber wishes to emphasise that it is not conducting a new trial. The Appeals Chamber does not hear as many witnesses or consider as many exhibits as a Trial Chamber; indeed, it may consult very few. Therefore, it lacks the Trial Chamber's competence to decide most matters of fact. The difference is especially acute in a case like this, where evidence in the form of exhibits, pictures, video, scientific tables and technical expertise have been so important. Therefore, the Appeals Chamber will only overturn factual findings of the Trial Chamber if the Appeals Chamber is convinced that no reasonable trier of fact, having regard to all the evidence that was presented to it and that it should have considered, could have come to the same conclusion.

A. Preliminary issue

253. Galić alleges several errors of law in this ground of appeal. As stated above, these alleged errors are listed here, but are in general more fully addressed in those parts of the Appeal Judgement dealing with errors of law.

254. The allegations of legal errors include:

a. The existence of fighting on both sides precludes the finding that Galić intended to target civilians or spread terror.[704]

b. A shooter must have either actually known or been able to determine that the target was a civilian for a crime to have been committed.[705]

c. Armies firing at an apartment block in a residential area "as soon as something moves" at night are not unlawfully targeting civilians.[706]

d. The intent to target civilians cannot be proved based on inferences from circumstantial evidence.[707]

---

[704] Defence Appeal Brief, paras 258, 316. *See supra* para. 190 (there is an absolute prohibition against targeting civilians, regardless of the fact that there is fighting on both sides. The fighting on both sides affects the determination of what is an unlawful attack and what is acceptable collateral damage, but it does not affect the prohibition).

[705] Defence Appeal Brief, paras 292, 310, 319, 356, 361, 365, fn. 234. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian (*Kordić and Čerkez* Appeal Judgement, para. 48).

[706] Defence Appeal Brief, para. 306. Combatants have a duty to differentiate civilians from combatants; where there is doubt, potential targets must be considered civilians and must not be attacked (*Kordić and Čerkez* Appeal Judgement, para. 48). Attacking anything that moves in a residential building, before determining whether the mover is a civilian or a combatant, is a paradigmatic example of not differentiating between targets.

e. The crime of "terror [against the] civilian population" requires proof that each attack is undertaken for the purpose of spreading terror.[708]

f. The crime of attack on civilians requires proof that the shooter intended to deliberately hit a particular civilian.[709] Reckless disregard does not establish a crime.[710]

g. The type of weapon used in a sniping incident is a necessary element of proof.[711]

h. A civilian population living on the front lines or near strategic military objectives loses the protection accorded to civilians. Incidents on the front line or close to military targets have no protection because activities near the front line, even football matches, are interpreted as military activities, and the presence of soldiers near where a civilian has been hit indicates that the injury cannot be the product of a deliberate attack on civilians. Further, a strike on a civilian population located on the front line, even if it is a line of civilians getting water from a well, cannot be an example of a campaign against civilians.[712]

i. The presence of civilians among victims does not imply that the targeted population is civilian.[713]

j. A Trial Chamber errs in not considering the possibility of a reckless attack, even if it finds evidence of a deliberate attack.[714]

---

[707] Defence Appeal Brief, para. 260. *See supra* para. 171 (facts can be proven based on direct or circumstantial evidence; a conviction can in principle be grounded on circumstantial evidence alone).

[708] Defence Appeal Brief, para. 261. *See supra* paras 107-108 (the only reasonable conclusion is that the primary aim of the campaign of sniping and shelling as a whole was to instil terror).

[709] Defence Appeal Brief, para. 313. Article 51 of Additional Protocol I makes no requirement of the intent to attack particular civilians; rather, it prohibits making "*[t]he civilian population as such*, as well as individual civilians […] the object of attack" (Additional Protocol I, art. 51(2), emphasis added). That is, any attack against civilians, whether alone or in groups, is prohibited; there is no need for an attacker to have a particular civilian in mind when he attacks.

[710] Defence Appeal Brief, para. 319, fn. 268. *See supra* para. 140 (the required *mens rea* for the crime of attack on civilians is wilfulness, which encompasses recklessness).

[711] Defence Appeal Brief, para. 374. The Trial Chamber defined "sniping" as the "direct targeting of individuals at a distance using any type of small calibre weapon" (Trial Judgement, para. 184). The Appeals Chamber notes that the issue of the definition of "sniping" had previously been addressed by the Trial Chamber in its decision on Galić's motion for acquittal (*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, 3 October 2002). The same definition as that proposed on appeal was offered by Galić, but was at that stage rejected by the Trial Chamber as being too narrow, on the basis that the case did not focus on the specific type of weapon used, but rather on whether civilians were directly targeted. In any event, Galić was charged not with sniping but with murder, other inhumane acts and attacks on civilians.

[712] Defence Appeal Brief, para. 393. *See supra* para. 130 (there is an absolute prohibition against targeting civilians, no matter where they are located; such prohibition may not be derogated from on the grounds of military necessity).

[713] Defence Appeal Brief, para. 391. *See supra* paras 137-138 (the presence of civilians within a group of people makes that group a civilian population. Under certain circumstances, a large number of soldiers intermingled with civilians may change that characterisation, but it is presumed that civilians constitute a civilian population unless it is proved otherwise).

k. A Trial Chamber cannot base its finding on the evidence of only one witness.[715]

B. Alleged errors of facts

255. Many of Galić's allegations are of a general, introductory nature, which he later explains in greater or lesser detail.[716] The Appeals Chamber will only address his specific arguments.[717]

1. Allegations that the Trial Chamber did not consider evidence

256. In many instances, Galić alleges that the Trial Chamber did not consider particular pieces of evidence. As a general proposition, the Trial Chamber has the duty to consider all relevant evidence. The standard of review has been expressed as follows:

> It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. […] If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings […] as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective.[718]

257. Therefore, where Galić alleges that the Trial Chamber did not consider evidence, his allegation of error will succeed only if he identifies the evidence. He has to show that it is relevant and demonstrate that the Trial Chamber disregarded that evidence. If he makes no demonstration that the Trial Chamber disregarded the evidence, the Appeals Chamber will dismiss the allegation. If there is such indication, the Appeals Chamber will then inquire whether such failure led to a miscarriage of justice.[719] Only in that case will the Appeals Chamber revise or reverse the Trial Chamber's findings.

258. Where, however, the Trial Chamber did in fact consider the evidence, or if the evidence referred to is not relevant to the point at hand, the Appeals Chamber will dismiss the allegation without further discussion.

---

[714] Defence Appeal Brief, para. 396. *See supra* para. 140 (both reckless and deliberate attacks are unlawful, so if a Trial Chamber finds evidence of one state of mind, it does not need to inquire into the existence of the other).
[715] Defence Appeal Brief, para. 414. It is well-settled that testimony from a single witness may be the acceptable basis of establishing a material fact. *See, e.g.*, *Aleksovski* Appeal Judgement, paras 62-63.
[716] *See, e.g.*, Defence Appeal Brief, para. 252.
[717] Practice Direction on Appeals Requirements, para. 4(b); *see also Vasiljević* Appeal Judgement, para. 12.
[718] *Kvočka* Appeal Judgement, para. 23 (footnote omitted).
[719] *See* Article 25 of the Statute.

(a) The Trial Chamber did consider the evidence

259. In a number of instances, Galić claims that the Trial Chamber did not consider the evidence that ABiH forces fired on their own territory to gain international sympathy.[720] Yet the Trial Chamber did consider and analyse this evidence, and it accepted that on occasion ABIH forces may have fired on their own people.[721] However, it found that "only a minimal fraction of attacks on civilians could be reasonably attributed to such conduct" and most of the attacks came from the SRK.[722] The Appeals Chamber sees no reason to overturn this finding, and notes that in every incident in which the Trial Chamber found evidence of SRK targeting, it determined that the shells or sniping had come from behind SRK lines. In most instances when Galić submitted that attacks came from ABiH forces, he presented this allegation as a mere possibility, without presenting any facts in support.[723] This miscomprehends the concept of reasonable doubt: just because there is some possibility, however slight, that an incident could have happened in another way does not in itself raise reasonable doubt. This is particularly so at the appeal level, where an appellant needs to demonstrate not only some "fact or allegation"[724] in support of his contention, but also that no reasonable trier of fact could have ruled the way it did.[725] The Trial Chamber recognised and discussed this and Galić has not demonstrated any error to the Appeals Chamber;[726] it thus does not avail Galić to repeat these arguments,[727] even under the application of the principle of *in dubio pro reo*.[728]

260. Similarly, Galić states on various occasions that the Trial Chamber either did not take into account the fact that there was frequent fighting or ignored the activities of the ABiH.[729] This is incorrect – the Trial Chamber frequently mentioned and considered the position of ABiH forces.[730]

261. The following allegations are also included in the category of evidence considered by the Trial Chamber:

a. The allegation that the Trial Chamber did not consider the evidence of Defence witnesses Dunjić and Kunjadić in relation to Scheduled Sniping Incidents 10 and 6.[731] It did consider the evidence.[732]

---

[720] *See, e.g.*, Defence Appeal Brief, paras 341-342.
[721] *See* Trial Judgement, para. 589; *see also* Trial Judgement, para. 211.
[722] Trial Judgement, paras 211, 589.
[723] *See, e.g.*, Trial Judgement, paras 341-342.
[724] Trial Judgement, para. 342.
[725] *See Stakić* Appeal Judgement, para. 10.
[726] *See, e.g.*, Trial Judgement, para. 342.
[727] *See, e.g.*, Defence Appeal Brief, paras 341-343.
[728] *See, e.g.*, Defence Appeal Brief, para. 342.
[729] *See, e.g.*, *ibid.*, paras 253, 351, 408, 470.
[730] *See, e.g.*, Trial Judgement, paras 202, 204, 346, 414, fn. 1461.

b. The allegation that the Trial Chamber did not consider evidence regarding military targets in Alipašino Polje.[733] The Trial Chamber did consider this evidence.[734]

c. The allegation that the Trial Chamber did not consider the layout of ABiH forces with regard to the Dobrinja area.[735] It did.[736]

d. The allegation that the Trial Chamber should have considered the fact that the grenade in Scheduled Shelling Incident 2 hit somebody.[737] The Trial Chamber considered exactly that.[738]

262. Finally, Galić claims that the Trial Chamber did not consider that Witness E, a nine-year-old girl shot in Scheduled Sniping Incident 2, was wearing blue, the same colour as the ABiH, and was relatively tall for her age.[739] The Appeals Chamber notes that the Trial Chamber specifically observed that Witness E "was maximum 150 centimeters tall [and] was wearing dark trousers and a blue jacket." The Trial Chamber thus did not fail to consider these details when concluding that Witness E was targeted as a civilian.

263. Therefore, because the Trial Chamber considered all the evidence that Galić alleges it ignored, this subground of appeal is dismissed.

(b) The evidence advanced by Galić was not relevant

264. In all of the following allegations, Galić contends that the Trial Chamber ignored certain evidence; however, none of the evidence put forward was relevant to the Trial Chamber's findings of guilt.

a. Those parts of UN reports showing ABiH movement to contest evidence of SRK gunfire, shelling and deaths.[740] In most cases, the ABiH movement is irrelevant to whether the SRK deliberately targeted civilians; in any event, the Trial Chamber considered and discussed evidence of ABiH positions when relevant.[741]

[731] Defence Appeal Brief, paras 294, 358.
[732] Trial Judgement, fn. 697.
[733] Defence Appeal Brief, para. 340.
[734] *See* Trial Judgement, paras 329, 336, 344.
[735] Defence Appeal Brief, paras 352, 359.
[736] Trial Judgement, paras 346, 355.
[737] Defence Appeal Brief, para. 395.
[738] Trial Judgement, para. 393, fn. 1337.
[739] Defence Appeal Brief, para. 436.
[740] Defence Appeal Brief, para. 256.
[741] *See, e.g.*, Trial Judgement, paras 253, 351, 408, 470.

b. The contention that neither the police nor UNPROFOR investigated Scheduled Sniping Incident 5.[742] The Trial Chamber found that there was deliberate targeting from the testimony of witnesses;[743] there is no requirement that there be an official investigation into an incident before a Trial Chamber can make findings with regard thereto.

c. The testimony of Witness D as to sniping attacks on his SRK unit from ABiH soldiers.[744] Even if ABiH soldiers sniped at SRK units, that would not be relevant to the Trial Chamber's findings in particular incidents that SRK soldiers sniped at civilians.

d. The allegations that the ABiH systematically shelled its own territory, with regard to Scheduled Shelling Incident 3.[745] This evidence could not be relevant where the Trial Chamber found that the shells in that incident actually came from SRK territory.[746]

e. The allegation that there was an SRK medical unit in the Faculty of Theology.[747] First, the existence of a particular SRK unit in a particular location has no bearing on findings that shots came from that location. Second, the Trial Chamber explicitly said that it could not conclude that the shooting in that incident (Scheduled Sniping Incident 22) came from the Faculty of Theology; rather, it concluded that the shooting came from the wider area of Neđarići.[748]

f. The location of ABiH members with regard to Scheduled Sniping Incident 9.[749] The Trial Chamber found that three young girls were deliberately targeted more than once while pulling a wheelbarrow loaded with jerry cans of water.[750] The presence or not of ABiH soldiers in their vicinity would not affect that finding.

265. Therefore, because none of the evidence supposedly ignored was relevant to the Trial Chamber's findings of guilt, this subground of appeal is dismissed.

---

742 Defence Appeal Brief, para. 273.
743 *See* Trial Judgement, paras 247-253.
744 Defence Appeal Brief, paras 288-290.
745 Defence Appeal Brief, paras 341-342.
746 *See* Trial Judgement, paras 340-343.
747 Defence Appeal Brief, para. 351.
748 Trial Judgement, para. 365.
749 Defence Appeal Brief, para. 463.
750 *See* Trial Judgement, paras 552-555.

(c) The evidence was relevant and there is no clear showing that the Trial Chamber considered it

266. First, Galić claims that the Trial Chamber did not consider Defence testimony that a direct physical examination of the victim in Scheduled Sniping Incident 16 could have established better information on the direction from which she was shot, given the angle of entry and the direction of the injury channel.[751] This testimony was relevant and there is no discussion of it by the Trial Chamber. However, the Trial Chamber also considered the varying testimony regarding the origin of the shot and the location of the wound, along with the Defence's other contentions,[752] and still found, based on hospital and other evidence, that the bullet came from SRK lines.[753] The Appeals Chamber agrees that a physical examination of the victim *may* have been helpful; if Galić had conducted such an examination, the Trial Chamber would have been obliged to consider and discuss it. However, there was no physical examination for the Trial Chamber to consider, and it is clear that the Trial Chamber took into account the uncertainty surrounding the wound.

267. Second, Galić submits that the Trial Chamber should have considered that the brewery in Bistrik was a military target.[754] The Appeals Chamber notes that the brewery in Bistrik is mentioned once by the Trial Chamber, in a brief discussion of an incident, testified to by one witness, of an attack on the brewery, killing 15 people.[755] The Prosecution submits that there is some evidence in the trial record that the brewery was used as a military installation, supplying the army with water and ammunition; there is also evidence that it was used by civilians to obtain water.[756] The Prosecution argues that even if it was a dual-use building, that still would not make it a legitimate target.[757]

268. The purpose of the brewery – and what the SRK knew of that purpose and when – is an important factor in determining if attacks on or around the brewery were deliberately aimed at civilians, indiscriminate or disproportionate, or if they were legitimate military forays. Because the Trial Chamber discussed the presence or absence of military targets in relation to other incidents, failure to do so in this instance is an indication that it did not consider whether the brewery was a military target. Such omission was an error on the Trial Chamber's part.

269. However, the attacks on the area of Stari Grad were not part of the scheduled attacks, but were considered in the context of a wider discussion about a campaign of attacks on civilians. Even

[751] Defence Appeal Brief, para. 410.
[752] Trial Judgement, paras 422-423, 427, fn. 1483.
[753] Trial Judgement, paras 427-429.
[754] Defence Appeal Brief, para. 421.
[755] Trial Judgement, para. 436.
[756] Prosecution Response Brief, paras 15.38-15.42.
[757] Prosecution Response Brief, para. 15.45.

if the alleged attack on the brewery was a legitimate strike against a military target, there is enough evidence of other attacks to lead to the conclusion that civilians in Stari Grad, and certainly in Sarajevo as a whole, were deliberately targeted.[758] Therefore, this error did not lead to a miscarriage of justice and does not warrant overturning the decision.

270. Finally, Galić claims that the Trial Chamber should not have determined there was a pattern of fire by the SRK against civilians without considering the activities of ABiH forces.[759] As an assertion of error, this fails on two counts. First, it is not strictly necessary to discern the ABiH movements to determine an SRK pattern. Where there are many incidents showing clearly that civilians have been targeted, as the Trial Chamber found throughout the Trial Judgement,[760] those incidents can suffice to show a pattern of fire. Second, the Trial Chamber in many instances (although not all) discussed the positions and movements of ABiH forces.[761] This indicates that it kept the positions and actions of the ABiH forces in mind when deciding both specific incidents and the evidence of a campaign.[762]

271. Therefore, because any relevant evidence that was possibly not considered by the Trial Chamber would not have affected the Trial Chamber's findings of guilt, this subground of appeal is dismissed.

2. Allegations that the Trial Chamber came to the incorrect conclusion based on the evidence

272. Galić frequently alleges that the Trial Chamber came to an incorrect conclusion based on the evidence. Where Galić clearly supports his argument that the conclusion should be different, the Appeals Chamber will consider the argument. However, it will not review the evidence and the conclusion to determine whether the Trial Chamber was correct but rather whether no reasonable trier of fact could have reached that particular conclusion.[763]

---

[758] *See* Trial Judgement, paras 435-437.
[759] Defence Appeal Brief, para. 470.
[760] *See, e.g.*, Trial Judgement, paras 253, 258, 271, 276, 284, 289, 321, 356, 360, 367, 397, 496, 509, 518, 537, 551, 556.
[761] *See, e.g.*, Defence Appeal Brief, paras 253, 351, 408, 470.
[762] Galić also alleges that firing errors and weaponry's lack of precision were not taken into account. *See* Defence Appeal Brief, para. 402. To the contrary, as the Appeals Chamber noted in ground 12, the Trial Chamber properly assessed the legality of the attacks. *See* Trial Judgement, paras 41-62, 188.
[763] *See Vasiljević* Appeal Judgement, para. 12.

273. Further, the Appeals Chamber will look only at the arguments actually made by Galić; the Appeals Chamber will not devise its own arguments, nor will it look at Judge Nieto Navia's Dissent for arguments unless Galić has explicitly repeated those arguments.[764]

274. In those instances where Galić does not state reasons as to why the Trial Chamber reached a putatively incorrect conclusion, the Appeals Chamber will dismiss the allegation without further discussion.[765]

(a) Allegations presenting reasons

275. In a number of instances, Galić explains why he believes the Trial Chamber came to the wrong conclusion. In each case, the Appeals Chamber will consider whether, given Galić's alternative explanation, no reasonable trier of fact could have reached that conclusion.

276. First, Galić alleges that the Trial Chamber could not have concluded that the JNA attacked Sarajevo because the JNA was also attacked.[766] The one contention does not rule out the other, so this allegation does not affect the Trial Chamber's conclusion.

277. Second, Galić alleges that there was no sniping from the Grbavica area because there was a line of separation next to Grbavica, including along the Miljacka River, so there was daily fighting there and in the area of the Jewish Cemetery, and SRK fire from Grbavica was in response to ABiH fire from other parts of the city.[767] The Trial Chamber did consider evidence of fighting between the two sides[768] but it also found, based on the testimonies of numerous witnesses, that there was a great deal of firing that was not a normal part of warfare and was in fact intentional sniping or shelling against civilians.[769] Galić has not shown why that testimony should be disregarded.

278. Third, Galić alleges that the conclusion that a victim was targeted because there were no soldiers around ignores the possibility that the victim could have been hit by a ricochet from a trailer or container.[770] But the mere fact that a bullet ricocheted before hitting someone does not mean that the victim was not targeted as a civilian; it is not necessary that every shot aimed at a

---

[764] *Vasiljević* Appeal Judgement, para. 12: "[T]he Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure [or] vague[…]. A party alleging an error of fact must explain what the alleged error is and why a reasonable trier of fact could not make this finding and in what way it leads to a miscarriage of justice." The arguments must thus be apparent from the Appeal Brief itself.

[765] *Vasiljević* Appeal Judgement, para. 12: "Where an appellant only challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber's assessment of the evidence was erroneous, then the appellant will have failed to discharge the burden incumbent upon him".

[766] Defence Appeal Brief, fn.197.

[767] Defence Appeal Brief, paras 263-265.

[768] *See* Trial Judgement, paras 241-242.

[769] *See* Trial Judgement, paras 228-240, 243.

[770] Defence Appeal Brief, para. 271.

civilian be a perfect one for the shot to be properly construed as an intentional attack. Further, if a bullet ricochets in an area where there are no soldiers, it is reasonable to assume that such shots are intentionally directed against civilians.

279. Fourth, Galić alleges that the Trial Chamber could not have found deliberate sniping from Hrasno Brdo because of the possibility of random injury during the "daily" exchange of fire.[771] Yet the Trial Chamber heard about and discussed numerous incidents of sniping that give rise to the inference of deliberate attack rather than accidental bullets.[772] The Appeals Chamber does not find that no reasonable trier of fact could have come to the same conclusion.

280. Fifth, Galić alleges that the Trial Chamber could not have found that Nafa and Elma Tarić were shot from Ozrenska Street because they could not identify exactly where the shot had come from.[773] In fact, the Trial Chamber did hear evidence indicating the direction of the shooting: containers were set up to protect people from the Ozrenska Street snipers; a second shot almost hit Nafa and Elma Tarić; and a policeman testified to hearing shooting from Ozrenska Street that day.[774] The Trial Chamber thus reasonably concluded that the shots came from Ozrenska Street.

281. Sixth, Galić alleges that the Trial Chamber was incorrect in finding in Scheduled Shelling Incident 3 an SRK desire to hit civilians; rather, he argues that the SRK's intention was to hit military targets, based on the large number of shells fired.[775] The Appeals Chamber sees no reason why an army would not use a large number of shells against civilians if it is the army's intent to attack civilians. The Appeals Chamber finds that the number of shells deployed does not compel a conclusion either way.

282. Seventh, Galić alleges that the Trial Chamber could not have concluded there was an intentional attack on Dobrinja "C5" well because it did not consider nearby military targets, including a supply tunnel and command post, and ignored Galić's claim that the well was not visible from SRK positions.[776] Yet the Trial Chamber did consider military targets, including the tunnel and post, and found that either they were not operational or were too far away from the impact to have been the true objective.[777] In support of its finding that SRK had knowledge of the well's location, it discussed other attacks on that well.[778]

[771] Defence Appeal Brief, para. 284.
[772] Trial Judgement, paras 262, 267-289.
[773] Defence Appeal Brief, para. 293.
[774] Trial Judgement, paras 267, 269-270.
[775] Defence Appeal Brief, para. 348.
[776] Defence Appeal Brief, paras 389-390.
[777] Trial Judgement, paras 395-396, fn.1348.
[778] Trial Judgement, para. 396, fn.1348.

283. Eighth, Galić alleges that Witness E, hit in Scheduled Sniping Incident 3, could have been hit by a ricochet because there was regular fighting in her area.[779] But the Trial Chamber also found that the victim was hit by a single bullet and that another shot was fired at the car in which she was being taken to hospital.[780] The Appeals Chamber does not find that no reasonable trier of fact could have concluded, as the Trial Chamber did, that two single shots aimed at the same person equate to deliberate sniping.

284. Ninth, Galić alleges that the Trial Chamber erred in finding that Anisa Pita was wounded by a bullet shot from Baba Stijena hill because her parents described differently the location of Baba Stijena, the time of the incident, and what later happened with the bullet.[781] Galić does not explain these contentions in the Defence Appeal Brief, and the Appeals Chamber cannot determine why such allegation would render the Trial Chamber's decision in this regard unreasonable.

285. Tenth, Galić contends that the Trial Chamber erred in concluding from witness statements that the area around Briješko Brdo was "far away" from the confrontation line because witnesses said the distance was between 300m and 500m.[782] The Trial Chamber noted and accepted this testimony[783] and still found the distance "far from the confrontation lines";[784] indeed, it expressly determined a distance of 300m-400m.[785] The Trial Chamber was not just reasonable but perfectly correct to decide that this distance was far away, when the incidents alleged were those of sniping.

286. Eleventh, Galić contends that the Trial Chamber erred in finding that General Mladić ordered the establishment of the SRK, because the evidence cited established only that Mladić was Commander-in-Chief of the General Staff of the VRS.[786] The Appeals Chamber finds that whether the SRK was established by Mladić's order or by an order of the entire General Staff, or by some other means entirely, is irrelevant for the purposes of assessing Galić's guilt.

287. Twelfth, Galić contends that the Trial Chamber was wrong to conclude that the shells in Scheduled Shelling Incident 3 came from behind SRK lines because Alipašino Polje, the area hit, was about a kilometre from Neđarići, an area held by SRK forces and thus a possible destination for ABiH fire;[787] he claims that the actual distance between the areas is closer, so there was good

[779] Defence Appeal Brief, para. 435.
[780] Trial Judgement, para. 515.
[781] Defence Appeal Brief, paras 450-451.
[782] Defence Appeal Brief, para. 407.
[783] Trial Judgement, para. 425.
[784] Trial Judgement, para. 417.
[785] Trial Judgement, para. 425.
[786] Defence Appeal Brief, fn.197.
[787] Defence Appeal Brief, para. 343; Trial Judgement, paras 341-342.

reason to believe the ABiH may have mistakenly shelled Alipašino Polje.[788] Whether the distance is greater or smaller, the Trial Chamber did not err: first, it considered the possibility that the ABiH had accidentally shelled Alipašino Polje; second, as the Trial Chamber stated, there was no evidence at all that the fire came from ABiH ranks, beyond the fact that it was possible, which is not evidence.[789]

288. Finally, Galić submits that Witness G was not targeted in Scheduled Sniping Incident 4 because he had heard shooting a few minutes before he was shot, which indicates that there was fighting in the area, so he may have been hit by a stray bullet.[790] Witness G said: "I heard the shooting. That was the only thing I heard. I didn't hear the bullets".[791] It is unclear from his testimony whether the shooting he heard was that of large-scale fighting, or if it was small arms aimed at or near him. However, Galić ignores other evidence that was strongly corroborative of targeting, that when Witness G's neighbours came to help him, they were shot at repeatedly, in 10 to 15 different periods as they dragged Witness G to the house.[792] The Appeals Chamber finds that Galić has failed to demonstrate that no reasonable trier of fact could have reached that conclusion.

289. Therefore, because Galić has failed to show in any of the above instances that no reasonable trier of fact could have reached the same conclusions as the Trial Chamber did, this subground of appeal is dismissed.

(b) Allegations not presenting reasons

290. The Appeals Chamber finds that, for the allegations below, Galić fails to present reasons as to why the Trial Chamber reached a putatively incorrect conclusion. The Appeals Chamber held in the *Vasiljević* Appeal Judgement that "[w]here an appellant only challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, without indicating in what respects the Trial Chamber's assessment of the evidence was erroneous, then the appellant will have failed to discharge the burden incumbent upon him."[793] Each of the following arguments will consequently be dismissed.

[788] Defence Appeal Brief, para. 343.
[789] Trial Judgement, para. 342.
[790] Defence Appeal Brief, para. 460.
[791] T. 2397.
[792] Trial Judgement, para. 547.
[793] *Vasiljević* Appeal Judgement, para. 12.

a. "The Trial Chamber erroneously concluded that the Prosecution presented evidence […] which could serve, as general facts, for factual findings corroborating that the intent existed for deliberate targeting of civilians".[794]

b. "The majority of the Trial Chamber finds that the Prosecution has proved beyond reasonable doubt that, in the scheduled incident No. 5, Almasa Konjhodzić, a civilian, was deliberately targeted and killed by a bullet fired from the territory controlled by the SRK, and that the event did take place just as described by the witnesses. Such a conclusion of the Majority is […] based on an incomplete analysis of evidence".[795]

c. "The Majority finds […] that Hatema Mukanović […] was killed by a bullet fired from the SRK positions. The Defence finds this conclusion erroneous as none of the above stated pieces of evidence used by the Majority for its findings […] is sufficient to form such a set of facts which would allow this conclusion to be made".[796]

d. "The Majority accepts that it was not possible to determine the place […] which was the source of fire, but nevertheless finds that the shot was fired from the territory under […] SRK control. This finding of the Majority is erroneous".[797]

e. "The fact proving whether a person was hit deliberately or by a [s]tray bullet, or a bullet which ricocheted, cannot be established on the basis of the argument that the victim was hit by one bullet only, and the circumstance that in the vicinity of the victim there were no soldiers present".[798]

f. "The conclusion of the Trial Chamber is erroneous in terms that scheduled shelling incident [No.] 3 constituted an attack that was, at the very least, indiscriminate as to its target, which was primarily if not entirely a residential neighbourhood".[799]

g. "The Majority erroneously finds that the fact of only one bullet having been fired was sufficient ground[s] to conclude that the passengers on board the bus were deliberately targeted".[800]

---

[794] Defence Appeal Brief, para. 261.
[795] Defence Appeal Brief, para. 269 (footnotes omitted).
[796] Defence Appeal Brief, para. 305 (footnotes omitted).
[797] Defence Appeal Brief, para. 320.

h. "The Majority gives an erroneous conclusion, rejecting the possibility that Ramiza Kundo could have been hit by a stray bullet, only because she had stated that there were no fights at that place and on that day".[801]

i. "[A]t a distance of 760 meter[s] candle light can not be seen, especially not if the candle is located in the room where the light is being dispersed".[802]

j. "[T]he distance was 1500 meters, not a distance for deliberate targeting".[803]

k. "At the distance of 900 meters in the morning hours, in the woods when it was overcast and cloudy it would not be possible to deliberately target a person, because at such a distance nothing can be seen, even if it was possible to establish a visual line of sight between the place of firing the shot and the place of the injury of the victim".[804]

291. Therefore, because Galić did not present any reasons as to why the Trial Chamber reached an incorrect conclusion, this subground of the appeal is dismissed.

3. Allegations that contain misrepresentations of the evidence or the Trial Judgement, or that ignore other findings of the Trial Chamber

292. In a number of instances, Galić has misstated the evidence, misstated or misrepresented what the Trial Chamber said in the Trial Judgement, ignored other evidence, or ignored a relevant part of the Trial Judgement. In each of these cases, the Appeals Chamber will dismiss the allegation without further discussion.

293. Galić states frequently with regard to particular incidents that there was no proof that optical sights were used.[805] On at least one occasion, he says, with no basis in fact, that the Trial Chamber found that "infrared or optical sights were not used",[806] although the Trial Chamber never made such a finding. This lack of proof, he contends, fatally undermines findings that civilians were targeted at a distance. The Appeals Chamber finds that Galić is incorrect for a number of reasons.

---

[798] Defence Appeal Brief, para. 326.
[799] Defence Appeal Brief, para. 349.
[800] Defence Appeal Brief, para. 373.
[801] Defence Appeal Brief, para. 413.
[802] Defence Appeal Brief, para. 307. Galić also claims that the candlelight was blocked by drawn shutters but that ignores the evidence that the blinds were thin cotton and had already been torn by previous shooting. *See infra* para. 295(k).
[803] Defence Appeal Brief, para. 370.
[804] Defence Appeal Brief, para. 440 (footnote omitted).
[805] *See, e.g.*, Defence Appeal Brief, paras 272, 356, 365, 372, 436, 452, fns 253, 261, 322.
[806] Defence Appeal Brief, fn.255.

294. First, in order to prove that a particular attack constituted a deliberate attack on civilians, it is not necessary to demonstrate every detail of the attack. Second, in at least one instance in the Trial Judgement, the Trial Chamber recounted testimony of a witness who observed SRK soldiers using binoculars.[807] Third, the Trial Chamber found that the SRK was a professional, well-run, properly equipped army.[808] It is a logical inference that such an army, especially when fighting at a distance, possesses optical sights, binoculars, rangefinders or other equipment necessary to be effective at a distance. That is, the finding that the army was properly equipped leads to a presumption that the army owned such equipment, and Galić has failed to rebut the presumption. Therefore, there was no need for the Trial Chamber to find in any particular instance that the SRK member doing the firing had such a sight.

295. Other allegations that contain misstatements of the evidence or the record, or ignore other Trial Chamber findings, are:

a. Galić contends that the Trial Chamber did not consider evidence tending to disprove the existence of a campaign.[809] However, in every alleged incident, the Trial Chamber considered Defence evidence tending to prove that those injured were not targeted, were hit accidentally, or were hit by their own forces.[810]

b. Galić refers to the Trial Chamber's finding that the number of incidents was not sufficient to be considered a widespread or systematic campaign[811] as proof for the non-existence of the campaign. That statement ignores the fact that the Trial Chamber also stated, in the same paragraph, that it was also looking at evidence – beyond the mere number of incidents – that the incidents "were not isolated […] but representative of a campaign."[812]

c. Galić contends that the Trial Chamber did not analyse the UN reports as to fighting and warfare in the city.[813] In fact, the Trial Chamber analysed the reports extensively in light of all the evidence presented to it.[814]

[807] Trial Judgement, para. 263.
[808] *See* Trial Judgement, paras 616-617.
[809] Defence Appeal Brief, para. 254.
[810] *See* Trial Judgement, paras 206-594.
[811] Defence Appeal Brief, para. 255.
[812] Trial Judgement, para. 208.
[813] Defence Appeal Brief, para. 257.
[814] Trial Judgement, paras 210-225.

d. Galić contends that the UN reports did not contain detailed evidence on shelling targets.[815] Yet the UN reports, and UN officials, gave detailed evidence about some of the shelling.[816]

e. Galić contends that Witness Hvaal did not provide photographic evidence in connection with the incidents to which he testified.[817] That is clearly incorrect.[818]

f. Galić contends that one UN witness said he did not hear of any trams being hit; [819] that statement ignores the fact that the witness also said trams were probably shot at once UN escorts ceased.[820]

g. Galić contends that the testimony as to attacks in Hrasno Brdo was not relevant because it discussed a different part of town.[821] However, the Trial Chamber explicitly discussed that the victims were in Hrasno Brdo, but the attacks came from Grbavica, a neighbourhood adjoining Hrasno Brdo.[822]

h. Galić contends that two victims could not have been shot from Ozrenska Street, which was elevated, because their injuries, caused by the same bullet, were at the same height.[823] But the record shows (as was pointed out by the Trial Chamber) that there is no evidence as to the relative height of the wounds.[824]

i. Galić contends that the loader in Scheduled Sniping Incident 15 was not targeted because later photographs showed the glass was not damaged.[825] However, witnesses testified that the glass in the loader had been replaced before the taking of the photograph, which still showed bullet damage to the bodywork.[826]

j. Galić contends that the Trial Chamber should not have concluded that the victim in Scheduled Sniping Incident 20 was targeted from SRK lines because the evidence

[815] Defence Appeal Brief, para. 257.
[816] *See* Trial Judgement, paras 210, 214, 220.
[817] Defence Appeal Brief, para. 266.
[818] *See* T. 2278-2284, 2290-2291, 2356, 2358-2360, 2363-2364, 2370 (discussing the five photographs admitted as P3625).
[819] Defence Appeal Brief, para. 280.
[820] T. 18178.
[821] Defence Appeal Brief, para. 285.
[822] Trial Judgement, paras 264-265.
[823] Defence Appeal Brief, para. 295.
[824] Trial Judgement, para. 270.
[825] Defence Appeal Brief, fn.246.
[826] T. 2806-2807.

only showed the layout and position of his apartment in relation to SRK positions.[827] But other evidence leading to that conclusion was adduced as well.[828]

k. Galić contends that little or nothing could be seen through the blinds of witness Mukanović's apartment.[829] However, the witness had testified that the blinds were thin cotton, with holes made from earlier shooting.[830]

l. Galić contends that unscheduled sniping and shelling incidents were not examined by the Trial Chamber.[831] To the contrary, they were examined throughout the Trial Judgement.[832]

m. Galić contends that daily fighting in Alipašino Polje meant that the possibility of stray bullets could not be discounted in Scheduled Sniping Incident 23.[833] That contention ignores other evidence leading to the conclusion of deliberate targeting.[834]

n. Galić contends that there was no serious analysis of the shelling incidents in Alipašino Polje, including the existence of military targets.[835] The Trial Chamber, to the contrary, referred to a large amount of evidence regarding shelling activities in that area.[836]

o. Galić contends that the Trial Chamber found there was no targeting from the Faculty of Theology in the unscheduled Dobrinja incident; this allegation ignores the fact that the Trial Chamber found targeting from elsewhere in the surrounding area of Neđarići.[837]

p. Galić contends that the Trial Chamber did not analyse any non-scheduled incidents in the Dobrinja area.[838] To the contrary, it did.[839]

---

[827] Defence Appeal Brief, para. 304.
[828] Trial Judgement, paras 278, 283.
[829] Defence Appeal Brief, paras 305, 307-308.
[830] T. 3058-3061.
[831] Defence Appeal Brief, para. 317.
[832] *See, e.g.*, Trial Judgement, paras 417-419, 558-560.
[833] Defence Appeal Brief, para. 321.
[834] *See* Trial Judgement, paras 311-316.
[835] Defence Appeal Brief, paras 334-335, 338.
[836] *See* Trial Judgement, paras 329, 331-345.
[837] *See* Defence Appeal Brief, para. 351; Trial Judgement, para. 365.
[838] Defence Appeal Brief, para. 353.
[839] Trial Judgement, paras 347-350.

q. Galić contends that Witness Dževlan confirmed there were barricades at the bridge where she was shot.[840] This statement ignores her testimony that she had moved beyond the barricades when she was shot.[841]

r. Galić contends that no evidence pointed to a shot fired from the SRK position in Neđarići in Scheduled Sniping Incident 22.[842] There was such evidence, from witnesses' testimonies of what they heard, and from line-of-sight calculations.[843]

s. Galić contends that the medical documentation arising from Scheduled Shelling Incident 1 does not indicate the number of victims.[844] The documentation does in fact state numbers of victims, though different sources state different numbers – a fact the Trial Chamber explicitly adverted to.[845]

t. Galić contends that the evidence in Scheduled Shelling Incident 1 excludes the possibility of deliberate targeting.[846] This allegation ignores the fact that the Trial Chamber considered Scheduled Shelling Incident 1 an example of indiscriminate shelling, not deliberate targeting.[847]

u. Galić contends that because UNPROFOR was monitoring Toplik, Scheduled Shelling Incident 1 could not have originated from there.[848] Yet the Trial Chamber did not find that the shelling originated from Toplik, only from somewhere behind SRK lines.[849]

v. Galić contends that the Trial Chamber erred when considering correction fire in Scheduled Shelling Incident 1 because there was too little time between the two shellings for the second to have been an attempt at the trenches, rather than the parking lot.[850] This allegation misstates the Trial Chamber's finding: it found that both shellings were probably aimed at the parking lot because they were too close together in time for the second one to have been correction fire.[851]

---

[840] Defence Appeal Brief, para. 367.
[841] Trial Judgement, para. 359.
[842] Defence Appeal Brief, para. 370.
[843] Trial Judgement, para. 365.
[844] Defence Appeal Brief, para. 380.
[845] Trial Judgement, para. 376.
[846] Defence Appeal Brief, para. 382.
[847] Trial Judgement, para. 387.
[848] Defence Appeal Brief, para. 384.
[849] Trial Judgement, paras 377-380.
[850] Defence Appeal Brief, para. 385.
[851] Trial Judgement, para. 382.

w. Galić contends that the Trial Chamber did not analyse the civilian-military mix of the population with regard to each of the alleged incidents, and did not keep the mingling of the population in mind.[852] This is patently incorrect.[853]

x. Galić contends that the area around the well hit in Scheduled Shelling Incident 2 was strategically vital to the ABiH because it was near the opening of a military tunnel.[854] However, there was much evidence that the tunnel was not operational at time of the shelling.[855]

y. Galić contends that the Trial Chamber was incorrect in finding that there were no military targets in the area of Scheduled Shelling Incident 4.[856] To the contrary, the Trial Chamber found there were military installations, but concluded, given the sequence of shell explosions, that they were not the target of the shelling.[857]

z. Galić contends that the testimony of witness DP35 was the main basis for the finding that civilians at Sarajevo airport were targeted.[858] In fact, many witnesses testified to evidence supporting such targeting.[859]

aa. Galić contends that the Trial Chamber did not compare and contrast the evidence about Scheduled Sniping Incident 16.[860] This is incorrect.[861]

bb. Galić contends that only one witness testified to the attack on victim Osmanović.[862] That is incorrect: two witnesses did.[863] This fact also overcomes his contention that there is no proof that Osmanović was hit by a bullet fired from a firearm.[864]

cc. Galić contends that Witness E testified to two sets of trenches with regard to Scheduled Sniping Incident 3, which supposedly indicates that the SRK were firing

---

[852] Defence Appeal Brief, para. 391.
[853] *See* Trial Judgement, paras 206-563.
[854] Defence Appeal Brief, para. 394.
[855] Trial Judgement, fn.1348.
[856] Defence Appeal Brief, paras 399-400.
[857] Trial Judgement, paras 405, 409.
[858] Defence Appeal Brief, para. 405.
[859] Trial Judgement, paras 411-417.
[860] Defence Appeal Brief, para. 409.
[861] Trial Judgement, paras 423-427.
[862] Defence Appeal Brief, para. 414.
[863] Trial Judgement, fns 1518-1519. Galić also states that "not a single piece of evidence" was presented in support of the allegation. Defence Appeal Brief, para. 416. He is forgetting that testimony *is* evidence.
[864] Defence Appeal Brief, para. 415.

at legitimate military targets.[865] This ignores the fact that the witness also said the trenches were 700m away from her house, where she was shot.[866]

dd. Galić contends that Witness Jusović said that during the day on which she was shot "there were many combats".[867] This statement, purporting to prove that she was shot accidentally, ignores the fact that at the time of her shooting, which was early in the morning, she heard no firing other than that aimed at her.[868]

ee. Galić contends that no witnesses identified Baba Stijena, making conclusions about it unreliable.[869] This is incorrect.[870]

ff. Galić contends that the Trial Chamber failed to determine the armies' positions and layouts, and the types of combat actions in Vogošća.[871] This kind of contention, repeated a number of times in various contexts, is patently incorrect. The "finding" attacked is the opening paragraph of a new section in the Trial Judgement. The Trial Chamber, as it does in many other places, briefly mentions the zone where a number of incidents allegedly took place and sketches out the Prosecution's main allegation.[872] Such paragraphs (in some instances, the Trial Chamber uses more than one) serve as introductions; they present the allegations which are meant to be proven; they do not present findings. For the record, the Trial Chamber describes these details in the following paragraphs of the Trial Judgement, where it looks at each incident and puts the Prosecution's proof to the test.[873]

gg. Galić contends that the Prosecution did not prove that Vildana Kapur was visible from SRK positions.[874] But the Trial Chamber discussed the visibility issue and found that there was a line of sight.[875]

hh. Galić contends that the shooting of Elma Jakupović was not examined at trial;[876] yet the Trial Chamber examined the shooting in the very same paragraph where it was mentioned.[877]

---

865 Defence Appeal Brief, para. 435.
866 T. 4100.
867 Defence Appeal Brief, para. 441.
868 Trial Judgement, fn.1812.
869 Defence Appeal Brief, para. 448.
870 T. 3990, T. 4008-4009, T. 12943-12950.
871 Defence Appeal Brief, para. 455.
872 Trial Judgement, para. 544.
873 *See* Trial Judgement, paras 545-557.
874 Defence Appeal Brief, para. 464.
875 Trial Judgement, para. 554.

ii. Galić contends that it was incorrect to say many hundreds of civilians were killed and thousands wounded because the Tabeau Report mentions a maximum of 253 deaths, and the number of injured cannot be thousands.[878] This mischaracterisation is so large, the Appeals Chamber can only posit a clerical error. Rather, the Tabeau Report claims that just under 1,300 civilians were killed and just under 5,000 wounded.[879] The number 253 is in reference to those civilians killed by sniping.[880]

jj. Galić contends that "[t]he conclusion of the Majority is erroneous that the natural and urban […] topography of the city of Sarajevo gave advantage to the SRK forces to target civilians in town. [But a]ll the elevated points in Sarajevo, except for the 4 or 5 high-rise buildings in Grbavica […] were held by the ABiH forces".[881] The Trial Chamber found that the "natural and urban topography of the city of Sarajevo, such as ridges and high-rise buildings, provided vantage-points to SRK forces to target civilians moving around the city".[882] That is, it did not state what Galić alleges. Further, the Trial Chamber discussed the particular high areas controlled by the SRK, which Galić has not contradicted.[883]

296. Therefore, because these allegations either misstate the evidence or the Trial Judgement, or ignore other vital evidence, this subground of appeal is dismissed.

4. Challenges to findings without presenting argument

297. Any challenge to the findings must indicate in what respects the Trial Chamber's assessment of the evidence was incorrect; if an appellant merely challenges the findings without making such an indication, he will have failed to discharge the burden incumbent upon him.[884] On a number of occasions, Galić claims that a finding of the Trial Chamber was incorrect but fails to present any argument in support. Frequently, he says only that the finding was "erroneous" or "clearly erroneous" without giving any content to the allegation. These allegations will be dismissed without discussion.

---

876 Defence Appeal Brief, para. 467.
877 Trial Judgement, para. 559. Galić is correct that all details were not established beyond reasonable doubt, but this was one of the illustrative incidents discussed by the Trial Chamber; it did *not* find beyond a reasonable doubt that the incident happened as described.
878 Defence Appeal Brief, paras 474-475.
879 Trial Judgement, para. 579.
880 Trial Judgement, para. 579.
881 Defence Appeal Brief, para. 476, fn 404.
882 Trial Judgement, para. 585.
883 Trial Judgement, para. 585.
884 *See Vasiljević* Appeal Judgement., para. 12.

298. Included in this category are:

a. The allegation that the finding that there were no soldiers in the vicinity of Almasa Konjhodzić's shooting was incorrect.[885]

b. The allegation that the Trial Chamber was wrong to find there was no fighting on the day Witness AG was shot.[886]

c. The allegation that the finding that there were no military targets being attacked in Alipašino Polje was incorrect.[887]

d. The allegation that witness testimony could not allow conclusions about when or where shelling occurred or where military targets were in Dobrinja.[888]

e. The allegation that the Trial Chamber erroneously analysed the reports of expert witnesses in Scheduled Shelling Incident 1.[889]

f. The allegation that the Trial Chamber erroneously analysed the testimony of witnesses Mehonić, Grebić, A.E., A.K.2 and Arifagić with regard to scheduled shelling incidents in Dobrinja.[890]

g. The allegation that the Trial Chamber failed to analyse contradictions in the testimonies of numerous witnesses about Scheduled Shelling Incident 4.[891]

h. The allegation that the Trial Chamber erred in finding that the shells in Scheduled Shelling Incident 4 hit civilians in peaceful activities and that the SRK was at least indiscriminate as to the shells' target.[892]

i. The allegation that SRK attacks on Sarajevo airport were aimed at ABiH soldiers, not civilians.[893]

j. The allegation that the finding that a variety of sources indicated indiscriminate shelling in Novi Grad is untenable[894] because the Trial Chamber's analysis of testimony was incomplete and led to erroneous conclusions.[895]

[885] Defence Appeal Brief, para. 269.
[886] Defence Appeal Brief, para. 311.
[887] Defence Appeal Brief, paras 343, 350.
[888] Defence Appeal Brief, para. 376.
[889] Defence Appeal Brief, paras 381-382.
[890] Defence Appeal Brief, para. 387.
[891] Defence Appeal Brief, para. 397.

k. The allegation that there is no single piece of evidence that firing in Stari Grad originated from SRK areas.[896]

l. The allegation that the finding, based on uncontested evidence, that the SRK controlled Špicasta Stijena, was incorrect.[897]

m. The allegation that the videos and photographs in support of Scheduled Sniping Incident 3 show that the victim could not have been hit by a direct shot.[898]

n. The statement that the Prosecution presented no evidence on the injuries to Witness Jusović.[899]

o. The allegation that the finding that civilians in Sedrenik were targeted deliberately or indiscriminately is erroneous.[900]

p. The contention that the mention of the destruction of a civilian house in Žuć is unacceptable.[901]

299. Therefore, because Galić has not stated why these findings of the Trial Chamber were incorrect, this subground of appeal is dismissed.

5. Challenges to findings purely because other witnesses testified differently

300. In many cases, Galić argues that the Trial Chamber should not have reached a certain finding because a witness or witnesses that he presented testified to the opposite fact. In other words, the Trial Chamber found the testimony of Prosecution witnesses more persuasive than that of Defence witnesses. This allegation fundamentally miscomprehends the difference between a trial and an appeal proceeding. At trial, witnesses frequently contradict one another, and it is the duty of the Trial Chamber to weigh different witnesses' evidence according to certain well-settled indicia, including credibility, reliability, plausibility and corroboration. Such weighing will not be lightly disturbed by the Appeals Chamber.[902] It is thus likely[903] that many findings will be made that are at

---

[892] Defence Appeal Brief, paras 400-401.
[893] Defence Appeal Brief, para. 406.
[894] Defence Appeal Brief, para. 418.
[895] Defence Appeal Brief, para. 420.
[896] Defence Appeal Brief, para. 422. *Contra* Trial Judgement, para. 435.
[897] Defence Appeal Brief, para. 431.
[898] Defence Appeal Brief, para. 434.
[899] Defence Appeal Brief, para. 442.
[900] Defence Appeal Brief, para. 445.
[901] Defence Appeal Brief, para. 468. Galić also attacks the "stance" that there were no military targets; what he does not see is that the Trial Chamber was repeating testimony, not making findings.
[902] *Kupreškić et al.* Appeal Judgement, paras 31-32.

odds with some witnesses' testimony. Therefore, an argument on appeal that a Trial Chamber finding must be overturned because it is contradicted by a witness is, by itself, no argument at all.[904]

301. Thus, when faced with any such allegations, the Appeals Chamber will dismiss the allegation without further discussion. Included in this category are:

a. Allegations that testimony about actions against the State Hospital should be disregarded because another witness had testified that the hospital was targeted only at the beginning of the conflict.[905]

b. A challenge to the finding that the SRK controlled the higher parts of Hrasno Brdo hill because some witnesses testified differently.[906]

c. Allegations that the SRK could not have fired on Nafa and Elma Tarić from Ozrenska Street because witnesses said the SRK had no positions there.[907]

d. A challenge to the finding that the shooting in Scheduled Sniping Incident 15 came from SRK lines because witnesses DP10 and DP16, whom the Trial Chamber found to be inconsistent with one another, had testified differently.[908]

e. The dispute about the distance between the bus shot in Scheduled Sniping Incident 22 and the separation line comes down to one Defence witness testifying differently from other witnesses.[909] Further, the dispute about the view shown in photographs used to demonstrate the area in Scheduled Sniping Incident 22 is based only on contradictory statements of witnesses, which were assessed by the Trial Chamber.[910]

f. Disagreements between defence witnesses and other witnesses about where the front lines were in Dobrinja.[911]

---

[903] In contentious proceedings such as these, it is all but inevitable.
[904] Similar arguments, such as complaints that the Trial Chamber believed a witness it should not have, or did not believe a witness it should have, are also misconceived. Of course, an allegation that a Trial Chamber erred because it made a finding contrary to overwhelming evidence is a different matter, and must be taken seriously. However, Galić has not made any such arguments.
[905] Defence Appeal Brief, para. 268. It should also be noted that here, and in many other cases, Galić mentions only the identity of the witness who alleged contradictory facts without providing a reference to the transcript or a document. That alone is enough to dismiss an argument. *See Vasiljević* Appeal Judgement, paras 10-11 (stating that the Appeals Chamber will dismiss arguments that do not "provide the Appeals Chamber with exact references to the parts of the records, transcripts, judgements and exhibits to which reference is made").
[906] Defence Appeal Brief, paras 282-283.
[907] Defence Appeal Brief para. 297.
[908] Defence Appeal Brief para. 300.
[909] Defence Appeal Brief, para. 370.
[910] Defence Appeal Brief, para. 371.
[911] Defence Appeal Brief, para. 384.

g. Defence witness testimony, in contradiction to other witness testimony, that there were trenches 50m from the well hit in Scheduled Shelling Incident 2.[912]

h. A challenge to the finding that victim Kundo was not hit from behind SRK lines because a Defence witness said he could not have been.[913]

i. A Defence expert's opinion that witness Jusović may have been shot by a ricochet.[914]

j. A challenge to the finding that the mine in Scheduled Shelling Incident 2 was fired from the direction west-north-west because Defence witness Vilićić gave an explanation of his calculations and his inversion of a photograph.[915] Galić does not explain why his witness's calculations are more reliable than those accepted by the Trial Chamber.

302. Therefore, because each of these allegations contends merely that a finding should be overturned because other witnesses testified to something different, this subground of appeal is dismissed.

6. Re-presentation of the same argument that was made unsuccessfully at trial

303. Because this is not a trial *de novo*, Galić cannot simply repeat the same arguments that were made at trial without saying how the Trial Chamber erred: "an appeal is not an opportunity for the parties to reargue their cases".[916] In many instances, Galić's argument on appeal is a mere repetition of an argument that was made and rejected at trial, and he has not demonstrated why no reasonable trier of fact could have rejected his arguments. For each one of these, the Appeals Chamber will dismiss the allegation without further discussion. Included in this category are:

a. The allegation that the bullets hitting the tram in Scheduled Sniping incident 24 came from ABiH forces because they also held positions in the Jewish Cemetery, or that the tram was hit by a stray bullet.[917]

b. The allegation that there was no possibility of visual observation from the SRK lines to the position where Witness AG was hit.[918]

[912] Defence Appeal Brief, para. 394.
[913] Defence Appeal Brief, para. 412.
[914] Defence Appeal Brief, para. 441.
[915] Defence Appeal Brief, para. 221.
[916] *Kupreškić et al.* Appeal Judgement, para. 22.
[917] Defence Appeal Brief, paras 278-279; *see* Trial Judgement, paras 256-258.

c. The allegation that there was fighting in the vicinity at the time of Scheduled Sniping Incident 25.[919]

d. The allegation that there were ABiH soldiers on the bridge in Dobrinja during Scheduled Sniping Incident 6.[920]

e. The allegation that there was an error in determining North in the map describing Scheduled Shelling Incident 1, leading to an erroneous determination of the shelling origin.[921]

f. The allegation that the witnesses in Scheduled Sniping Incident 4 showed that the separation lines were close, and Witness G was shot behind ABiH lines.[922]

g. The allegations about the police canteen, soldiers, shooting and machine guns with regard to Scheduled Sniping Incident 9.[923]

h. The allegation that Witness G's testimony and body position show he could not have been hit from SRK lines.[924]

304. Therefore, because these arguments are mere repetitions of arguments made at trial, this subground of appeal is dismissed.

7. Allegations that the Trial Chamber accepted incredible or unreliable evidence

305. For these allegations, the Appeals Chamber recalls the test to be applied:

> Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial. Whether a Trial Chamber will rely on single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case. In a similar vein, it is for a Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous.[925]

---

[918] Defence Appeal Brief, para. 310; *see* Trial Judgement, para. 288.
[919] Defence Appeal Brief, para. 330; *see* Trial Judgement, para. 320.
[920] Defence Appeal Brief, para. 360; *see* Trial Judgement, para. 355.
[921] Defence Appeal Brief, para. 381; *see* Trial Judgement, para. 378, fn. 1264.
[922] Defence Appeal Brief, para. 458; *see* Trial Judgement, para. 551.
[923] Defence Appeal Brief, para. 462; *see* Trial Judgement, paras 552-555.
[924] Defence Appeal Brief, para. 459; *see* Trial Judgement, para. 550.
[925] *Aleksovski* Appeal Judgement, para. 63 (footnotes omitted).

306. In a number of instances, Galić alleges that the Trial Chamber accepted unreliable or incredible evidence, but fails to show that no reasonable tribunal would have accepted that evidence as reliable, or that its evaluation of the evidence was wholly erroneous. Included in this category are:

a. Allegations that witnesses to sniping and shelling incidents are incredible and unreliable.[926]

b. Allegations that evidence given by some journalists should not be believed because it was "in function of the media war" and they could not support their allegations with photographs.[927]

c. Allegations that witness testimony about where they were shot is not sufficiently precise to be admitted.[928]

d. Attacks on the credibility of photographs submitted by Witness Ashton.[929]

e. Allegations that no conclusion can be made based on the contradictory testimony of Witnesses Salćin and Maljanović, and that the witnesses were unreliable.[930]

f. The statement that the Trial Chamber erred in disagreeing with the conclusions of Witness Vilicić with regard to shelling in Alipašino Polje[931] and Dobrinja.[932]

g. The allegation that the Trial Chamber should not have admitted the testimony of Witness Hadžić.[933]

h. The contention that the Trial Chamber should not have accepted allegations of witnesses that soldiers continued to fire on a Dobrinja sniper victim.[934]

i. The allegation that Witnesses Hafizović, Omerović, A.E. "and others", testifying to shelling in Dobrinja, were unreliable and incorrect.[935]

---

[926] Defence Appeal Brief, para. 255.
[927] Defence Appeal Brief, paras 266, 336.
[928] Defence Appeal Brief, para. 267.
[929] Defence Appeal Brief, para. 287, fn. 228.
[930] Defence Appeal Brief, paras 322-323.
[931] Defence Appeal Brief, paras 343-344.
[932] Defence Appeal Brief, paras 379, 381, 404.
[933] Defence Appeal Brief, para. 352.
[934] Defence Appeal Brief, para. 360.
[935] Defence Appeal Brief, para. 376.

j. The allegation that the medical documentation presented in support of Scheduled Shelling Incident 1 was incomplete and unacceptable.[936]

k. Complaints that the Trial Chamber accepted UNMO evidence over Witness Vilicić's evidence with regard to Dobrinja shelling incidents.[937]

l. The allegation that the Trial Chamber accepted evidence from Witness Kundo about Scheduled Sniping Incident 16 that was inconsistent and contradictory to her husband's testimony.[938]

m. Vague attacks on the "impressions of certain witnesses, who even in their testimonies do not have grounds for making any factual findings" with regard to the crime of terror against the civilian population.[939]

n. The contention that the Trial Chamber should not have accepted the evidence of Ewa Tabeau regarding the number of civilians killed or injured because the Defence's witness showed that Tabeau's arguments were unacceptable.[940]

307. For all of the above contentions, the Appeals Chamber finds that Galić has failed to discharge his duty to demonstrate that no reasonable trier of fact could have accepted the evidence relied upon. This sub-ground of appeal is dismissed.

8. Allegations contrary to evidence, experience or common sense

308. All allegations of error require that they be sensible, logical and not contradictory to any uncontradicted evidence. Where faced with allegations that do not conform to these requirements, the Appeals Chamber will dismiss them without further discussion.

309. Included in this category are:

a. The contention that the loader in Scheduled Sniping Incident 15 was hit accidentally because a large number of bullets was fired at it.[941] Yet the fact that a large number of bullets hit the loader makes it more likely that it was targeted deliberately, not less.

[936] Defence Appeal Brief, para. 380.
[937] Defence Appeal Brief, para. 388.
[938] Defence Appeal Brief, paras 411-412.
[939] Defence Appeal Brief, para. 472.
[940] Defence Appeal Brief, para. 473.
[941] Defence Appeal Brief, para. 301.

b. The contention that the existence of military facilities halfway between SRK lines and the high-rise apartment of Witness Mukanović meant that he could not have been deliberately targeted.[942] A civilian can be deliberately targeted regardless of what else there is in his vicinity.

c. The contention that where two civilians are together and only one was shot, as in Scheduled Sniping Incident 25, that cannot have been targeted.[943] A soldier could quite easily decide to shoot only one person, or may only have enough time or ammunition to shoot one.

d. The contention that there was fighting at the time of Scheduled Sniping Incident 25 because witnesses were warned of firing in the area.[944] What Galić disingenuously ignores is that the firing they were warned of *was sniping*.[945]

e. The contention that if a civilian on her own was shot by a bullet ricocheting off the concrete around her, that indicates that she was not deliberately targeted.[946] If a civilian is the only likely target around, a ricochet indicates rather that she was targeted deliberately but inaccurately.

f. The contention that if shelling forces could not see the parking lot hit in Scheduled Shelling Incident 1, that indicates the shelling could not have been an example of indiscriminate firing.[947] Shelling towards an area that one cannot see is certainly an example of indiscriminate firing because there has, by definition, been no discrimination between different potential targets.

g. The contention that the establishment of a line of sight can only be determined on the basis of on-site inspection or from a photograph taken from the firing position.[948] A line of sight could be determined by any number of things, including, for example, witness testimony or a detailed topographical map.

310. Therefore, because these allegations lack logic or sense, this subground of appeal is dismissed.

---

[942] Defence Appeal Brief, para. 308.
[943] Defence Appeal Brief, para. 329, fn. 278.
[944] Defence Appeal Brief, para. 331.
[945] Trial Judgement, para. 320.
[946] Defence Appeal Brief, para. 366.
[947] Defence Appeal Brief, para. 383.
[948] Defence Appeal Brief, para. 439.

9. Allegations based on new evidence

311. The Appeals Chamber can rule based only on the evidence before it, which is the combination of that evidence found in the trial record and any new evidence admitted by the Appeals Chamber pursuant to Rule 115 of the Rules. Galić brought six motions under Rule 115 to admit new evidence. All six were rejected.[949] Therefore, the Appeals Chamber, in deciding this appeal, will consider only evidence that is part of the trial record. Consequently, any allegation made by Galić that are based on new evidence – including factual allegations for which he does not give precise citations and that do not appear clearly in the Trial Judgement – will be dismissed without further discussion.[950]

312. Included in this category are contentions that:

a. SRK members did not have positions in or near Pržulje house.[951]

b. Shells frequently dropped short because of unskilled crews and weather conditions.[952]

c. The photographs on which the Trial Chamber concluded that Scheduled Sniping Incident 6 originated from the Orthodox Church were not taken from the spot where the victim was standing.[953]

d. The ABiH used forced labour on the front line.[954]

e. Most of the people around the well hit in Scheduled Shelling Incident 2 were soldiers.[955]

f. All victims killed beneath Špicasta Stijena were the victims of stray or ricocheting bullets.[956]

g. Žuć was not a civilian zone.[957]

---

[949] *See* Procedural Background, Annex A.
[950] The onus of looking through the record to find support for allegations of error falls on Galić, not the Appeals Chamber.
[951] Defence Appeal Brief, para. 312.
[952] Defence Appeal Brief, para. 345.
[953] Defence Appeal Brief, para. 355.
[954] Defence Appeal Brief, fn.331.
[955] Defence Appeal Brief, para. 394
[956] Defence Appeal Brief, para. 446.
[957] Defence Appeal Brief, fn. 400.

313. Therefore, because these allegations rely on evidence that was never properly admitted before either the Trial Chamber or the Appeals Chamber, this subground of appeal is dismissed.

C. Specific Incidents

1. Markale Market

314. With regard to the Markale Market shelling, Galić makes nine specific allegations:

a. The Trial Chamber was wrong to conclude that the bearing of the shell was 18 degrees because one of the UN experts thought the bearing was 25 degrees and the Trial Chamber is "not an expert" able to determine between different technical opinions.[958]

b. The Trial Chamber was wrong to determine that the angle of descent of the shell was about 65 degrees because two UN experts thought the angle was significantly different, and the Trial Chamber did not clearly explain why it rejected other calculations.[959] Also, Galić claims there was no way to tell how far the shell penetrated the ground, an essential factor in determining the angle of descent.[960]

c. One cannot determine how deep a shell embeds itself into the ground without knowing the exact composition of the ground.[961]

d. The Trial Chamber erroneously determined that the depth of the crater was 10 cm because one witness said the margin of error in measuring the crater was 50%, and in any event the figure is meaningless without exact knowledge of the ground's composition.[962]

e. The Trial Chamber should not have accepted Witness AF's testimony because he lied to the Trial Chamber about the location of ABiH forces.[963]

f. Witness AK-1's testimony, which the Trial Chamber found reliable to indicate what direction the shells came from, also established that the shell was fired at a very short

[958] Defence Appeal Brief, para. 424, fn. 352.
[959] Defence Appeal Brief, para. 424, fn. 353.
[960] Defence Appeal Brief, para. 424, fns 354-355.
[961] Defence Appeal Brief, para. 424, fns 354-355.
[962] Defence Appeal Brief, para. 424.
[963] Defence Appeal Brief, para. 425, fn. 357.

distance from the market, not from the distant SRK lines, but the Trial Chamber incorrectly failed to come to this conclusion.[964]

g. The Trial Chamber was wrong to conclude that the SRK could have prerecorded the market's position from previous shellings over the previous four months because changing conditions mean that coordinates cannot remain the same for any length of time.[965] An undisputed Prosecution witness claimed that prerecorded data can only be used for two hours, and there had been no shelling in the previous two hours.[966] Further, the market was too small a target to be deliberately hit from such a great distance.[967]

h. The Trial Chamber relied on Witness AD's testimony in order to conclude that the market could have been deliberately targeted, but it erred in failing to accept his testimony that SRK soldiers refused to execute orders which could have been interpreted as illegal.[968]

i. The tailfin produced as evidence cannot have been the actual tailfin because the fragments of shrapnel were never produced.[969]

315. The testimony and the allegations surrounding the Markale Market incident are extremely complicated, with a number of technical factors coming into play, experts providing different conclusions, and uncertainty as to the accuracy of the different findings. The Trial Chamber received into evidence, *inter alia*: a report produced by a Bosnian expert three days after the shelling based on analysis conducted on the day of the shelling (Sabljica Ballistic Report);[970] a report produced by a Bosnian expert two days after the shelling based on analysis conducted the day after the shelling (Zečević Ballistic Report);[971] a report produced by UNPROFOR ten days after the shelling, which included ten different analyses made by eight different UN officials at different times after the shelling (UNPROFOR Report);[972] a report produced by a defence expert eight years after the shelling (Viličić Shelling Report);[973] and testimony from both Bosnian experts,[974] the

[964] Defence Appeal Brief, para. 425, fn. 359.
[965] Defence Appeal Brief, para. 426, fn. 362.
[966] Defence Appeal Brief, para. 426.
[967] Defence Appeal Brief, fn. 362.
[968] Defence Appeal Brief, fn. 362.
[969] Defence Appeal Brief, para. 427.
[970] P2309.A1.
[971] P3276.1.
[972] P2261.
[973] D1917.
[974] Sabljica, T. 5116-5433; Zečević, T. 10283-10370.

Defence expert,[975] and various UN officials with varying knowledge of the UN's different analyses.[976]

316. Some of Galić's allegations of error can be easily dismissed.

a. As to the composition of the ground, Zečević testified that the ground was composed of a thin layer of asphalt above sand, rocks, gravel and stones.[977] No other contradictory evidence has emerged. Galić has not shown either why that finding is incorrect or why more detailed analysis is necessary.

b. Matters of credibility are largely up to the Trial Chamber; in that respect, Galić has failed to show that Witness AF's testimony as to the presence of ABiH troops is so unreliable that his testimony cannot be accepted on any other matter.

c. That Witness AK-1 heard the sound of the shell does not necessarily lead to the conclusion that the shell came from nearby; evidence adduced at trial demonstrated that differing conditions could have made the shell audible from different places.[978]

d. A Trial Chamber's acceptance of one fact a witness testifies to, does not oblige it to accept all of the witnesses testimony; therefore, the Trial Chamber's acceptance of only parts of witness AD's testimony was not error.

e. Whether the shrapnel was produced is not relevant to whether the tailfin entered into evidence was the actual tailfin; the Trial Chamber determined from the evidence that it was, and Galić has presented no reason why that determination was erroneous.[979]

317. Therefore, the Appeals Chamber is left with arguments about the bearing of the shell; the angle of descent; the depth of the crater; and the possibility of targeting the market. The first three concern where the shell came from; the last one, whether it was sent deliberately.

318. Determination of where a shell comes from is an extremely difficult process. To be precise, the bearing, angle of descent and charge must all be known. Working *ex post*, these data are obviously rarely available and have to be reconstructed, as in this case, from data gathered at the site of impact. Data from the site would include, *inter alia*: the depth of the crater created by the shell, the shape, size and location of the disturbance of the ground around the crater; any tailfins,

---

[975] Viličić, T. 20182-20607.
[976] *See, e.g.*, Witness Hamill, T. 6059-6233.
[977] Trial Judgement, para. 443.
[978] *See* Trial Judgement, para. 454.
[979] *See* Trial Judgement, para. 463, fns 1630, 1669.

igniters, shrapnel or other objects recovered from the explosion; and the surrounding topography, both close and far. But, as is apparent from the evidence discussed by the Trial Chamber, not all of these data are susceptible to precise measurement, and even when they are, they can lead to a range of possible solutions.

319. The task of reconstruction becomes more difficult when a number of experts come to different conclusions. The Trial Chamber received five different values for the bearing of the shell,[980] six different values for its angle of descent,[981] three different measurements of the crater depth,[982] and three different estimates of the distance the shell travelled.[983] Further, with one or two exceptions, these data were *ranges*, not numbers.

320. Nonetheless, some of the imprecisions in this case are less important than others. The arguments regarding the shell's bearing can be dismissed without difficulty. The Trial Chamber may have erred in finding that the bearing was 18 degrees.[984] There was another opinion, accepted by the UNPROFOR Report as equally reliable, that the bearing may have been as high as 23.6 degrees, even 25 degrees.[985] However, such an error would not have caused a miscarriage of justice because the possible ranges all fit within a north-north-easterly direction, pointing to roughly the same configuration of ABiH and SRK lines.[986] In that direction, the Markale market was 2,300m from the ABiH confrontation line and 2,600m from the SRK confrontation line.[987] Therefore, the salient inquiry is how far the shell travelled. Three factors are at play in this: relative altitude, which is undisputed; charges, which are disputed; and angle of descent, which is heavily disputed.

321. It is undisputed that the ground rises about 400m above the market towards the confrontation lines, from where it rises another 100m to 250m – so the shell fell at least 400m.[988] The charge on the mortar can only be determined (if at all) from the depth of the crater and tunnel created by the shell. As shown below, the Trial Chamber's findings in this regard were entirely reasonable and will not be disturbed. The angle of descent thus becomes pivotal.[989] On this issue,

[980] *See* Trial Judgement, para. 465.
[981] *See* Trial Judgement, paras 443, 467-468.
[982] *See* Trial Judgement, paras 484-485.
[983] *See* Trial Judgement, paras 443-444, 471.
[984] Trial Judgement, para. 465.
[985] Trial Judgement, paras 445, 465. Another expert fixed the bearing at 35 degrees. Trial Judgement, para. 445. However, he used an unconventional method and his calculation was rejected by the UNPROFOR Report as being unreliable (UNPROFOR report, Annex C). Galić has not relied on that witness's conclusion in his appeal. Therefore, the applicable range of bearings that must be considered is 18 to 25 degrees.
[986] *See* D1790-D1796 (maps submitted into evidence by the Defence).
[987] Trial Judgement, para. 455.
[988] *See* Trial Judgement, para. 479.
[989] Schematically, the angle of descent, the bearing and the speed are necessary to determine the shell's origin; the angle of descent, the crater, the altitude difference and the charge are all necessary to determine its speed. Combinations or particular values of these possible numbers can rule out or indicate certain possibilities: for example, a very shallow crater suggests either a low charge, a shallow angle of descent, or both.

the Appeals Chamber will not reverse or revise the Trial Chamber's findings despite certain shortcomings in the Trial Chamber's analysis.

322. The greater the angle of descent, the closer the shell was fired from. Because ABiH lines were closer to the market, if the angle was particularly high, the shelling had to come from ABiH lines; if the angle was particularly low, the shelling had to come from SRK lines. Within a particular range, it could have come from either territory, depending on the number of charges used. Judge Nieto Navia's dissent gave an illustration: if a 120mm shell that hits the ground at 235m/s has an angle of descent of 55.6 degrees, it will have been fired from 6,464m, behind SRK lines; if the angle was 86.2 degrees and it hit the ground at the same speed, it will have been fired from 1,168m, well within the ABiH lines.[990] But a change in other factors can also produce large effects. If a 120mm shell, falling at an 85.7 degrees angle, hit the ground at 179m/s, it will only have travelled 680m.[991]

323. Partly because of the surroundings of the market, it is undisputed that the angle of descent was at least 50 degrees.[992] But the upper band was the subject of much dispute and great uncertainty. Two UN inspectors set the maximum angle at 62 degrees,[993] the Defence expert set it at 62.5 degrees,[994] and the Bosnian inspector fixed the angle at 60 degrees with a 5 degrees margin of error.[995] But Major Russell, another UN inspector, calculated the angle at 67-73 degrees.[996] The UNPROFOR report, having regard to numerous UN analyses, some of which it rejected for faulty methodology, said it was "not possible to estimate with any acceptable degree of accuracy the angle of descent".[997] UNPROFOR could only conclude that "the possible distance of origin of fire […] is between 300 and 5,551 metres from the point of detonation [and there was] insufficient physical evidence to prove that one party or the other fired the mortar bomb. The mortar bomb in question could have been fired by either side".[998] It could not impute reliability to many of the calculations because they either used unreliable methods or were taken too long after the event.[999]

324. The Trial Chamber's discussion of the UNPROFOR Report is not entirely accurate. The Trial Chamber stated that "[t]he Majority understands that the UN Report endorsed the findings

---

[990] Separate and Partially Dissenting Opinion, para. 74.
[991] Viličić Shelling Report, tbl. 2.
[992] *See* Zečević, T. 10347. The Defence's own expert calculated the shell's angle of descent to be between 55.6 and 62.5 degrees. Trial Judgement, para. 451.
[993] Trial Judgement, para. 446.
[994] Trial Judgement, para. 451.
[995] Trial Judgement, para. 445.
[996] Trial Judgement, para. 445.
[997] UNPROFOR Report, p. 4.
[998] UNPROFOR Report, p. 4.
[999] UNPROFOR Report, Annex C.

made by Khan[1000] and Hamill[1001] although it cautioned that on the basis of the condition of the crater it was not possible to estimate with any 'acceptable degree of accuracy' the angle of descent".[1002] Calling the UNPROFOR Report an endorsement is inaccurate: the report discussed Khan and Hamill's findings at greater length than the other calculations (and, to be sure, rejected calculations made by Verdy and Frebat, the French UN battalion),[1003] but it did not endorse them, and concluded that there was a great deal of uncertainty. The Trial Chamber also said the UNPROFOR Report ignored Russell's findings,[1004] but that is not correct. UNPROFOR included Russell's findings in a table of the different measurements, and included it in the results "based on […] conventional methods of crater analysis".[1005]

325. The Trial Chamber concluded: "On the basis of the evidence presented, the Majority finds that the shell's angle of descent was approximately 60 degrees. Allowing for a margin of error of 5 degrees, the majority finds that the angle of descent […] was not greater than 65 degrees".[1006] The Trial Chamber's language could have been clearer. At first glance, it appears that the Trial Chamber found that the shell fell at a particular angle, whereas all the experts found only ranges,[1007] and then arbitrarily picked a particular margin of error, perhaps because one local expert had used it.[1008] However, the Appeals Chamber considers that the Trial Chamber's language obscures the fact that the Trial Chamber, in using both a single number and a margin of error, did in fact find that the angle of descent fell within a range of possibilities, a range which was as wide as any of the ranges attested to by the experts.

326. Neither the Trial Chamber's slight misreading of the UNPROFOR Report, nor its mildly confusing language render its decision unreasonable. Had the UNPROFOR report been the only evidence the Trial Chamber had to consider, an inaccurate analysis of the report may well have proved fatal, but an examination of the trial record shows that the Trial Chamber had much more evidence before it than simply the UNPROFOR report: it also had the Sablijca report; the Zečević report; the Viličić report, tendered by the Defence; and testimony from Bosnian experts, members of the UNPROFOR team, and Viličić.

1000 56-62 degrees.
1001 53-62 degrees.
1002 Trial Judgement, para. 468.
1003 UNPROFOR Report, Annex C.
1004 Trial Judgement, para. 468.
1005 UNPROFOR Report, Annex C.
1006 Trial Judgement, para. 469.
1007 Defence Appeal Brief, fn. 352.
1008 *See* Trial Judgement, para. 443.

327. The Zečević report, based on measurements taken the day after the shelling, came up with a range of 55-65 degrees.[1009] That was close to the range found by Khan and Hamill,[1010] and the Trial Chamber ended up using those figures.[1011] The Viličić report, using calculations made some years later and based on Sabljica's measurements and photographs of the area of impact, came up with a range of 55.6-62.5 degrees.[1012] This range fits entirely within the Trial Chamber's conclusion at the top end. It must be remembered that the greater the angle, the more likely the shell was to come from behind SRK lines. If the Trial Chamber made an error at the lower end of the calculations, that error would be favourable to Galić. Thus it cannot be the basis for reversing or revising the Trial Chamber's findings in favour of Galić. Testimony from Witnesses Hamill, Viličić and Zečević all gave further explanations for how they arrived at their figures, while Russell never testified. Therefore, there was much more evidence available to the Trial Chamber than only the UNPROFOR report to enable its finding that the angle was 55 to 65 degrees.

328. As to Russell's outlying numbers, it was unfortunate that the Trial Chamber did not provide a clear explanation why it rejected them. However, the testimony of Hamill provided justification for the failure to accept Russell's conclusion. According to Hamill, the UNPROFOR team had no knowledge of Russell's methods.[1013] Neither party called Russell as a witness, so no explanation was available to the Trial Chamber. Without knowing how Russell arrived at his results, the Trial Chamber acted reasonably in disregarding those calculations in favour of numerous other sets of calculations with known methodologies.[1014] The fact that Russell's calculations were outliers, while not enough in itself to justify ignoring his results, adds weight to the reasonableness of the Trial Chamber's decision. Of course, it might have been clearer had the Trial Chamber better explained why it disregarded Russell's conclusions, but a Trial Chamber does not have to explain every decision it makes, as long as the decision, having a view to the evidence, is reasonable.[1015]

329. Therefore, the Trial Chamber's findings as to the angle of descent are not unreasonable and will not be overturned.

330. But the bearing and the angle of descent alone are not enough. The type or amount of charges is also important in order to determine speed, and thus how far the shell travelled. As the UNPROFOR Report noted, a mortar can be fired with six different charges, so even if the angle of

---

[1009] Trial Judgement, para. 443.
[1010] Trial Judgement, para. 446.
[1011] Trial Judgement, para. 468.
[1012] Trial Judgement, para. 451.
[1013] Hamill, T. 6096.
[1014] Hamill also testified to the "remarkable consistency across the results despite the fact that each of [the experts] did [their] tests independently of the other and using different methods". T. 6194.
[1015] *See Kvočka et al.* Appeal Judgement, para. 23.

descent and bearing are known perfectly, a mortar can have come from six locations.[1016] But the amount of charge can be reconstructed. To determine the charge, one needs to determine the speed at which the shell was travelling when it hit the ground, and the best evidence for this comes from the depth of the crater it makes, and the composition of the ground.[1017]

331. The composition of the ground was established by one uncontradicted piece of evidence which Galić has shown no reason to doubt.[1018] There is, however, some confusion with regard to the depth of the crater. Prosecution witness Sabljica, on the scene shortly after the shelling, measured that depth at 9 cm;[1019] Zečević, based on his analysis the day after, said the shell penetrated the ground 20-25 cm;[1020] one UN expert measured it at 11 cm.[1021] The Trial Chamber stated that the 9cm and the 20-25 cm were two different measures, "the crater caused by the explosion" and "the depth of the tunnel of the tail-fin and the depth of the crater [...] together" respectively.[1022] The Trial Chamber used only the 9 cm figure in its calculations,[1023] Judge Nieto-Navia used in his dissent only the 20-25 cm figure.[1024] In his testimony, Zečević suggested that the crater and the tunnel were different things.[1025]

332. This confusion is lamentable, but ultimately not fatal. It appears that the total depth of penetration is the salient figure to determine the speed on impact. Zečević's estimate of 20-25 cm is the only estimate for this number, and it has not been reliably challenged. Galić says it is unreliable because it was taken after the tunnel had been disturbed.[1026] However, in this respect, the Trial Chamber had regard to all the evidence about the ground, including work done on the tunnel the previous day, and Galić has not shown that no reasonable trier of fact could have found Zečević's uncontradicted testimony as to penetration reliable. Therefore, the Trial Chamber's finding – based on the depth of penetration, the type of ground, and analysis presented by both Prosecution and Defence witnesses – that the shell was fired with a charge of at least 0+3,[1027] was a reasonable one.

[1016] UNPROFOR Report, Annex C.
[1017] Trial Judgement, paras 484-489.
[1018] *See* Trial Judgement, para. 443.
[1019] Trial Judgement, para. 442.
[1020] Trial Judgement, para. 443.
[1021] Trial Judgement, para. 447.
[1022] Trial Judgement, para. 484.
[1023] Trial Judgement, paras 484-486.
[1024] Separate and Partially Dissenting Opinion, paras 83-84.
[1025] Zečević, T. 10321 ("The crater doesn't – is not caused by the remnants of the stabiliser but by the explosion, and the hole in which the stabiliser was is quite a different thing".).
[1026] Defence Appeal Brief, para. 424. He also says the margin of error was too great, but he has misread 200-250mm as 10-15cm.
[1027] Trial Judgement, para. 490.

333. As the Trial Chamber pointed out, a shell fired at 0+3 charges with a difference in altitude of at least 400 m[1028] and an angle of descent of 65 degrees would have travelled 3600 m, placing its origin well within SRK lines.[1029] Therefore, the Trial Chamber's conclusion that the shell was fired from behind SRK lines is not unreasonable and will not be overturned.

334. As to the deliberateness of the targeting, Galić argues that the market could not have been deliberately targeted because reaching such a small target from more than 2,600 m away would be, "if not nearly impossible, extremely lucky";[1030] he further argues that prerecorded data about a target's location can only be successfully used within two hours, so shelling in the previous four months could have been of no assistance.[1031] The Appeals Chamber notes that the Trial Chamber's reasoning in this regard was sparse and somewhat unclear,[1032] but it finds that even if the Trial Chamber erred in determining that the market was deliberately targeted, that error was not prejudicial to Galić because civilians were deliberately targeted whether or not the SRK was aiming at the market.

335. Witness Hamill, relied on by Galić, testified both to the limited time in which prerecorded data could be used and to the difficulty of hitting a relatively small target such as the market from a great distance.[1033] However, Hamill also testified that an experienced mortar crew could reach to within 200 m or 300 m of their target on the very first shot.[1034] The Trial Chamber heard evidence that the closest military target to the market was 300 m away.[1035] Therefore, whether the SRK was aiming for the market itself or for some other target within the surrounding 300 m, it was aiming for a target within a civilian area, and this shelling incident was thus an example of shelling that deliberately targeted civilians. The Trial Chamber was incorrect to find that the shell was deliberately aimed at Markale market, but correct to find that it was deliberately aimed at civilians, and its conclusions will not be overturned.

2. Koševo Hospital

336. Galić challenges the Trial Chamber's findings that the shelling of Koševo Hospital constituted "examples of the campaign of attacks on civilians"[1036] because SRK forces fired on the

[1028] The change in altitude from the market to the ABiH confrontation line. A greater change in altitude would cause a longer flight.
[1029] Trial Judgement, para. 488. A lower angle of descent, as posited by most of the experts, would have travelled from even further behind SRK lines.
[1030] Defence Appeal Brief, fn. 362.
[1031] Defence Appeal Brief, para. 426.
[1032] *See* Trial Judgement, para. 494.
[1033] Hamill, T. 6193.
[1034] Hamill, T. 6225.
[1035] Trial Judgement, para. 456.
[1036] Trial Judgement, para. 509.

area of the hospital – and not in fact the hospital itself – "only as a response to ABiH military activities from that area".[1037]

337. Galić makes two separate contentions. The first is that SRK forces did not shell the hospital itself. But shelling of the hospital was established by a good deal of evidence, which Galić has in no way refuted.[1038] This contention is accordingly dismissed. The Appeals Chamber takes Galić's second contention to mean that it was not unlawful for SRK forces to fire at the hospital because ABiH forces were using it as a military base; an argument which will now be considered.[1039]

338. It is clear from the Trial Record that the SRK was fired at from the hospital grounds, and that the SRK fired on the hospital grounds and building.[1040] The Trial Chamber recounted the testimonies of ten witnesses and a number of UN reports testifying to 13 specific instances – along with an acknowledgement that there were numerous other instances – where the hospital or its grounds were shelled between October 1992 and January 1994.[1041] It also recounted the testimonies of 12 witnesses describing 14 specific instances – again with an acknowledgement that there were other instances – where weapons were fired from the hospital grounds towards SRK forces, or military vehicles were seen in the hospital grounds, in 1992 and 1993.[1042]

339. A number of UN witnesses testified to specific incidents where SRK fire on the hospital came in direct response to firing from the hospital grounds.[1043] One said the hospital was "often hit in the context of return fire".[1044] Conversely, another UN witness reported that the SRK initiated the firing, and another witness testified to attacks on the hospital that responded solely to normal hospital activity.[1045]

340. Given the evidence, the Trial Chamber was clearly correct to find both that the Koševo hospital "was regularly targeted during the Indictment Period by the SRK" and that "ABiH mortar fire originated from the hospital grounds or from its vicinity[1046] and that these actions may have provoked SRK counter-fire".[1047] But its conclusion that the firing on the Koševo hospital buildings

[1037] Defence Appeal Brief, para. 429.
[1038] *See* Trial Judgement, paras 498-503.
[1039] Although this contention posits a legal, rather than a factual, error, the Appeals Chamber will nevertheless consider it in this section.
[1040] *See* Trial Judgement, paras 498-508.
[1041] Trial Judgement, paras 498-503.
[1042] Trial Judgement, paras 504-508. The Trial Chamber also heard one witness testify to damage caused to the hospital by ABiH forces. Trial Judgement, fn. 1722.
[1043] Trial Judgement, paras 504-506, 508.
[1044] Trial Judgement, para. 508.
[1045] Trial Judgement, para. 508.
[1046] Most of the evidence referred to fire from the hospital grounds itself. *See* Trial Judgement, paras 504-508.
[1047] Trial Judgement, para. 509.

"was certainly not aimed at any possible military target"[1048] is partially incorrect. If the hospital, whether the building or the grounds, was used as a base to fire at SRK forces, then the hospital was, at least temporarily, a military target. As the ICRC Commentary to Additional Protocol I to the Geneva Conventions states: "If the medical unit is used to commit acts which are harmful to the enemy, it actually becomes a military objective which can legitimately be attacked, and even destroyed".[1049]

341. It is important to establish exactly what restrictions international humanitarian law establishes, as set out in the Fourth Geneva Convention and Additional Protocols thereto, regarding attacks on hospitals. All three instruments state that hospitals shall not be the object of attack.[1050] However, all three also state – with slightly different wording – that hospitals lose their protection if they are used for military purposes. The Fourth Geneva Convention states that the protection ceases if "they are used to commit, outside their humanitarian duties, acts harmful to the enemy";[1051] Additional Protocol I, if "they are used to commit, outside their humanitarian function, acts harmful to the enemy";[1052] and Additional Protocol II, if "they are used to commit hostile acts, outside their humanitarian function".[1053]

342. The Fourth Geneva Convention and the two Additional Protocols, along with the ICRC Commentary, give examples of actions that result in the loss of protection under international humanitarian law for hospitals. According to the ICRC Commentary, these include:

- "[T]he use of a hospital as a shelter for able-bodied combatants or fugitives";[1054]
- The use of a hospital "as an arms or ammunition dump";[1055]
- The use of a hospital "as a military observation post";[1056]
- "[T]he deliberate siting of a medical unit in a position where it would impede an enemy attack";[1057] and
- Heavy fire from every window of a hospital meeting an approaching body of troops.[1058]

[1048] Trial Judgement, para. 509.
[1049] ICRC Commentary (Additional Protocols), para. 555.
[1050] *See* Geneva Convention (IV), art. 18; Additional Protocol I, art. 12; Additional Protocol II, art. 11.
[1051] Geneva Convention (IV), art. 19.
[1052] Additional Protocol I, art. 13.
[1053] Additional Protocol II, art. 11.
[1054] ICRC Commentary (Additional Protocols), para. 551.
[1055] ICRC Commentary (Additional Protocols), para. 551.
[1056] ICRC Commentary (Additional Protocols), para. 551.
[1057] ICRC Commentary (Additional Protocols), para. 551.
[1058] ICRC Commentary (Additional Protocols), para. 4728.

343. According to Geneva Convention IV, Additional Protocol I and the ICRC Commentary, these actions do not lose protection:

- Nursing sick or wounded members of the armed forces;[1059]
- "The presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service";[1060]
- "[T]he personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge";[1061]
- "[T]he unit is guarded by a picket or by sentries or by an escort";[1062]
- "[M]embers of the armed forces or other combatants are in the unit for medical reasons";[1063]
- "[A] mobile medical unit accidentally breaks down while it is being moved in accordance with its humanitarian function, and thereby obstructs a crossroads of military importance";[1064] and
- "[R]adiation emitted by X-ray apparatus […] interfere[s] with the transmission or reception of wireless messages at a military location, or with the working of a radar unit."[1065]

344. Therefore, where a hospital is used for one of the hostile purposes articulated above, or for an analogous purpose, or for a purpose even more obviously hostile, the hospital loses protection and becomes a legitimate military objective while used for that purpose.[1066] However, that loss of protection is not instantaneous: a warning period is required. Additional Protocols I and II have the same wording: "Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded."[1067]

345. Though it does not change the legal analysis, it should also be noted that the parties to the conflict specifically included a version of these provisions in the 22 May Agreement, that:

[1059] Geneva Convention (IV), Article 19.
[1060] Geneva Convention (IV), Article 19.
[1061] Additional Protocol I, Article 13.
[1062] Additional Protocol I, Article 13.
[1063] Additional Protocol I, Article 13.
[1064] ICRC Commentary (Additional Protocols), para. 552.
[1065] ICRC Commentary (Additional Protocols), para. 552.
[1066] *Cf.* Additional Protocol I, Article 51(3) ("Civilians shall enjoy […] protection […], unless *and for such time as* they take a direct part in hostilities.") (emphasis added); ICRC Commentary (Additional Protocols), para. 1942 ("Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, *though only for as long as he takes part in hostilities*.") (emphasis added).
[1067] Additional Protocol I, art. 13(1); Additional Protocol I, Article 11(2). The Fourth Geneva Convention's wording is slightly different, but the practical effects of the difference are nugatory: "Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded." Geneva Convention (IV), art. 19.

"Hospitals, and other units, including medical transportation[,] may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attacks. The protection shall not cease unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities."[1068] The key difference in the agreement is the statement that hospitals shall not be used to commit "military", rather than "hostile" or "harmful" acts. In context, though, these words have very similar effects.

346. The law is thus clear: a hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function, but the opposing party must give warning before it attacks.[1069] In this case, the hospital was used as a base to fire mortars at the SRK forces.[1070] Therefore, the Trial Chamber erred in law in determining that fire on the hospital was "not aimed at any possible military target",[1071] because fire from the hospital turned it into a target. At the same time, however, military activity does not permanently turn a protected facility into a legitimate military target. It remains a legitimate military target only as long as it is reasonably necessary for the opposing side to respond to the military activity.[1072] Additionally, an attack must be aimed at the military objects in or around the facility, so only weaponry reasonably necessary for that purpose can be used. The Appeals Chamber must now review the Trial Chamber's factual findings in light of the correct legal standard.[1073]

347. As noted, the Trial Chamber heard a good deal of evidence about attacks from both sides. In some instances, evidence demonstrates that the SRK fired the type of weaponry ordinarily used against mortars within a reasonable time after there was mortar fire from the hospital.[1074] The Trial Chamber was thus incorrect not to find that a number of the SRK attacks were attacks on legitimate military targets. However, there is also evidence revealing that some of the SRK attacks, either

---

[1068] 22 May Agreement, para. 2.2.

[1069] The Trial Chamber did not entirely ignore this. In a footnote towards the end of its discussion on the hospital, it wrote: "Although using hospitals or medical facilities to commit military acts is not in accordance with international humanitarian law, before these installations loose the protection to which they are entitled, the attacking side should provide a prior warning to cease such use and provide reasonable time to comply therewith. If the medical facility is to be attacked, appropriate precautions should be taken to spare civilians, the hospital staff and the medical installations." Trial Judgement, footnote 1747. It provided no citation, and the second sentence is unclear as to *who* is to take the precautions. The ICRC Commentaries indicate that the onus is on the side using the hospital illegitimately.

[1070] The Trial Chamber found that the mortars came from "the hospital grounds or its vicinity". Trial Judgement, para. 509. But the evidence it discussed overwhelmingly described firing from the hospital grounds itself. *See* Trial Judgement, paras 504-506.

[1071] *See* Trial Judgement, para. 509.

[1072] *Cf.* ICRC Commentary (GC IV), p. 154 (discussing time limits of warnings); ICRC Commentary (Additional Protocols), para. 4727 (same).

[1073] *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.

[1074] *See* Trial Judgement, para. 508.

because of their timing or because of the weaponry deployed, cannot be construed as attacks on a legitimate military target.

348. First, the Trial Chamber heard and accepted evidence from Jacques Kolp, a UNPROFOR liaison officer, that the SRK had fired on the hospital before there was ever any firing from it.[1075] Adding strength to this testimony is the fact that the earliest dated attack on the hospital was October 1992,[1076] while the earliest dated attack from the hospital was December 1992.[1077] Another witness testified that fire on the hospital "often increased with the level of activity [at the hospital], vehicles arriving and leaving, people being carried on stretchers from building to building".[1078] The Trial Chamber accepted this evidence, and the Appeals Chamber sees no reason to reject it. Therefore, all this evidence demonstrates that on some occasions, the SRK attacks on the hospital were not attacks against a legitimate military target, but rather attacks on a protected facility that killed civilians, and thus parts of the campaign of attacks on civilians.

349. Further, the Trial Chamber also discussed the battle damage assessment of Squadron Leader Harding, a UN Military Observer.[1079] Harding visited Koševo Hospital on 30 December 1992 to identify how damage from the attacks had affected the hospital's operation.[1080] He found that the hospital had taken direct hits by 40 mm and 20 mm anti-aircraft artillery.[1081] There was also much evidence of heavy artillery fire on the hospital.[1082] None of this weaponry is of the type militaries use to take on mortars,[1083] so attacks using those weapons were not attacks against the mortars, but rather attacks on the hospital as a hospital.

350. Finally, the Trial Chamber also heard evidence that the Minister of Health of Republika Srpska told the Republika Srpska Assembly that if the "Hospital is to end up in the hands of the enemy, I am for the destruction of the Koševo Hospital so that the enemy has nowhere to go for medical help."[1084] Though the hospital was never destroyed, this evinces a willingness to target the hospital even when there was no legitimate military purpose to doing so, and is additional evidence lending credence to the conclusion beyond a reasonable doubt that the hospital was deliberately targeted.

[1075] *See* Trial Judgement, para. 508.
[1076] *See* Trial Judgement, para. 498.
[1077] *See* Trial Judgement, para. 505.
[1078] *See* Trial Judgement, para. 508.
[1079] *See* Trial Judgement, para. 499.
[1080] Trial Judgement, para. 499.
[1081] Trial Judgement, para. 499. Other witnesses also discussed anti-aircraft fire hitting the hospital. *See* Cutler, T. 8914.
[1082] *See, e.g.*, Trial Judgement, para. 499.
[1083] Harding, T. 4366-4367; Henneberry, T. 8668.
[1084] Trial Judgement, para. 502.

351. Therefore, when applying the correct standard of law, the Appeals Chamber finds that some, but not all, of the attacks on the hospital by the SRK constituted examples of the campaign of attacks on civilians. Other attacks were attacks on a legitimate military target. The Trial Chamber was thus only partially incorrect and its conclusion is revised accordingly.

352. For the foregoing reasons, Galić's seventeenth ground of appeal is dismissed.

XVI. GROUND 18: GALIĆ'S CRIMINAL RESPONSIBILITY

353. Galić contends that the Trial Chamber gave a "one-sided, incomplete and erroneous evaluation of [the] evidence" regarding his position, role and criminal responsibility.[1085] He points to numerous alleged errors of facts.

A. Errors on general matters

354. Galić first claims that the Trial Chamber erred in holding that he was appointed commander of the SRK by the Minister of Defence on the basis of testimony of Prosecution's Expert Witness Philipps. According to him, he was so appointed by Proclamation of the Presidency of the Republic of Srpska. He argues that the erroneous conclusion of the Trial Chamber shows that Expert Witness Philipps cannot be considered reliable.[1086] Second, he argues that the Trial Chamber erroneously stated that there was no dispute among the parties as to the facts of the planning and execution of the military encirclement of Sarajevo, when in fact he argued at trial that there was no encirclement but only a division of the city.[1087] Third, he contends that the Trial Judgement does not address his argument regarding his criminal responsibility under Article 7(1) of the Statute. As a result of this omission, he claims that it may be thought that he accepted the view of the Prosecution, whereas in fact he challenges his criminal responsibility under Article 7(1) of the Statute.[1088] The Prosecution does not respond to the first argument. In response to the second argument, it argues that Galić relied on a map produced by his military expert that establishes that, with the exception of the airport and the tunnel underneath it, there was indeed an encirclement of Sarajevo.[1089] In response to the third argument, it claims that Galić misinterpreted the Trial Judgement, which in fact addresses his position on his criminal responsibility.[1090]

355. With regard to the first argument, the Appeals Chamber finds that Galić does not explain how the question of which authority appointed him has any impact on his criminal responsibility. The relevant and uncontested fact is that he assumed his duty as Commander of the SRK on 10 September 1992.[1091] In fact, with respect to the argument pertaining to the reliability of Expert Witness Phillips, the Appeals Chamber notes that the reference in this part of the Trial Judgement to this witness's testimony is used only to support the fact that Galić assumed his duty on that date and does not refer to the authority appointing him. This part of Galić's argument therefore fails.

[1085] Defence Appeal Brief, para. 484.
[1086] Defence Appeal Brief, para. 485.
[1087] Defence Appeal Brief, para. 486.
[1088] Defence Appeal Brief, paras 487-488.
[1089] Prosecution Response Brief, para. 17.1.
[1090] Prosecution Response Brief, para. 17.2.
[1091] Trial Judgement, para. 205.

356. With regard to Galić's second argument, the Appeals Chamber notes that the characterisation of the situation surrounding Sarajevo as a "military encirclement", as opposed to a division of the city, is not relevant for the alleged crimes in question.[1092] The Trial Chamber used the term merely as a description of the relevant situation; Galić was not convicted on the basis of an encirclement or otherwise of the city.

357. With respect to Galić's third argument that the Trial Chamber failed to consider that he challenged his criminal responsibility under Article 7(1) of the Statute, the Appeals Chamber finds that Galić ignores that the Trial Chamber, at the very beginning of its discussion on the effective command of Galić, noted that the Defence argued that Galić "cannot be held criminally responsible for acts committed by his subordinates."[1093] Accordingly, this third argument is dismissed.

B. Effective command of SRK forces

358. Galić argues that there was no unlawful behaviour by his subordinates within the SRK.[1094] He also claims that the SRK structure has limited relevance to the establishment of his criminal responsibility under Article 7(1) of the Statute[1095] and that the Trial Chamber, in evaluating the chain of command, considered certain irrelevant factors in paragraph 617 of the Trial Judgement.[1096] Galić further submits that there is other evidence contradicting these factors.[1097] The Prosecution responds that the Trial Chamber was correct not to acknowledge Galić's argument that there was no unlawful behaviour by his subordinates in the section in question, as the Trial Chamber had previously determined that there was unlawful behaviour on the part of his subordinates and that it was part of a campaign.[1098] As to the structure of the SRK, the Prosecution submits that, although Galić argues that there were "erroneous evaluations" of the evidence, he does not actually dispute any of the evidence cited. The Prosecution also claims that Galić's criticisms of the evidence ignore the reason why the Trial Chamber cited the evidence.[1099]

359. In response to Galić's allegation that there was no unlawful behaviour, the Appeals Chamber notes that this section of the Trial Judgement relates solely to the criminal responsibility of Galić and is situated after the section of the Trial Judgement where the Trial Chamber found numerous instances of unlawful behaviour by SRK forces. His allegation relating to this section of

---

[1092] Trial Judgement, para. 609: "In itself, that encirclement is not directly relevant to the charges of the Indictment."
[1093] Trial Judgement, para. 614. Whether Galić was in "effective command" was used by the Trial Chamber as one factor among others to infer that he was responsible for ordering the crimes proved at trial (Trial Judgement, para. 171).
[1094] Defence Appeal Brief, para. 489.
[1095] Defence Appeal Brief, para. 490.
[1096] Defence Appeal Brief, para. 493.
[1097] Defence Appeal Brief, paras 490-492.
[1098] Prosecution Response Brief, para. 17.3.
[1099] Prosecution Response Brief, para. 17.4.

the Trial Judgement is therefore misplaced and Galić does not provide any argument to support it. His argument therefore fails.

360. As regards the relevance of the facts established in paragraph 617 of the Trial Judgement, the Appeals Chamber notes that the precise facts contained in that paragraph relate to the professionalism and efficiency of the SRK soldiers. Contrary to Galić's argument, this is clearly relevant for determinations relating to the chain of command as it concerns the quality of the information delivered to Galić and his ability to affect his subordinates' behaviour.

361. The Appeals Chamber considers that the arguments made by Galić concerning the evaluation of witness testimony either seek to replace the Trial Chamber's interpretation of the evidence with his own,[1100] or allege that the Trial Chamber cited the evidence in support of a different proposition than that for which it actually cited the evidence.[1101] These arguments pertain to the Trial Chamber's assessment of evidence and witness credibility. The Appeals Chamber finds that Galić has not established that no reasonable trier of fact could have reached the same findings as the Trial Chamber did. As such, the arguments of Galić cannot be upheld.

C. Reporting and monitoring systems of the SRK

362. Galić questions how he was able to control, by personal monitoring, the vast and deep front line, arguing that control is exercised through the submission of reports of commanders and through briefings and maps. He contends that he was kept informed only of significant matters involving the Corps, not of all activities of individual units, and that, contrary to the findings of the Trial Chamber, he could not have controlled everything at the same time. In particular, he argues that it does not follow from the presence of an established reporting system that he was informed of the unlawful acts of his subordinates, and he contends that the Trial Chamber did not examine the

---

[1100] Regarding the structure of the SRK, *see* Defence Appeal Brief, para. 490; regarding the professional level, the organisation of the SRK, and specific witnesses testifying in this regard, *see* Defence Appeal Brief, paras 491-492.

[1101] Regarding the testimony of Witness Hvaal, Galić alleges that this can only be used for proving the manner in which the passage through Serb-held territory was controlled by SRK soldiers, but for no other purpose than that (Defence Appeal Brief, para. 491, fn. 415). The Trial Chamber used this testimony as proof, as stated in a footnote, of the professionalism of the SRK soldiers: "Hvaal, in particular, testified in relation to the control over movement on SRK-held territory." Trial Judgement, fn. 2131. It thus used the tight control of the passage by Bosnian Serb soldiers as an example demonstrating the professionalism of the soldiers. As for Galić's allegation that "every party in war takes care of who is visiting its territory" (Defence Appeal Brief, para. 491, fn. 415), implying that the SRK's control cannot be used as proof for the degree of the army's organisational structure, it has to be said that the level of control which thus is enacted by the party controlling its territory very well is an indicator of an overall existing organisational structure of the respective army. Also, regarding the testimony of Witness Van Baal, Galić contends that this testimony can only be used to prove the smooth flow of information from the bottom to the top of the SRK hierarchy, but does not mean that every single event came to the attention of the SRK leaders (Defence Appeal Brief, para. 491, fn. 415). The Trial Chamber never made and never wanted to prove such an unrealistic statement as the latter and in fact used this witness testimony to prove there was good information flow within the SRK's organisational structure. *See* Trial Judgement, para. 617, fn. 2136.

contents of the reports he received.[1102] The Prosecution argues that the Trial Chamber only dealt at this stage with the developed communication system of the SRK and did not consider the reporting of unlawful activities, so Galić's criticisms are premature. The Prosecution also considers Galić to have mistakenly read into this part of the Trial Judgement a finding that he could personally see the whole front line and control every piece of weaponry.[1103]

363. The Appeals Chamber considers that Galić's contentions fall into two principal lines of argument. First, he contests a purported Trial Chamber finding that he was personally able to monitor the entire front line. Second, he argues that it does not follow from the presence of an efficient monitoring system that he was informed of unlawful acts on the part of his subordinates.

364. The Appeals Chamber considers that both lines of argument are misplaced. The Trial Chamber did not find that Galić was able to control the entire front line through personal monitoring. Rather, it merely noted how the monitoring and reporting system of the SRK functioned. The Trial Chamber found that "the central core of the SRK command [was] the Corps briefings" and that communications within the SRK were made by phone and radio, and through written commands.[1104] Furthermore, although the Trial Judgement states that "General Galić personally observed the situation in the field",[1105] the Appeals Chamber does not consider this as meaning that Galić was able to observe everything at the same time. As the Trial Chamber noted, Galić travelled to certain areas "when necessary, without a strict schedule" and inspected one particular brigade "every month or two" and another "on two occasions".[1106] In other words, Galić, like other professional general officers, discovered for himself what was happening in the field at regular intervals; there is no contention, nor need there be one, that he was at all times able to observe everything personally.

365. Turning to the second line of contention, the relevant part of the Trial Judgement to which Galić's challenges relate is entitled, "The Reporting and Monitoring Systems of the SRK".[1107] This part does not consider Galić's knowledge of his subordinates' unlawful acts – that is considered in another part of the Trial Judgement.[1108] Rather, this part of the Trial Judgement determines whether the SRK had a reporting and monitoring system in place and considers the constituent elements of that system. As such, Galić's arguments relating to his lack of knowledge of the unlawful acts of his subordinates are once again misplaced and are dismissed.

[1102] Defence Appeal Brief, paras 495-498, 509.
[1103] Prosecution Response Brief, para. 17.5.
[1104] Trial Judgement, paras 619, 621.
[1105] Trial Judgement, para. 620.
[1106] Trial Judgement, paras 620-621.

D. Control of SRK personnel

366. Galić puts forth a number of arguments in relation to the Trial Chamber's findings on his control over SRK personnel. These arguments relate to control over sniping activity, control over shelling activity and control over SRK weaponry.

1. Control over sniping activity

367. Galić contends that the evidence of Witness Fraser in paragraph 629 of the Trial Judgement cannot be accepted as proof that there was control over sniping activity, nor does the rest of the evidence referred to by the Trial Chamber prove such control. To the contrary, he claims that the sniping activity, "understood to mean action from light infantry armament", was controlled at platoon or detachment level, and the only rule that prevailed was to open fire only in response to shootings from the ABiH side.[1109] The Prosecution responds that the Trial Chamber referred to Witness Fraser's testimony in order to demonstrate the professionalism and skill of the SRK snipers, and the co-ordination of their activities, and was therefore not cited for the reasons invoked by Galić.[1110] It argues that Galić does not claim that the Trial Chamber erred in considering this evidence, but rather points to evidence presented by his own witnesses to the effect that orders were given not to attack civilians, and claims that this issue was considered in another part of the Trial Judgement.[1111]

368. The Appeals Chamber notes that the portion of Witness Fraser's evidence that appears in paragraph 629 of the Trial Judgement was used to support the propositions that "Serbian snipers were professionally trained", that their "activity appeared to have been coordinated", and that formal complaints by SFOR, followed by a face-to-face meeting with Galić, resulted in a decrease in sniping.[1112] Galić does not demonstrate that those findings of the Trial Chamber are unreasonable. Rather, he refers to matters already considered by the Appeals Chamber, namely the issue of the definition of sniping and the contention that orders were given only to fire in response to ABiH forces attacks or when there was danger, but does not give any new argument in support.[1113] This part of Galić's ground of appeal is accordingly dismissed.

[1107] Trial Judgement, Part IV(B)(1)(b).
[1108] Trial Judgement, Part IV(C).
[1109] Defence Appeal Brief, para. 501.
[1110] Prosecution Response Brief, para. 17.6.
[1111] Prosecution Response Brief, para. 17.7.
[1112] Trial Judgement, para. 629.
[1113] *See* respectively grounds 14 and 6.

2. Control over shelling activity

369. Galić contends that the testimonies referred to by the Trial Chamber in that section of the Trial Judgement discussing control over shelling cannot be relied upon as they contradict the testimony of other witnesses and are challenged in the UN Commission of Experts Report.[1114] He further argues that the witnesses whose testimonies were cited were not able to say from where the fire was opened or to where it was directed – their allegations thus being too general – and also that these witnesses refer to the shelling of military targets, thus excluding the deliberate targeting of civilians.[1115] As such, Galić claims that "from the testimony of these witnesses nothing else can be concluded but that the actions were controlled, yet certainly not that they were illegitimate and deliberately directed against civilians".[1116] The Prosecution responds that Galić does not point to any error on the part of the Trial Chamber and claims that the Trial Chamber carefully considered any evidence that distinguished the shelling of lawful targets from unlawful ones.[1117]

370. Insofar as Galić suggests that the evaluation of witness testimony by the Trial Chamber was erroneous, and insofar as he claims that the witness testimony as accepted by the Trial Chamber would contradict both other witness testimonies and the UN Commission of Experts Report, Galić would have to show that no reasonable trier of fact could have excluded or ignored inferences that lead to the conclusion that an element of the crime was not proven.[1118] The Appeals Chamber finds that he has failed to meet this requirement. The Appeals Chamber also notes that even if some of the witness testimony is general in nature, this does not detract from the Trial Chamber's conclusion that the shelling was controlled. The sole object of this part of the Trial Judgement, as the subheading indicates,[1119] was to establish whether or not there was control over shelling activities. The Appeals Chamber notes that even Galić himself is of the opinion that witness testimony at trial yields the conclusion that "the actions were controlled".[1120] His argument is therefore rejected.

371. The control over SRK weaponry is also challenged by Galić, who asserts that the evidence has proved that certain witnesses "were simply not telling the truth about the incident of the

[1114] Defence Appeal Brief, para. 502.
[1115] Defence Appeal Brief, para. 503.
[1116] Defence Appeal Brief, para. 504.
[1117] Prosecution Response Brief, paras 17.8-17.9.
[1118] *Stakić* Appeal Judgement, paras 219-220, *Čelebići* Appeal Judgement, paras 458-459.
[1119] The relevant subheading, IV.B.1(c)(iii), reads "Control over Shelling Activity".
[1120] Defence Appeal Brief, para. 504.

'barrage fire'".[1121] Nevertheless, no reference to the Trial Record and no reasoning is provided in support of this assertion. This argument is therefore dismissed.

E. Was Galić in a position to punish his subordinates?

372. Galić contests the Trial Chamber's finding that he did "not deny that [he] had the ability to prevent or punish commissions of crimes but […] did not have the need to do so".[1122] He claims that the Trial Chamber misinterpreted the position he expressed in his Pre-Trial Brief and his Final Trial Brief:

> General Galić had requested investigation to be carried out regarding some of the UNPROFOR protests, but […] the return information provided by the lower units and competent services of the SRK indicated that the SRK units did not take part in any illegal actions.[1123]

He argues that in any case he lacked the authority to punish those who had violated military discipline or committed criminal acts.[1124] He claims that the Trial Chamber's conclusion that he had "the material ability to prosecute and punish those who would go against his orders or had violated military discipline, or who had committed criminal acts"[1125] is erroneous as the Trial Chamber failed to differentiate between the authority of superiors in the SRK chain of command to punish disciplinary misconduct, and the authority of bodies legally established to investigate and punish criminal acts. The Prosecution responds that Galić's Pre-Trial Brief and Final Trial Brief reveal an admission that he had the power to prevent or punish commissions of crimes and that the Trial Chamber acknowledged the role of a military prosecutor.[1126]

373. The Appeals Chamber notes that it is clear from Galić's Pre-Trial Brief that he denied having authority "for [the] prosecution and punishing of those who had violated the military discipline, or who had committed criminal acts",[1127] and that other authorities within the SRK were responsible for criminal prosecution while commanders like him only had the authority to impose disciplinary penalties on soldiers.[1128] While he denied that the SRK took part in any illegal

[1121] Defence Appeal Brief, para. 505.
[1122] Trial Judgement, para. 654.
[1123] Trial Judgement, para. 654, citing Defence Pre-Trial Brief, para. 7.25, and referring to paragraph 24 of the Defence Final Trial Brief which reads: "General Stanislav Galić cannot be held criminally responsible pursuant to Article 7(3) of the Statute, and this for the main reason that criminal behaviours of subordinates, which would represent a violation [of international humanitarian law] provisions, did not exist."
[1124] Defence Appeal Brief, para. 507.
[1125] Trial Judgement, para. 662.
[1126] Prosecution Response Brief, para. 17.10.
[1127] Defence Pre-Trial Brief, para. 7.38.
[1128] Defence Pre-Trial Brief, para. 7.39.

actions,[1129] Galić nevertheless stated in his Final Trial Brief that, should investigation have demonstrated that a violation had occurred, he "would certainly not have failed [to] punish the perpetrator of such an illegal act".[1130] He also states in his Final Trial Brief that "whenever he had […] clear information on the existence of some illegal action, through the authorities of the SRK, [he] would undertake all the measures to investigate such conduct and to apply corresponding measures against eventual perpetrators. Such measures do not necessarily have to be criminal prosecution and may be a disciplinarian procedure, as well as elimination of individuals from the composition of the SRK units".[1131]

374. Accordingly, in Galić's own words, he had the authority to respond to illegal acts on the part of his subordinates.[1132] Thus, Galić has not shown that no reasonable trier of fact could have come to the same conclusion as the Trial Chamber in finding that "[t]he Defence does not deny that General Galić had the ability to prevent or punish commissions of crimes but argues that he did not have the need to do so."[1133] This part of Galić's ground of appeal is therefore dismissed.

F. Galić's knowledge of the crimes

375. Galić challenges the Trial Chamber's finding that he was "fully appraised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings".[1134] His arguments fall into the following categories: (1) protests delivered to him in person; (2) protests delivered to his subordinates; (3) the character of the protests delivered; and (4) the control of the artillery assets. The Prosecution responds that Galić's concerns regarding the evidence were taken into account by the Trial Chamber, that Galić has not pointed to any error by the Trial Chamber, and that Galić overstates the evidence to the contrary.[1135]

1. Protests delivered to Galić in person

376. Galić argues that the evidence before the Trial Chamber lacked precision as to the time and location of each specified incident and that he was therefore unable to proceed with any investigation.[1136] He also objects[1137] to the finding that he was put on notice through media coverage that "criminal activity attributed to forces under [his] command and control had been

---

[1129] Defence Pre-Trial Brief, para. 7.25.
[1130] Defence Final Trial Brief, para. 24.
[1131] Defence Final Trial Brief, para. 1068.
[1132] He may not have had the power to bring *every* form of punishment against a perpetrator, but that was not alleged, nor is it necessary to find him criminally responsible under Article 7(1) of the Statute.
[1133] Trial Judgement, para. 654.
[1134] Trial Judgement, para. 705, referred to at paragraph 529 of Defence Appeal Brief.
[1135] Prosecution Response Brief, para. 17.13.
[1136] Defence Appeal Brief, paras 514, 519, 525.

perpetrated".[1138] Those arguments are the same as those he submitted at trial and were duly taken into account by the Trial Chamber.[1139] Galić expresses on appeal his disagreement with the conclusions of the Trial Chamber but does not point to any specific error of the Trial Chamber. He does argue that the credibility of the testimonies of Witnesses Abdel Razek, Henneberry and W is at issue, but only by referring in a footnote of his Appeal Brief to the Dissenting Opinion of Judge Nieto Navia, without supporting his allegation.[1140] His only specific argument is that the evidence given by Witness Abdel-Razek does not show that he intended that civilians be targeted, but rather that he was implementing the agreement that the airport could not be crossed, thereby preventing "the transfer of […] ABiH soldiers", which Galić claims was "practically allowed" by UNPROFOR.[1141] The evidence of Witness Abdel-Razek, however, was not used by the Trial Chamber to prove that Galić intended that civilians be targeted while crossing the airport, but rather to prove that Abdel-Razek, the UNPROFOR Commander for the Sarajevo Sector, protested against the shelling.[1142] Galić's argument is therefore without merit and is dismissed.

2. Protests delivered to Galić's subordinates

377. Galić challenges the finding that he was put on notice by complaints filed with his subordinates, arguing that they never informed him of any unlawful conduct.[1143] The Appeals Chamber finds that a reading of the Trial Judgement makes clear that a number of protests were in fact made to Galić's subordinates.[1144] Galić offers no reasoning in support of his challenge to these findings of the Trial Chamber. Rather, he concentrates his challenge on arguing that the protests were not passed up the chain of command to him by his subordinates. The conclusion of the Trial Chamber in this regard was that it had "no doubt that [Galić] was subsequently informed by his subordinates".[1145] The Trial Chamber made this inference based on extensive evidence showing that the SRK's reporting and monitoring system was efficient and professional, and functioned properly, and after making allowance for the "possibility that General Galić was not aware of each and every crime that had been committed by the forces under his command".[1146] Galić has not shown that no reasonable trier of fact could have come to the same conclusion as that of the Trial Chamber and his argument is therefore dismissed.

[1137] Defence Appeal Brief, para. 520.
[1138] Trial Judgement, para. 695.
[1139] Trial Judgement, para. 666, referring to paragraph 7.33 of the Defence Pre-trial Brief and paragraph 24 of the Defence Final Trial Brief.
[1140] Defence Appeal Brief, para. 515.
[1141] Defence Appeal Brief, para. 516.
[1142] *See* Trial Judgement, para. 668.
[1143] Defence Appeal Brief, para. 518; Defence Reply Brief, para. 160.
[1144] Trial Judgement, paras 685-694.
[1145] Trial Judgement, para. 702.
[1146] Trial Judgement, paras 700-701.

3. The character of the protests delivered

378. Galić argues that "the evidence has demonstrated that there were many protests which were not grounded", that he "devoted his due attention to all the protests" for which he received sufficient information, and requested investigation, but that the protests were "unfounded".[1147] He nevertheless does not point to any part of the Trial Judgement where the Trial Chamber erred in this regard. He only generally refers to Witness DP35 and Witness Indić, without any reference to a contentious part of their testimony. This part of Galić's ground of appeal therefore fails.

4. The control of the artillery assets

379. Galić first argues that the Trial Chamber's findings as regards his knowledge of artillery assets are incorrect given that no mention is made of artillery force being used unlawfully.[1148] Second, he argues that the Trial Chamber erred when concluding that the rate of ammunition implied that artillery was being used unlawfully.[1149] Last, he contends that the Trial Chamber failed to address the basic issue: "what was the military advantage and how strong [a] military advantage [it was] necessary to achieve by the use of artillery, because that is the only test that could lead to a correct conclusion whether there was or not an unlawful action of artillery".[1150]

380. With regard to Galić's claim that artillery was not used unlawfully, the Appeals Chamber notes that he ignores the plethora of evidence of unlawful sniping and shelling activities. With regard to his argument that "[t]he rate of use of ammunition itself does certainly not imply that the artillery was used unlawfully",[1151] the Appeals Chamber notes that, in the paragraph at issue, the Trial Chamber held that "the rate of use of ammunition which would have been in excess of what was required for regular military operations, is among the reasons which allow the Trial Chamber to infer that [Galić] knew of [the] criminal activities of his troops".[1152] The Trial Chamber therefore considered the rate of ammunition only as one factor among others to determine that Galić had knowledge of the criminal activities of his troops. His argument is therefore misconceived. With regard to his final argument on determining military advantage, the Appeals Chamber notes that the military advantage gained from an attack is indeed among the factors the Trial Chamber must take into account in assessing the legality of an attack, but also notes that the Trial Chamber, as the

[1147] Defence Appeal Brief, para. 517.
[1148] Defence Appeal Brief, para. 521.
[1149] Defence Appeal Brief, para. 526.
[1150] Defence Appeal Brief, para. 523.
[1151] Defence Appeal Brief, para. 526.
[1152] Trial Judgement, para. 703.

Appeals Chamber already found, properly fulfilled its obligations in that respect.[1153] This sub-ground of appeal is accordingly dismissed.

G. Reasonableness of measures taken by Galić

381. Galić disputes the Trial Chamber's finding that he did not take reasonable measures to prosecute and punish the perpetrators of crimes against civilians.[1154] His principal argument is that there is no evidence to indicate that any of the crimes analysed by the Trial Chamber in paragraphs 707 to 717 of the Trial Judgement were actually perpetrated.[1155] In addition, he argues that the Trial Chamber's conclusion that no proper instructions were given regarding the Geneva Conventions was drawn despite evidence to the contrary being presented at trial.[1156] In response, the Prosecution claims that many of Galić's challenges to this section are misplaced as they relate to findings made earlier in the Trial Judgement. The Prosecution argues that Galić does not support his argument that the Trial Chamber made erroneous findings. The Prosecution also submits that Galić does not dispute the finding that there was "no evidence in the Trial Record that SRK troops were prosecuted or punished for having unlawfully targeted civilians".[1157]

382. The Appeals Chamber observes that the section of the Trial Judgement at issue concerns the measures taken by Galić upon his knowledge of the commission of crimes. Determinations of the precise crimes were made in a previous section of the Trial Judgement. As such, any argument in this part relating to the lack of evidence for the crimes is indeed misplaced. Further, Galić fails to support his allegations. With respect to his argument regarding the Geneva Conventions, the Appeals Chamber notes that the Trial Chamber did consider the evidence indicating that Galić conveyed instructions to respect the 1949 Geneva Conventions. However, the Trial Chamber found that those instructions instilled an inadequate and erroneous understanding of the obligations under the Conventions. For example, one battalion commander under Galić had the understanding that civilians had to be 300 metres away from a confrontation line in order to escape targeting, which the Trial Chamber found to be obviously improper considering the context of an urban battlefield.[1158] The Appeals Chamber does not find that no reasonable trier of fact could have come to the same conclusions as that of the Trial Chamber and this sub-ground of appeal is dismissed.

[1153] *See supra* Ground 12.
[1154] Defence Appeal Brief, paras 535, 537.
[1155] Defence Appeal Brief, paras 530, 536.
[1156] Defence Appeal Brief, para. 532.
[1157] Prosecution Response Brief, paras 17.18-17.19.
[1158] Trial Judgement, para. 718.

H. Actions undertaken in furtherance of a plan

383. Galić argues that the Trial Chamber erroneously concluded that there was a plan to attack civilians and commit criminal acts against civilians in Sarajevo, and that he not only knew of the attacks but wilfully intended the acts to happen.[1159] In support of his argument, he challenges the credibility and veracity of the evidence from witnesses Abdel Razek and Henneberry,[1160] and contests the Trial Chamber's finding that the strategic goals formulated at a meeting over which he presided included the direction that "Sarajevo must be either divided or razed to the ground", contending that the Trial Chamber neglected to consider the "Minutes of the Assembly of 12 May 1992", which contain no reference to such a goal.[1161] The Prosecution responds that Galić does not provide any proper argumentation against the relevant findings of the Trial Chamber. It refers to its earlier interpretation of Witness Donia's evidence and contests Galić's reading of Witness Henneberry's evidence.[1162]

384. With regard to Witness Abdel Razek and Witness Henneberry, Galić argues that their testimonies lack credibility as they wrongly reported that Witness W was angry with him, whereas Witness W did not recall such conversation.[1163] He does not, however, point to contentious parts of their testimonies and, in any case, Witness W mentioned in his testimony, as the Trial Chamber correctly noted, that the attitude of Galić in response to his protests against the targeting of civilians led to his "profound indignation, which broke their relationship".[1164] This part of Galić's ground of appeal therefore fails.

385. With regard to the strategic objective concerning Sarajevo, the Appeals Chamber notes that some confusion indeed arises out of the Trial Chamber's finding. According to the Donia Report[1165] referred to by the Trial Chamber, the fifth strategic goal of the 16th Session of the Assembly of the Serbian People in Bosnia-Herzegovina, held on 12 May 1992, was that Sarajevo had to be divided. The formulation of this fifth objective as "divided or razed to the ground" was only made at a meeting with local Serbian leaders presided over by Galić on 14 May 1992. The Trial Chamber therefore erred in stating that the fifth objective was so formulated at the 12 May 1992 meeting of Serbian leaders as this formulation cannot be found in the minutes of the 12 May 1992 meeting. Nevertheless, the Appeals Chamber does not find this to be to the prejudice of Galić as this error

[1159] Defence Appeal Brief, paras 538-539.
[1160] Defence Appeal Brief, fn. 438.
[1161] Defence Appeal Brief, fn. 437, referring to paragraph 726 of the Trial Judgement.
[1162] Prosecution Response Brief, para. 17.20.
[1163] Defence Appeal Brief, para. 538, fn. 438.
[1164] Trial Judgement, para. 677, referring to Witness W, T. 9566 (closed session).
[1165] Confidential Submission of Expert Report, filed on 25 February 2002 ("Donia Report").

did not affect the Trial Chamber's conclusion that he and his subordinates acted in furtherance of a plan. This ground of appeal is thus dismissed.

I. Article 7(1) responsibility of Galić

386. Galić contends that it is not possible to conclude that he issued orders to target civilians. He argues that such a conclusion is "based on the presumption that the criminal acts were not sporadic acts of soldiers out of control, but carried out pursuant to a deliberate campaign of attacking civilians, which must have emanated from a higher authority, or at least had its approval".[1166] He contends that the issuing of orders cannot be presumed, or established on the basis of assumptions, particularly when the evidence goes in the opposite direction. The Prosecution responds that Galić did not provide proper arguments against the findings of the Trial Chamber.[1167] It contends that Galić's argument that there was no proof to support the claim that orders were issued to target civilians goes against the overwhelming quantity of circumstantial evidence as well as the direct evidence of Witness AD.[1168]

1. Preliminary issue

387. The Appeals Chamber notes that Galić reiterates, without elaborating, that he was not aware that crimes were committed[1169] and that the Trial Chamber was incorrect to conclude that he failed to prevent crimes or punish perpetrators.[1170] As no specific support is provided, those arguments will not be dealt with by the Appeals Chamber. He also argues that the Trial Chamber "did not offer grounds"[1171] for its conclusion that he "satisfies all requirements of *actus reus* and *mens rea* of the crimes proved at trial",[1172] but fails to provide any argument in support of such a contention. This argument is accordingly dismissed. The same applies to his argument that the Trial Chamber erroneously concluded that orders were given to increase or decrease sniper fire.[1173] Lastly, the Appeals Chamber notes that Galić contends that he cannot be convicted twice for the same offence under two different counts.[1174] The Appeals Chamber refers in that respect to ground 9 above, addressing in detail the issue of cumulative convictions.

[1166] Defence Appeal Brief, para. 542.
[1167] Prosecution Response Brief, para. 17.20.
[1168] Prosecution Response Brief, para. 17.22.
[1169] Defence Appeal Brief, para. 545.
[1170] Defence Appeal Brief, para. 546.
[1171] Defence Appeal Brief, para. 544.
[1172] Trial Judgement, para. 748.
[1173] Defence Appeal Brief, para. 540.
[1174] Defence Appeal Brief, para. 548.

2. Whether orders were given to target civilians

388. In support of this allegation, Galić first argues that the evidence given by Witness AD does not allow the Trial Chamber to conclude that orders were ever given to target civilians. He claims that this testimony is not relevant as Witness AD "did not fear the Commander of his brigade for failure to execute his orders, because he knew that the Commander could not punish him, because he could not say that he failed to execute orders to target civilians, as in that case he would have probably had consequences from the higher command".[1175] Nevertheless, Galić does not cite to any evidence to counter Witness AD's testimony which was in any case not used to directly prove that Galić ordered that civilians be targeted but to prove that "the Commander of the Ilijaš Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo".[1176] Galić's argument is accordingly dismissed.

389. Second, Galić argues that the Trial Chamber could not conclude that he issued orders to target civilians. He argues that the method used by the Trial Chamber – that is inferring from the finding that "the criminal acts were not sporadic acts of soldiers out of control but were carried out pursuant to a deliberate campaign of attacking civilians, which must have emanated from a higher authority or at least had its approval",[1177] that he must have issued orders to target civilians – is not appropriate, as orders "cannot be presumed".[1178] He challenges the manner in which the Trial Chamber concluded that he ordered the crimes committed at trial, a challenge which has already been dealt with and dismissed by the Appeals Chamber under ground ten.

390. For the foregoing reasons, Galić's eighteenth ground of appeal is dismissed.

[1175] Defence Appeal Brief, para. 541, fn. 440.
[1176] Trial Judgement, para. 219.
[1177] Trial Judgement, para. 741.
[1178] Defence Appeal Brief, para. 542.

XVII. APPEAL AGAINST SENTENCE

391. The Trial Chamber found Galić guilty of five counts, including violations of the laws or customs of war and crimes against humanity, and imposed a single sentence of 20 years' imprisonment.[1179] Both Galić and the Prosecution appealed the sentence.

A. Standard of review in sentencing

392. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber obliging it to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[1180]

393. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[1181] Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[1182] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[1183] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[1184]

394. To show that the Trial Chamber committed a discernible error in exercising its discretion, "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was

[1179] Trial Judgement, para. 769.
[1180] *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[1181] *Kupreškić et al.* Appeal Judgement, para. 408.
[1182] *Čelebići* Appeal Judgement, para. 717.
[1183] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, para. 8; *Deronjić* Sentencing Judgement, para. 8; *Blaškić* Appeal Judgement, para. 680; *Krstić* Appeal Judgement, para. 242; *Kupreškić et al.* Appeal Judgement, para. 408; *Jelisić* Appeal Judgement, para. 99; *Čelebići* Appeal Judgement, para. 725; *Furundžija* Appeal Judgement, para. 239; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Sentencing Appeal Judgement, para. 22.
[1184] *Čelebići* Appeal Judgement, para. 725.

so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[1185]

B. Galić's appeal against sentence (Ground 19)

395. Under his nineteenth ground of appeal, Galić argues that the Trial Chamber erroneously applied the law when determining his sentence and that a more lenient sentence should have been imposed.[1186] The Prosecution rejects all arguments in this regard.[1187]

396. The Appeals Chamber identifies four main arguments in support of this ground of appeal: (1) the maximum sentence that can be imposed by the International Tribunal is 20 years' imprisonment; (2) the Trial Chamber erred when stating that the commission of the crimes would have attracted the harshest of sentences in the former Yugoslavia;[1188] (3) the Trial Chamber erred when considering as aggravating circumstances factors which are elements of the crimes for which he was found guilty;[1189] and (4) the Trial Chamber erred in not taking into account mitigating circumstances such as the conditions under which he commanded his troops,[1190] the conditions of urban warfare,[1191] and his personal and family situation.[1192]

1. Maximum sentence

397. Galić argues that a sentence of 20 years' imprisonment is the highest possible sentence that can be pronounced by the International Tribunal.[1193] He submits that the application of Article 24 of the Statute and Rule 101(B)(iii) of the Rules is mandatory,[1194] referring to the principle of "*nulla poena sine lege*"[1195] and to "the general maxim of the criminal law that the law which must be

[1185] *Babić* Judgement on Sentencing Appeal, para. 44; *Momir Nikolić* Judgement on Sentencing Appeal, para. 95.
[1186] Defence Appeal Brief, para. 586.
[1187] Prosecution Response Brief, paras 18.1-18.43.
[1188] Defence Appeal Brief, paras 556-558.
[1189] Defence Appeal Brief, paras 559-564.
[1190] Defence Appeal Brief, paras 566-569.
[1191] Defence Appeal Brief, paras 570-573.
[1192] Defence Appeal Brief, paras 574-585.
[1193] Defence Appeal Brief, para. 553 referring to Defence Final Trial Brief, paras 1123-1140; Defence Response Brief, paras 10-21. The Appeals Chamber notes with concern that Galić does not substantiate this argument in his Appeal Brief but only refers to the arguments he made in his response to the Prosecution's appeal. This part of his nineteenth ground of appeal could be dismissed on that basis alone. Nevertheless, the Appeals Chamber will still address the arguments made in the Defence Response Brief.
[1194] Defence Response Brief, para. 13, referred to in Defence Appeal Brief, para. 553. Article 24(1) of the Statute states: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia." Rule 101(B) of the Rules provides "In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as [...] the general practice regarding prison sentences in the courts of the former Yugoslavia [...]."
[1195] Defence Response Brief, paras 26-27.

applied is the one more lenient for the accused".[1196] He argues that the International Tribunal is bound by the sentencing law and practices of the former Yugoslavia and its successor states, which all have maximum prison sentences of 20 years and exclude a sentence of life imprisonment.[1197] Specifically, he argues that the introduction of a sentence of life imprisonment in Rule 101(A) of the Rules of Procedure and Evidence is contrary to Article 24 of the Statute.[1198]

398. The Appeals Chamber recalls that the International Tribunal, while bound to take the sentencing law and practice of the former Yugoslavia into account, does not have to follow it.[1199] The Appeals Chamber thus rejects Galić's argument that the maximum sentence imposable by the International Tribunal is 20 years' imprisonment. The Appeals Chamber also finds that the principle of *lex mitior*, to which Galić refers,[1200] is not applicable to the relationship between the law of the International Tribunal and the law of the national courts of the former Yugoslavia. The Appeals Chamber recalls its previous finding in this regard:

> It is an inherent element of [the] principle [of *lex mitior*] that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[1201]

399. Galić's arguments are accordingly dismissed.

2. The Trial Chamber's finding that the commission of the crimes in the present case would have attracted the harshest sentence in the former Yugoslavia

400. Galić claims that the Trial Chamber erroneously that found his criminal liability would give rise to the harshest possible sentence in the former Yugoslavia.[1202] He argues that in the practice of the courts of the former Yugoslavia, "the severity of a criminal act itself was not a decisive factor for pronouncing the harshest of sentences";[1203] rather, the circumstances of the case and the individual circumstances of the accused were appraised when sentencing a perpetrator.[1204]

[1196] Defence Response Brief, para. 16.
[1197] Defence Appeal Brief, para. 553. *See also* Defence Response Brief paras 29-30, 37-42.
[1198] Defence Response Brief, para. 42.
[1199] *Tadić* Sentencing Appeal Judgement, para. 21; *see also Blaškić* Appeal Judgement, para. 682; *Krstić* Appeal Judgement, para. 260.
[1200] Defence Response Brief, para. 16 (discussing "the general maxim of criminal law that the law which must be applied is the more lenient for the accused").
[1201] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 81; *Deronjić* Sentencing Appeal Judgement, para. 97.
[1202] Defence Appeal Brief, para. 556.
[1203] Defence Appeal Brief, para. 557.
[1204] Defence Appeal Brief, para. 557.

401. The Prosecution responds that the Trial Chamber did not consider that the severity of the criminal act itself was a decisive factor under the law of the former Yugoslavia.[1205] It argues that the Trial Chamber took into account the relevant provisions of the Yugoslav law and that Galić does not attempt to show any error in the Trial Chamber's analysis of those provisions.[1206] Further, it argues that such a stand entirely ignores parts of the Trial Judgement.[1207]

402. The Appeals Chamber recalls the paragraph in which the contentious statement is included:

> The Majority of the Trial Chamber has found that General Galić participated in a campaign of sniping and shelling and that crimes charge[d] in the Indictment were made out. For his participation in these crimes, General Galić has been found guilty of unlawfully committing the crimes of terror upon civilians (under Article 3 of the Statute; count 1), murder (under Article 5 of the Statute; counts 2 and 5), and inhumane acts (under Article 5 of the Statute; counts 3 and 6). The commission of these crimes would have attracted the harshest of sentences in the former Yugoslavia.[1208]

403. The Appeals Chamber sees no error in the Trial Chamber's finding that "[t]he commission of these crimes would have attracted the harshest of sentences in the former Yugoslavia".[1209] As correctly identified by the Trial Chamber,[1210] Article 142 of the SFRY Criminal Code punishes war crimes against civilians, including killings, inhumane treatment, and application of measures of intimidation and terror, with a minimum sentence of 5 years' imprisonment or the death penalty,[1211] or by 20 years in prison if a prison sentence was substituted for the death penalty.[1212] These penalties are indeed the most severe that appear in the SFRY Criminal Code.[1213]

404. Moreover, with respect to Galić's claim that, in the practice of the courts of former Yugoslavia, "the severity of a criminal act was not a decisive factor for pronouncing the harshest of sentences"[1214] because "a sentence is being pronounced against the perpetrator of the crime, and not against the crime itself",[1215] the Appeals Chamber finds this claim to rest upon a misinterpretation of the Trial Chamber's finding. The Trial Chamber found that "[t]he commission of these crimes would have attracted the harshest of sentences in the former Yugoslavia" but explicitly cites Article 41(1) of the SFRY Criminal Code, which reads:

[1205] Prosecution Response Brief, para. 18.5.
[1206] Prosecution Reply Brief, para. 18.5.
[1207] Prosecution Reply Brief, para. 18.5 (arguing that Galić's assertion ignores paragraphs 764-766 of the Trial Judgement).
[1208] Trial Judgement, para. 763.
[1209] Trial Judgement, para. 763.
[1210] Trial Judgement, fn. 2477.
[1211] SFRY Criminal Code, art. 142.
[1212] SFRY Criminal Code, art. 38(2).
[1213] *See* SFRY Criminal Code, art. 38.
[1214] Defence Appeal Brief, para. 557.
[1215] Defence Appeal Brief, para. 557.

> The court shall determine the sentence for the perpetrator of a given crime within the limits prescribed by the law for this crime, bearing in mind the purpose of the punishment and taking into account all the circumstances that could lead to this sentence being more or less severe, in particular: the degree of criminal responsibility, the motives of the crime, the degree of the threat or damage to protected property, the circumstances under which the crime was committed, the background of the perpetrator, his personal circumstances and behaviour after the commission of the crime as well as other circumstances which relate to the character of the perpetrator.[1216]

The Trial Chamber thus made it clear that a number of other factors had to be considered in determining the appropriate penalty.

405. The Appeals Chamber concludes that Galić has failed to demonstrate a discernible error on the part of the Trial Chamber. This part of his nineteenth ground of appeal is accordingly dismissed.

3. Whether the Trial Chamber took into account as aggravating circumstances factors which are elements of the crimes for which he was found guilty

406. Galić argues that the Trial Chamber erred in law in considering as aggravating circumstances factors which form part of the criminal offences for which he was pronounced guilty.[1217] He identifies the following: the suffering of the victims,[1218] the frequency of the illegal actions of the SRK,[1219] the anguishing environment,[1220] and his position as a commander.[1221]

407. The Prosecution responds that Galić is incorrect in arguing that the Trial Chamber considered these factors as aggravating circumstances.[1222] It claims that most of those factors were assessed as part of the gravity of the offence. Further, it argues that the Trial Chamber properly took into account Galić's position and experience as aggravating circumstances as the mode of liability of "ordering", for which Galić was found guilty, merely requires that the person had a position of authority, whereas the Trial Chamber took into account the fact that Galić was "a *very* senior officer" and thus considered not so much his position of authority as the degree of his rank.[1223]

408. The Appeals Chamber recalls that an element of the crime cannot constitute an aggravating circumstance.[1224] For example, a discriminatory intent cannot aggravate the crime of persecutions since it is an indispensable legal ingredient of that crime pursuant to Article 5(h) of the Statute;

[1216] SFRY Criminal Code, art. 41(1), cited at footnote 2476 of the Trial Judgement.
[1217] Defence Appeal Brief, para. 560.
[1218] Defence Appeal Brief, para. 561.
[1219] Defence Appeal Brief, para. 562.
[1220] Defence Appeal Brief, para. 563.
[1221] Defence Appeal Brief, para. 564.
[1222] Prosecution Response Brief, para. 18.6.
[1223] Prosecution Response Brief, para. 18.10.
[1224] *Blaškić* Appeal Judgement, para. 693.

however, discriminatory intent can be used as an aggravating circumstance for the other offences enumerated in Article 5 of the Statute.[1225]

(a) Gravity of the offence

409. The Appeals Chamber notes Galić's argument, in reference to the factors set out in paragraph 764 of the Trial Judgement, that "[i]t appears that the Majority appraised all of these circumstances as aggravating factors".[1226] However, Galić overlooks the fact that that paragraph does not address aggravating circumstances but rather the gravity of the offence.[1227] When assessing the gravity of the offence, a Trial Chamber must take into account the inherent gravity of the crime and the criminal conduct of the accused, the determination of which requires a consideration of the particular circumstances of the case and the crimes for which the accused was convicted, as well as the form and degree of participation of the accused in those crimes.[1228]

410. The Trial Chamber held that the gravity of the offence for which Galić was found guilty encompasses the suffering of the victims, the frequency of illegal actions by the SRK, and the anguishing environment, in which hundreds of people were killed and thousands wounded and terrorised.[1229] These factors are particular circumstances of the crimes for which Galić were convicted and clearly play a role when assessing his sentence. Galić failed to demonstrate that the Trial Chamber committed an error when it took these factors into account in its assessment of the gravity of the offence.

(b) Galić's superior position as an aggravating circumstance

411. The Trial Chamber considered as an aggravating factor "the fact that General Galić occupied the position of VRS Corps Commander, and repeatedly breached his public duty from this very senior position".[1230] Galić argues that the Trial Chamber erred in law as his position as a

---

[1225] *Vasiljević* Appeal Judgement, paras 171-173.
[1226] Defence Appeal Brief, para. 559, fn. 448, citing Trial Judgement, para.764.
[1227] It is clear that the Trial Chamber, in the section in which it addresses the applicable law on sentencing, distinguished between the concept of the gravity of the offence and that of aggravating circumstances. *See* Trial Judgement, paras 758, 760. Also, when applying the law on the facts of the case, it first addressed the gravity of the offence (Trial Judgement, para. 764) and then Galić's position as commander as an aggravating circumstance (Trial Judgement, para. 765).
[1228] *See Blaškić* Appeal Judgement, para. 683; *Vasiljević* Appeal Judgement, para. 182; *Furundžija* Appeal Judgement, para. 249;.*Aleksovski* Appeal Judgement, para. 182.
[1229] The Appeals Chamber notes that the actual infliction of terror on the civilians of Sarajevo, taken into account by the Trial Chamber as an aspect of the gravity of the offence, could also have been considered as a separate aggravating circumstance, since it is, as shown above, not an element of the crime of terror. The Appeals Chamber also recalls, however, that a factor can only be taken into account once in sentencing, that is, either in the gravity of the offence or as an aggravating circumstance. *See Deronjić* Sentencing Appeal Judgement, para. 106: "The Appeals Chamber considers that factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*."
[1230] Trial Judgement, para. 765.

commander was already an element of ordering, the mode of liability under which he was found guilty.[1231] The Prosecution responds that the position of authority is a requirement of "ordering", but argues that "at what level of authority an illegal order was issued is […] a relevant sentencing factor".[1232] It argues that Galić was a "*very* senior officer" and therefore the Trial Chamber could take into account "the *degree* of his rank or authority as aggravating".[1233]

412. While the mode of liability of ordering necessarily entails that the person giving the order has a position of authority,[1234] the level of authority may still play a role in sentencing as it is not an element of the mode of liability of "ordering" that an accused is high in the chain of command and thus wields a high level of authority.[1235] The Appeals Chamber recalls the relevant part of the Trial Judgement:

> Moreover, the defendant was not – contrary to his assertion – just a professional soldier. General Galić was an experienced military officer of 49 years of age at the time of his appointment as commander of the SRK. As a military professional, General Galić was well aware of the extent of his obligations laid out in the military codes of the former JNA and then of the VRS. The majority of the Trial Chamber has already affirmed General Galić's voluntary participation in the crimes of which he has been found guilty. He had a public duty to uphold the laws or customs of war. The crimes that were committed by his troops (or at least a high proportion of these) would not have been committed without his assent. […] The Majority finds that the fact that General Galić occupied the position of VRS Corps commander, and repeatedly breached his public duty from this very senior position, is an aggravating factor.[1236]

The Trial Chamber did not regard as an aggravating circumstance the fact that Galić had the authority to give orders. Rather, it took into account other factors that emanate from his position of authority as commander and found that he repeatedly breached his public duty from this very senior position, thereby abusing his position of authority.[1237] The Trial Chamber therefore did not use the same factors both to establish Galić's responsibility for the crimes and to aggravate his sentence. The Appeals Chamber concludes that Galić has failed to demonstrate an error of the Trial Chamber in this regard.

[1231] Defence Appeal Brief, para. 564.
[1232] Prosecution Response Brief, para. 18.10.
[1233] Prosecution Response Brief, para. 18.10.
[1234] *Kordić and Čerkez* Appeal Judgement, para. 28.
[1235] The Appeals Chamber has previously considered that the level of authority may affect the sentence. *See Tadić* Sentencing Appeal Judgement, para. 56.
[1236] Trial Judgement, para. 765.
[1237] *Babić* Judgement on Sentencing Appeal, para. 80.

4. Whether the Trial Chamber failed to take into account several mitigating circumstances

413. Galić argues that the Trial Chamber failed to take into account a number of mitigating circumstances when rendering the sentence.[1238]

414. The Appeals Chamber recalls that neither the Statute nor the Rules exhaustively defines the factors which may be taken into account by a Trial Chamber in mitigation of a sentence. Rule 101(B)(ii) of the Rules only states that in determining a sentence, a Trial Chamber shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction".[1239] In general, Trial Chambers are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account" in mitigation of the sentence.[1240] It is for the appellant to show that the Trial Chamber erred in exercising its discretion; a mere recital of mitigating factors, without more, does not discharge this burden.[1241] Moreover, the Appeals Chamber emphasises that an appeal is not the appropriate forum in which mitigating circumstances, evidence of which was readily available at trial, should be presented for the first time.[1242]

415. Keeping these requirements in mind, the Appeals Chamber now addresses the factors which, Galić argues, were not considered correctly or not considered at all by the Trial Chamber as mitigating circumstances.

(a) The conditions under which Galić commanded the troops

416. Galić argues that the Trial Chamber failed to take into account as a mitigating circumstance the conditions under which he commanded the troops.[1243] He points to the chaotic circumstances under which he received his command[1244] and the difficulties in the realisation of the full chain of command.[1245] He argues that, after assuming his position, he immediately started to work on dismantling the paramilitary groups, thus decreasing the number of victims.[1246] He nevertheless admits that he never completely succeeded in his efforts, that the problem of the full control of

---

[1238] Defence Appeal Brief, paras 565-586.
[1239] As stated at paragraph 22 of the *Serushago* Sentencing Appeal Judgement, Trial Chambers are "required as a matter of law to take account of mitigating circumstances". *See also Musema* Appeal Judgement, para. 395.
[1240] *Čelebići* Appeal Judgement, para. 780. This is also true for factors in aggravation of the sentence.
[1241] *Kvočka et al.* Appeal Judgement, para. 675.
[1242] *See Deronjić* Sentencing Appeal Judgement, para. 150; *Babić* Judgement on Sentencing Appeal, para. 62; *Kvočka et al.* Appeal Judgement, para. 674: "As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised." *See also Kupreškić et al.* Appeal Judgement, para. 414.
[1243] Defence Appeal Brief, paras 565-569.
[1244] Defence Appeal Brief, para. 566.
[1245] Defence Appeal Brief, para. 567.
[1246] Defence Appeal Brief, para. 567, citing the Tabeau Report, P 3731.

these units persisted,[1247] and that “it was impossible to achieve full control over an entire battle front of 237 kilometres”, in particular having regard to the untrained command staff in the “lower rank units”.[1248] He also argues that he undertook all steps necessary to prevent the actions of the paramilitary formations and that he acted in accordance with the rules of the military service and gave orders in respect of the Geneva Conventions.[1249]

417. The Prosecution responds that the Trial Chamber did find that Galić made efforts to dismantle paramilitary groups and assign their members to other units and that there is therefore no basis for an argument that the Trial Chamber did not consider this issue.[1250] It argues that Galić does not point to any findings by the Trial Chamber regarding the effect of the dismantling of the paramilitary groups on the number of the civilian victims. Further, it argues that Galić does not allege that the Trial Chamber erred in not making any such findings and in any case he does not refer to any evidence on the record that could prove such a causal relationship.[1251] In the opinion of the Prosecution, Galić further failed to show that he dismantled the paramilitary groups for any other purpose than to restore military discipline.[1252]

418. The Appeals Chamber considers that Galić’s argument that he received his command of the SRK units “practically in the state of chaos”[1253] is not an argument the Trial Chamber was bound to consider in mitigation. As a military commander Galić had the authority and competence to order lawful combat operations, and it was his duty to work towards an effective chain of command. With respect to the related factor concerning the dismantling of the paramilitary units, the Appeals Chamber notes that the Trial Chamber referred to the arguments put forward by Galić in this regard[1254] and thus considered this factor. It was perfectly within its discretion not to take it into account in mitigation of the sentence.

419. The Appeals Chamber reiterates that Trial Chambers have considerable discretion whether or not to accept a factor as a mitigating circumstance. Galić has not demonstrated that the Trial Chamber ventured outside its discretionary framework in not taking into account the conditions under which he commanded his troops as a mitigating circumstance.

[1247] Defence Appeal Brief, para. 568.
[1248] Defence Appeal Brief, para. 569.
[1249] Defence Appeal Brief, para. 578, citing the written statement of expert Witness Radinović, para. 210 (Radinović Report, D1925).
[1250] Prosecution Response Brief, paras 18.12-18.13.
[1251] Prosecution Response Brief, para. 18.14.
[1252] Prosecution Response Brief, para. 18.14.
[1253] Defence Appeal Brief, para. 566.
[1254] Trial Judgement para. 755, referring to paragraph 1146 of the Defence Final Trial Brief, which reads: “Immediately after he took over the duty of Corps Commander, General Stanislav Galić took all measures to prevent activity of paramilitary formations, in order to avoid or reduce possibilities of events that would violate the Laws and Customs of War.”

(b) The conditions of urban warfare

420. Galić submits that the conditions of urban warfare considerably lessen his criminal responsibility.[1255] He argues that the warring sides conducted the conflict in an urban environment and this rendered control of the combat units very difficult. He argues that the SRK responses to attacks of the ABiH possibly caused civilian casualties because ABiH forces were mixed with civilians.[1256] He acknowledges that the Trial Chamber recognised this in the Trial Judgement but argues that it erroneously found that the ABiH would "from time to time" provoke return fire from the SRK, claiming that the ABiH attacked the SRK from civilian areas on a regular basis and significantly contributed to the infliction of collateral damage.[1257]

421. The Prosecution responds that this argument addresses collateral damage, which is irrelevant to the victims of deliberate conduct.[1258] To the extent that Galić claims reduced liability, this is not a matter of sentencing but of conviction, and the argument cannot show any discernible error regarding sentencing.[1259]

422. The Appeals Chamber notes that the Trial Chamber addressed the circumstance of urban warfare in its determination of Galić's sentence:

> The Majority of the Trial Chamber is mindful of the siege-like conditions in the city of Sarajevo where one party to the conflict (the ABiH) was mixed with the civilian population[,] which could be compared [to] a stalemate situation[,] and of the evidence which suggests that, at times, the other warring party sought to attract sympathy from the international community by attracting SRK counter-fire or fire at its own civilians. The behaviour of the other party, however is not an excuse for the deliberate targeting of civilians and, as such, does not alleviate the responsibility of the Accused.[1260]

It is accordingly clear that the Trial Chamber considered the issue.

423. The Appeals Chamber notes that Galić failed to put forward this argument at trial as a mitigating circumstance. The Appeals Chamber reiterates that this is not the appropriate forum in which alleged mitigating circumstances, evidence of which was readily available at trial, should be presented the first time. In any case, Galić has failed to demonstrate a discernible error of the Trial Chamber. He has not put forward any argument to show that the Trial Chamber had ventured

[1255] Defence Appeal Brief, para. 573.
[1256] Defence Appeal Brief, para. 571.
[1257] Defence Appeal Brief, paras 572-573.
[1258] Prosecution Response Brief, para. 18.16.
[1259] Prosecution Response Brief, para. 18.17.
[1260] Trial Judgement, para. 765 (footnotes omitted).

outside its discretionary framework in not accepting the conditions of urban warfare in mitigation of his sentence. This part of Galić's ground of appeal is therefore dismissed.

(c) Personal and family situation

424. Galić argues that the Trial Chamber did not properly consider his personal and family situation.[1261] He points to the following factors: (a) the denial of his voluntary surrender; (b) his family situation; (c) his cooperation with UNPROFOR and the international community; (d) his co-operation with the Prosecution; and (e) his illness and exemplary conduct in the UN Detention Unit (UNDU).

(i) Denial of his voluntary surrender

425. Galić argues that he was deprived of the "the right to decide to voluntarily surrender"[1262] since he was arrested before his Indictment was disclosed to him.[1263] He argues that, in accordance with the "principle of equality of the accused before court", this circumstance should have been accepted as mitigating.[1264] The Prosecution responds that Galić did not have a "right" to be given the opportunity to voluntarily surrender.[1265] Furthermore, his letter to the Ministry of Defence in Belgrade[1266] shows that he knew about the Indictment against him and did not wish to surrender but rather tried to evade justice.[1267] Galić replies that his letter to the Ministry of Defence in Belgrade in no way indicates that he had knowledge of the Indictment and cannot be interpreted as establishing his reluctance to surrender voluntarily.[1268]

426. The Appeals Chamber notes that an accused's voluntary surrender to the International Tribunal has in several cases been taken into account as a mitigating circumstance.[1269] The Appeals Chamber considers that, if an accused, who was arrested before having the opportunity to surrender voluntarily, shows a willingness to have done so, this mere willingness may, depending on the

[1261] Defence Appeal Brief, paras 574-585.
[1262] Defence Appeal Brief, para. 576
[1263] Defence Appeal Brief, paras 575-576
[1264] Defence Appeal Brief, para. 576.
[1265] Prosecution Response Brief, para. 18.18.
[1266] Letter from Stanislav Galić to the SFRY Minister for Defence, 16 September 1999, annexed to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-PT, Prosecutor's Further Response to Defence Reply and Documents on Motion for Provisional Release, 29 June 2000 (filed 30 June 2000).
[1267] Prosecution Response Brief, paras 18.20-18.22.
[1268] Defence Reply Brief, para. 167.
[1269] *Naletilić and Martinović* Appeal Judgement, para. 599; *Blaškić* Appeal Judgement, para. 702. *See also Kupreškić et al.* Appeal Judgement, para. 430; *Prosecutor v. Biljana Plavšić*, Case Nos IT-00-39-S & IT-00-40/1-S, Sentencing Judgement, 27 February 2003, para. 84; *Blaškić* Trial Judgement, para. 776; *Kunarac et al.* Trial Judgement, para. 868; *Serushago* Sentencing Appeal Judgement, para. 24.

circumstances of the case, be taken into account in mitigation of the sentence.[1270] However, where there is no indication of such willingness to surrender voluntarily, Trial Chambers correctly exercise their discretion in not taking into account such a factor in mitigation of sentence. To do so would involve the Trial Chamber in speculation as to whether or not the accused would in fact have surrendered voluntarily.

427. The Appeals Chamber finds that the Trial Chamber did not commit a discernible error when it did not take into account any possible willingness on the part of Galić to surrender voluntarily, because it was not presented with any evidence in support thereof.

(ii) Family situation

428. Galić submits that the Trial Chamber erroneously found his family situation to be "not so atypical" as to warrant consideration as a mitigating circumstance.[1271] He argues that the Trial Chamber should have accepted his family situation as a mitigating circumstance as the facts indicate that he does not have any prejudice towards people of different nationality, ethnicity or religion.[1272] The Prosecution responds that the Trial Chamber was apprised of and made reference to Galić's family situation,[1273] and that, in any case, lack of discriminatory motives could be no more than a neutral factor.[1274] It argues that, as a result, there is no error in the Trial Chamber's assessment that his situation was not atypical and does not warrant a reduction in sentence.[1275]

429. The Appeals Chamber understands Galić's submission regarding his "family" situation to be limited to the argument that he never discriminated against anybody. The Appeals Chamber finds that Galić's argument is misconceived. Respect towards all people, regardless of their nationality, ethnicity or religion, is the demeanour expected of any individual and does not constitute a factor to be considered in mitigation of sentence.[1276] As such, the Trial Chamber correctly found that this circumstance "is not so atypical that it is a relevant factor in this case to go towards mitigating [Galić's] sentence".[1277]

[1270] In the cases of *Obrenović* and *Deronjić*, the accused had indicated their willingness to surrender voluntarily before the arrest and the Trial Chambers accordingly accorded some weight to this mitigating circumstance. *See Prosecutor v. Miroslav Deronjić,* Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004, paras 266-267; *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 136.
[1271] Defence Appeal Brief, para. 577.
[1272] Defence Appeal Brief, para. 577.
[1273] Prosecution Response Brief, para. 18.24.
[1274] Prosecution Response Brief, para. 18.24.
[1275] Prosecution Response Brief, para. 18.25.
[1276] On the contrary, a discriminatory motive should be considered as an aggravating circumstance, where it is not an element of the crime. *See Vasiljević* Appeal Judgement, paras 172-173; *Kunarac et al.* Appeal Judgement, para. 357, citing *Tadić* Appeal Judgement, para. 305.
[1277] Trial Judgement, para. 766.

(iii) Cooperation with UNPROFOR and the international community

430. Galić argues that the Trial Chamber failed to take into account his "very good cooperation" with the members of UNPROFOR, which caused him problems with local authorities and his superiors.[1278] Furthermore, he argues that he fully cooperated with the international community after the war,[1279] and that he has cooperated with the Prosecution through his defence team.[1280] The Prosecution responds that Galić's contentions regarding cooperation with UNPROFOR and other international bodies are unsubstantiated,[1281] and even if such cooperation did occur, there is no reason why such normal discharge of his professional tasks should be regarded as mitigating.[1282]

431. The Appeals Chamber notes that the Trial Chamber referred to the arguments put forward by Galić, which is *prima facie* evidence that it considered his submission.[1283] The Appeals Chamber finds that Galić failed to show that the Trial Chamber ventured outside its sentencing discretion by not considering his cooperation with UNPROFOR as a mitigating circumstance.

432. With respect to his cooperation, even after the war, with representatives of the international community, Galić himself notes that "he performed his duties in a professional manner".[1284] As such, the fact that he, as a professional soldier, cooperated with the international community is not a factor that the Trial Chamber had to take into account as a mitigating circumstance. In addition, the Appeals Chamber notes that this argument was not put forward at trial. An appellant cannot expect the Appeals Chamber to consider mitigating circumstances, evidence of which was available but not introduced at trial, for the first time on appeal.

(iv) Cooperation with the Prosecution

433. Galić submits that he has cooperated with the Prosecution through submitting a large number of military documents.[1285] The Prosecution responds that this argument should be rejected as Galić is in effect arguing that presenting evidence in his defence is a mitigating circumstance.[1286]

434. The Appeals Chamber recalls that substantial cooperation with the Prosecution is a mitigating circumstance that has to be taken into account when assessing the sentence.[1287] However, the Appeals Chamber notes that Galić's putative co-operation with the Prosecution has not been

[1278] Defence Appeal Brief, para. 579.
[1279] Defence Appeal Brief, para. 580.
[1280] Defence Appeal Brief, para. 582.
[1281] Prosecution Response Brief, paras 18.27-18.30.
[1282] Prosecution Response Brief, para. 18.31.
[1283] Trial Judgement, para. 755.
[1284] Defence Appeal Brief, para. 580.
[1285] Defence Appeal Brief, para. 582.
[1286] Prosecution Response Brief, para. 18.32.

substantiated in the Defence Appeal Brief, as there is only a reference to a "large number" of military documents without naming those documents nor providing any indication as to their content.[1288] In any case, the Appeals Chamber notes that no argument was put forward in Galić's Final Trial Brief in this regard. Galić cannot expect the Appeals Chamber to consider evidence of mitigating circumstances for the first time on appeal that was readily available at trial.

(v) Illness and exemplary conduct in the UNDU

435. Galić argues that his illness and his exemplary conduct throughout detention should be taken into account as mitigating circumstances.[1289] The Prosecution responds that there is no evidence to support Galić's reference to his alleged illness.[1290] In any case, poor health is to be considered only in exceptional cases and Galić's condition is not exceptional.[1291] Further, it argues, Galić has not pointed to relevant evidence before the Trial Chamber regarding his conduct in the UNDU.[1292] The matter was not raised in his Final Trial Brief or closing submissions, and he is unable to show that the Trial Chamber erred by not considering the issue.[1293]

436. The Appeals Chamber reiterates that "[p]oor health is to be considered only in exceptional or rare cases".[1294] The Appeals Chamber finds that Galić has failed to demonstrate that his health was exceptionally poor. In addition, this factor was not raised in his sentencing submissions at trial and the Appeals Chamber is not the appropriate forum to do so for the first time. The same reasoning applies *mutatis mutandis* to Galić's argument with regard to his alleged exemplary conduct in the detention unit. His arguments under that part of his nineteenth ground of appeal are accordingly dismissed.

5. Whether the mode of liability influences the sentence of an accused

437. Galić argues that should the Appeals Chamber find Article 7(1) of the Statute inapplicable, and rather apply Article 7(3) of the Statute, his responsibility would be considerably lessened and

[1287] Rule 101(B)(ii) of the Rules.
[1288] Defence Appeal Brief, para. 582.
[1289] Defence Appeal Brief, para. 585.
[1290] Prosecution Response Brief, para. 18.40.
[1291] Prosecution Response Brief, paras 18.41-18.42, citing *Blaškić* Appeal Judgement, para. 696, and *Krstić* Trial Judgement, para. 271.
[1292] Prosecution Response Brief, para. 18.43.
[1293] Prosecution Response Brief, para. 18.43.
[1294] *Blaškić* Appeal Judgement, para. 696.

that this should in turn be reflected in the sentence.[1295] Since the Appeals Chamber has found Article 7(1) applicable, however, the Appeals Chamber need not consider this argument.

C. Prosecution's appeal against sentence

438. The Prosecution argues that the sentence handed down by the Trial Chamber "falls outside the discretionary range which was available [for the] Trial Chamber"[1296] and "clearly does not reflect the extreme gravity of the crimes and [his] high ranking position".[1297] It argues that Galić's crimes are among the worst to come before the Tribunal and therefore that the Trial Chamber committed a discernible error by not imposing the Tribunal's highest sentence.[1298] In its view, where a crime was committed under "particularly aggravating circumstances", it would fall in a "'worst case' category".[1299] Claiming that Galić's crimes "clearly"[1300] fall within such "'worst case' category" and pointing to the gravity of the crimes and Galić's high-ranking position,[1301] the Prosecution requests the Appeals Chamber to revise the sentence to life imprisonment.[1302]

439. Galić responds that the Prosecution's appeal is "groundless" as the Prosecution has failed to identify any error on the part of the Trial Chamber.[1303] He claims that "[m]andatory pronouncement of the highest sentence for the 'worst' criminal cases, without determining all the other circumstances connected with the person of the Accused, would lead to a total negation of the principle of individualization of the sentence",[1304] which is "one of the fundamental principles of sentencing in criminal law".[1305]

440. The Prosecution replies that it did not fail "to consider the individualisation of sentence"[1306] and that its proposed imposition of a life sentence "is not solely due to the gravity of the crime, but due to the gravity of the crime, the role and participation of [Galić], the aggravating factors and the lack of mitigating factors".[1307]

[1295] Defence Appeal Brief, paras 583-584.
[1296] Prosecution Appeal Brief, para. 2.3.
[1297] Prosecution Appeal Brief, para. 2.9; *see also ibid.*, paras 2.1, 3.1.
[1298] Prosecution Appeal Brief, paras 2.3, 2.21.
[1299] Prosecution Appeal Brief, para. 2.19.
[1300] Prosecution Appeal Brief, sec. 2(c).
[1301] Prosecution Appeal Brief, paras 2.27-2.48.
[1302] Prosecution Appeal Brief, paras 2.4, 3.5.
[1303] Defence Response Brief, para. 4.
[1304] Defence Response Brief, para. 24.
[1305] Defence Response Brief, para. 6.
[1306] Prosecution Reply Brief, para. 1.39.
[1307] Prosecution Response Brief, para. 1.39.

1. Preliminary issues

441. The core complaint of the Prosecution is that the sentence rendered by the Trial Chamber is "manifestly inadequate" and that the Trial Chamber committed a "discernible error" as the sentence "does not reflect the entire gravity of the crimes and the high ranking position of [Galić]".[1308] The Prosecution claims that for crimes of such severity the sentencing aims of deterrence and retribution can only be achieved through the most severe punishments.[1309] Before turning to whether the sentence rendered by the Trial Chamber was unreasonable, the Appeals Chamber will first address the other arguments raised by the Prosecution: (1) Galić's case falls within the "worst case" category; and (2) a comparison with national practice shows that the crimes committed are "universally condemned as particularly grave".[1310]

442. With regard to the Prosecution's argument that Galić's case falls within the "worst case" category, the Appeals Chamber reiterates that cases cannot be categorised systematically. No difference in sentence can be inferred from the category in which a crime falls, as the level of gravity in any particular case must be fixed by reference to the circumstances of the case.[1311] Trial Chambers have an overriding obligation to individualise a sentence to fit the circumstances of the accused and the gravity of the crime.[1312] While deterrence and retribution may be taken into account in sentencing, those factors must not be given undue weight in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[1313] The Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime. As noted by the Trial Chamber, the gravity of the offence is the primary factor to be taken into account in imposing a sentence.[1314] In the present case, the Trial Chamber duly took notice of those principles,[1315] but the question as to whether it gave them sufficient attention in determining the sentence will be examined below in considering the alleged unreasonableness of the sentence.

443. With regard to the Prosecution's reference to national practice, the Appeals Chamber recalls that while some guidance may be found in sentencing practices of systems other than the former Yugoslavia, those must not be given undue weight as Trial Chambers are not bound by any

---

[1308] Prosecution Appeal Brief, para. 2.9.
[1309] Prosecution Appeal Brief, paras. 2.12-2.13, 3.1.
[1310] Prosecution Appeal Brief, para. 2.12.
[1311] *Furundžija* Appeal Judgement, paras 242-243, referring to paragraph 69 of the *Tadić* Sentencing Appeal Judgement. *See also Dragan Nikolić* Judgement on Sentencing Appeal, para. 14, fn. 25.
[1312] *Simić* Appeal Judgement, para. 238; *Čelebići* Appeal Judgement, para. 717.
[1313] *Aleksovski* Appeal Judgement, para. 185. *See also Dragan Nikolić* Judgement on Sentencing Appeal, para. 46.
[1314] Trial Judgement, para. 758.
[1315] Trial Judgement, para. 757.

maximum term of imprisonment applied in a national system.[1316] Again, the gravity of a crime must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime.[1317]

2. Whether the sentence rendered was unreasonable

444. In support of its argument that the sentence rendered by the Trial Chamber was unreasonable, the Prosecution points to the Trial Chamber's assessment of the gravity of the crime, the aggravating circumstances and the alleged lack of mitigating circumstances. The Prosecution does not challenge the Trial Chamber's findings of fact[1318] but rather attempts to demonstrate, in view of those facts, that the sentence rendered by the Trial Chamber was "manifestly inadequate". The Appeals Chamber will now consider whether the Trial Chamber committed a discernible error in the exercise of its discretion by giving insufficient weight to the gravity of Galić's conduct.[1319] Such an error will exist where the sentence rendered by the Trial Chamber was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[1320]

(a) The factors put forward by the Prosecution and the findings of the Trial Chamber

(i) The "victimisation"

445. The Prosecution argues that the "victimisation, both in terms of scale and choice of victims, bespeaks an extraordinary brutality on the part of [Galić] in ordering and maintaining the campaign in these circumstances".[1321] In its view, the "sinister selection of victims and the cowardly nature of such acts seriously aggravate the crimes of [Galić]".[1322]

446. The first part of the Prosecution's argument goes to the large number of victims. It notes that the "Trial Chamber found that hundreds of civilians were killed by snipers and in mortar attacks on

[1316] *Tadić* Sentencing Appeal Judgement, para.21, cited at paragraph 377 of the *Kunarac et al.* Appeal Judgement. *See also Dragan Nikolić* Judgement on Sentencing Appeal, para. 76.
[1317] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 18; *Blaškić* Appeal Judgement, para. 680; *Krstić* Appeal Judgement, para. 241; *Jelisić* Appeal Judgement, para. 101; *Čelebići* Appeal Judgement, para. 731; *Aleksovski* Appeal Judgement, para. 182.
[1318] Prosecution Appeal Brief, para. 2.3: "the Prosecution does not challenge any of the Trial Chamber's factual findings".
[1319] *Aleksosvki* Appeal Judgement, para. 187. *See also Gacumbitsi* Appeal Judgement, paras 205-206.
[1320] *Babić* Judgement on Sentencing Appeal, para. 44.
[1321] Prosecution Appeal Brief, para. 2.39.
[1322] Prosecution Appeal Brief, para. 2.39.

civilians targets".[1323] The Trial Chamber considered the large number of victims when assessing the gravity of the crime**:**

> In general, the Trial Chamber will assess the gravity of the offences proven in this case by taking into account the number of victims, the effect of the crimes on the broader targeted group, and the suffering inflicted on the victims.[1324]
>
> The gravity of the offences committed by General Galić is established by their scale, pattern and virtually continuous repetition, almost daily, over many months […].[1325]

447. The second part of the Prosecution's arguments goes to the "particular cruelty" of the crimes committed.[1326] The Appeals Chamber notes that the Prosecution points to elements referred to in the Trial Judgement that demonstrate such cruelty: the crimes were perpetrated against civilians "in the perceived safety of their homes, at hospitals, schools, market places and while commuting through the city"; people were targeted "trying to cope with the effects of the war, such as mothers fetching water for themselves and their families in rivers and or at water pumps [and] while attending funerals and going to weddings"; and "[e]ven children were not spared".[1327]

(ii) <u>The actual infliction of terror on the civilian population of Sarajevo</u>

448. The Prosecution argues that the facts of the case amount to "the most severe crime of terror that in all probability will come before the Tribunal – namely the terrorisation of the population of Sarajevo, the largest city in Bosnia-Herzegovina […] with about 300,000 civilians at the time".[1328] It notes that although it was not "specifically addressed, it is clear that the Trial Chamber accepted the evidence of numerous witnesses who testified that the civilian population of Sarajevo was indeed terrorised".[1329]

449. The Appeals Chamber notes that the Trial Chamber indeed held that "[i]nhabitants of Sarajevo – men, women, children and elderly persons – were terrorized" and that "[t]his was an anguishing environment in which, at a minimum[,] hundreds of men, women, children, and elderly people were killed, and thousands were wounded and more generally terrorized".[1330]

(iii) <u>The systematic, prolonged and premeditated participation of Galić</u>

1323 Prosecution Appeal Brief, para. 2.29.
1324 Trial Judgement, para. 758.
1325 Trial Judgement, para. 764.
1326 Prosecution Appeal Brief, para. 2.39.
1327 Prosecution Appeal Brief, para. 2.39.
1328 Prosecution Appeal Brief, para. 2.29.
1329 Prosecution Appeal Brief, para. 2.40. *See also* Prosecution Reply Brief, para. 1.31.
1330 Trial Judgement, para. 764.

450. The systematic, prolonged and premeditated participation of Galić referred to by the Prosecution was taken into account by the Trial Chamber at paragraph 764 of the Trial Judgement where it held that "[t]he gravity of the offences committed by General Galić is established by their scale, pattern and virtually continuous repetition, almost daily, over many months."[1331]

(iv) Galić's position of authority

451. The Prosecution argues that Galić's abuse of authority is a factor that aggravates his crimes.[1332] In particular, it points to the fact that "rather than using his senior position as a professional officer to ensure that any military action was carried out lawfully [and] fought according to the laws and customs of war, he gave orders to do the opposite".[1333]

452. As noted above, in Galić's nineteenth ground of appeal, the Trial Chamber correctly took into account in paragraph 765 of the Trial Judgement that he repeatedly breached his public duty from his very senior position, thereby abusing his position of authority.

(v) Mitigating circumstances

453. The Prosecution argues that the Trial Chamber did not find any mitigating circumstances[1334] and that therefore "there is nothing that mitigates against the imposition of the highest sentence".[1335] The Appeals Chamber notes, however, that the Trial Chamber found Galić's "exemplary behaviour [...] throughout the proceedings" to be a mitigating circumstance.[1336]

(b) Conclusion

454. The Appeals Chamber recalls that the Prosecution does not challenge the Trial Chamber's findings of fact.[1337] In addition to the findings recollected above, the Appeals Chamber notes that, from 10 September 1992 to 10 August 1994, Galić assumed the post of the commander of the Sarajevo Romanija Corps, his superiors being the Chief of Staff of the VRS, General Ratko Mladić, and the supreme commander of the VRS, Radovan Karadžić.[1338] As such, and during a period of 23

[1331] Trial Judgement, para. 764.
[1332] Prosecution Appeal Brief, paras 2.42-2.44.
[1333] Prosecution Appeal Brief, para. 2.44.
[1334] Prosecution Appeal Brief, para. 2.47.
[1335] Prosecution Appeal Brief, para. 2.48.
[1336] Trial Judgement, para. 766.
[1337] *See* above, para. 444.
[1338] Trial Judgement, paras 604-607.

months, he was in charge of continuing the planning and execution of the military encirclement of Sarajevo.[1339] The Trial Chamber particularly found:

> The gravity of the offences committed by General Galić is established by their scale, pattern and virtually continuous repetition, almost daily, over many months. Inhabitants of Sarajevo – men, women, children and elderly persons – were terrorized and hundreds of civilians were killed and thousands wounded during daily activities such as attending funerals, tending vegetable plots, fetching water, shopping, going to hospital, commuting within the city, or while at home. The Majority of the Trial Chamber also takes into consideration the physical and psychological suffering inflicted on the victims. Sarajevo was not a city where occasional random acts of violence against civilians occurred or where living conditions were simply hard. This was an anguishing environment in which, at a minimum hundreds of men, women, children, and elderly people were killed, and thousands were wounded and more generally terrorized.[1340]

455. Taking into account the above findings of the Trial Chamber, the Appeals Chamber, by majority, Judge Pocar partially dissenting and Judge Meron dissenting, finds that the Trial Chamber committed a discernible error in assessing the factors in relation to the gravity of the crime, the role and participation of Galić, the aggravating circumstance of abuse of Galić's position of authority, and the single mitigating circumstance regarding his behaviour throughout the proceedings. Although the Trial Chamber did not err in its factual findings and correctly noted the principles governing sentencing, it committed an error in finding that the sentence imposed adequately reflects the level of gravity of the crimes committed by Galić and his degree of participation. The sentence rendered was taken from the wrong shelf. Galić's crimes were characterized by exceptional brutality and cruelty, his participation was systematic, prolonged and premeditated and he abused his senior position of VRS Corps commander. In the Appeals Chamber's view, the sentence imposed on Galić by the Trial Chamber falls outside the range of sentences available to it in the circumstances of this case. The Appeals Chamber considers that the sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct, that it is able to infer that the Trial Chamber failed to exercise its discretion properly.

456. Accordingly, the Appeals Chamber finds that the Trial Chamber abused its discretion in imposing a sentence of only 20 years and allows the Prosecution's appeal.

[1339] Trial Judgement, para. 609.

[1340] Trial Judgement, para. 764.

XVIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearing of 29 August 2006;

SITTING in open session;

DISMISSES Galić's appeal;

ALLOWS, by majority, Judge Pocar partially dissenting and Judge Meron dissenting, the Prosecution's appeal, **QUASHES** the sentence of twenty years' imprisonment imposed on Galić by the Trial Chamber and **IMPOSES** a sentence of life imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Galić has already spent in detention;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Galić is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Done in English and French, the English text being authoritative.

____________________	____________________	____________________
Judge Fausto Pocar Presiding	Judge Mohamed Shahabuddeen	Judge Mehmet Güney

____________________	____________________
Judge Theodor Meron	Judge Wolfgang Schomburg

Judge Fausto Pocar appends a partially dissenting opinion.
Judge Mohamed Shahabuddeen appends a separate opinion.
Judge Theodor Meron appends a separate and partially dissenting opinion.
Judge Wolfgang Schomburg appends a separate and partially dissenting opinion.

Dated this 30th day of November 2006

At The Hague,

The Netherlands

[Seal of the International Tribunal]

XIX. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. I am in agreement with the majority that the Trial Chamber committed a discernible error in the exercise of its discretion when it found that a sentence of 20 years imposed on Galić adequately reflected the number and gravity of the crimes committed by him and his degree of participation during the military encirclement of Sarajevo from 10 September 1992 to 10 August 1994. Although the Trial Chamber neither made an error of fact in determining the sentence nor misstated the law with respect to sentencing, it abused its discretion in assessing all of the relevant sentencing factors in relation to the gravity of Galić's criminal conduct. Under the circumstances of this case, it can be inferred that the sentence imposed is unreasonable and plainly unjust in light of the Trial Chamber's finding, which we affirm on appeal, that as a result of Galić's conduct over the course of 23 months, "[i]nhabitants of Sarajevo – men, women, children and elderly persons – were terrorized and hundreds of civilians were killed and thousands wounded during daily activities such as attending funerals, tending vegetable plots, fetching water, shopping, going to hospital, commuting within the city, or while at home."[1] Thus, in this situation, the Appeals Chamber has the power to intervene under the Statute and Rules of the International Tribunal in order to ensure that the Trial Chamber's error is corrected.

2. However, I part ways with the majority where it finds that the Appeals Chamber, as the Chamber of last resort in this International Tribunal, may itself correct such an error committed by a Trial Chamber by revising and increasing the sentence entered against an accused at trial. For the reasons emphasized in my dissents in *Prosecutor v. Rutaganda*[2] and *Prosecutor v. Semanza*,[3] the Appeals Chamber is bound to uphold an accused's right of appeal enshrined in international law as reflected in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"). Thus, the modalities of the Appeals Chamber's intervention under Article 25(2) of the Statute of the International Tribunal to correct errors committed by a Trial Chamber must be interpreted so as to comply with the fundamental human rights principle that any conviction *and or* sentence must be capable of review by a higher tribunal according to law.[4] While Article 25(1) of our Statute affords the Prosecution the possibility of lodging an appeal that seeks an increase in sentence, this provision does not allow for an exception to the Appeals Chamber's obligation to guarantee the fundamental right of appeal under Article 14(5) of the ICCPR. As stated by the Human Rights Committee of the ICCPR, although the applicable law in a jurisdiction may allow for a person to be convicted and

[1] Trial Judgement, para. 764.
[2] Case No. ICTR-96-3-A, Judgement, 26 May 2003.
[3] Case No. ICTR-97-20-A, Judgement, 20 May 2005.
[4] Art. 14(5) of the ICCPR states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

sentenced at first instance by the higher court in that jurisdiction, "this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court."[5]

3. Consequently, where the Appeals Chamber finds, as it does in this case, that the Trial Chamber erred by imposing a sentence that was inadequate for fully reflecting the gravity of the crimes committed by an accused, the only avenue available to the Appeals Chamber is to quash the Trial Chamber's sentence and remit it back to the Trial Chamber under Rule 118(C) of the Rules[6] for a redetermination of the sentence consistent with the Appeals Chamber's decision. Such an approach is in line with that taken by the Appeals Chamber in *Čelebići* wherein the Chamber reasoned that some issues, such as determination of sentence, are of such significance that they should not be decided by a Chamber from which it is impossible to exercise one's right to an appeal.[7]

4. Remitting to the Trial Chamber for a redetermination of sentence in order to ensure that the right to appeal against sentence is upheld is especially important where, as here, the Appeals Chamber does not consider that the Trial Chamber merely erred by improperly taking into account one of the sentencing factors at issue, or made an error as to some of the facts upon which it exercised its discretion, or failed to correctly note one or more of the legal principles governing sentencing. Rather, in this case, the Appeals Chamber finds that the Trial Chamber completely erred in its determination of an appropriate sentence even though it properly took into account all of the relevant sentencing factors due to the fact of the extremely grave nature of the crimes committed. In other words, the Appeals Chamber considers that the sentence must be wholly reassessed. Such a *de novo* reassessment must be made by a Trial Chamber as the Chamber with primary responsibility for evaluating the evidence and with broad discretion to fulfil its obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime. Furthermore, such a complete reassessment makes it all the more imperative that the resulting sentence be subject to review by a higher court, in other words, the Appeals Chamber.

5. For these reasons, I respectfully dissent.

Done in English and French, the English text being authoritative.

---

[5] Communication No. 1095/2002, *Gomaríz v. Spain*, 26 August 2005.
[6] Rule 118(C) provides that "[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried before the Trial Chamber."
[7] *Prosecutor v. Delalić et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 711.

Done this 30th day of November 2006,	______________________
At The Hague,	Fausto Pocar
The Netherlands	Judge

[Seal of the International Tribunal]

XX. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I support the outcome of today's judgement. I shall give my views on (i) whether the Tribunal has competence over treaty-based crimes; (ii) whether "terror" is a crime known to customary international law; and (iii) whether the Appeals Chamber should allow the prosecution's appeal against sentence.

A. Whether the Tribunal has competence over treaty-based crimes

2. In paragraph 85 of its judgement, the Appeals Chamber "rejects Galić's argument that the International Tribunal's jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law". But the paragraph goes on to state that "in practice the International Tribunal always ascertains that the treaty provision in question is declaratory of custom". Recalling the essence of Pascal's wager**,** that paragraph seeks to have the best of both worlds. Whatever the *theory*, it acknowledges that the Tribunal does not *in fact* exercise jurisdiction over crimes created by treaty unless they are known to customary international law. I agree with that acknowledgement, except that I would say that the Tribunal does not exercise jurisdiction over purely treaty-based crimes because it cannot: it has no such jurisdiction. I reserve my reasons for saying that.

B. Whether "terror" is a crime known to customary international law

3. I agree with the view that terror as charged is a crime known to customary international law. I only wish to indicate my understanding that the Appeals Chamber, in taking up that position, is not suggesting that a comprehensive definition of terror is known to customary international law; the Appeals Chamber is really speaking of a core concept. The international community is divided on important aspects of the question, with the result that there is neither the required *opinio juris* nor state practice to support the view that customary international law knows of a comprehensive definition. The developing state of the law gives reason for caution. The perils of going forward in haste were presumably in the mind of Judge Petrén when, on another matter, he referred to what he regarded as a request for the International Court of Justice "to pronounce upon the future of a customary law in active evolution".[1]

4. However, that need not prevent the Tribunal from recognising that customary international law does know of a core or predominant meaning of "terror" for which there was individual

criminal responsibility at the material times. Such a limited view need not trench on the controversy as to what is a comprehensive definition of "terror".[2] That controversy is not involved in this case; pertinent issues have not been raised and the Appeals Chamber is not called upon to navigate between them.

5. There is of course a question whether there is individual criminal responsibility, as opposed to state responsibility, at customary international law. I take guidance from *Oppenheim*'s statement that "it is an established principle of customary international law that individual members of armed forces of the belligerents – as well as individuals generally – are directly subject to the law of war and may be punished for violating its rules".[3] I am satisfied that a serious violation of "the laws or customs of war" within the meaning of article 3 of the Statute, namely, by resorting to the core of terror, gives rise to such responsibility.[4] I am also satisfied that this responsibility existed at the time of the alleged acts of the appellant.

C. Whether the Appeals Chamber should allow the prosecution's appeal against sentence

6. The Trial Chamber, by majority, sentenced the appellant to 20 years' imprisonment. The prosecution has appealed against the sentence, criticising it as manifestly inadequate to the gravity of the crime and asking for a life sentence. There are two points on which I propose to speak, namely, (a) the competence of the Appeals Chamber to convict and to sentence, and (b) the appellate evaluation of the gravity of a crime.

---

[1] *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits*, 25 July 1974, 1974 ICJ 55, at 158-159. It is apposite also to recall Montesquieu's general warning when, speaking of the laws, he said that "il n'y faut toucher que d'une main tremblante." *Montesquieu, Lettres persanes, lettre LXXIX.*

[2] The principal problems concern the subject of state terrorism as well as the question whether there is terrorism in the case of force employed by a national liberation movement. For these and other reasons, the tendency has been in the direction of making terrorism conventions on particular subjects. *See* the list given in the first preambular paragraph of Annex I to Report of the *Ad Hoc* Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth Session (28 January-1 February 2002) , GAOR, 57th Session, Supplement No. 37 (A/57/37). Discussions on a Draft Comprehensive Convention on International Terrorism have not yet been completed. An *Ad Hoc* Committee met from 27 February 2006 to 3 March 2006; *see* GAOR, sixty-first Session, Supplement No. 37 (A/61/37). *See also* Ben Saul, "Defining 'Terrorism' to Protect Human Rights" – A Working Paper (Madrid, February 2006).

[3] Jennings & Watt, eds., *Oppenheim's International Law*, 9th ed., Vol. I (New York: Longman, 1996), p. 17, para. 7. Further discussion at page 505, para. 148, relates individual criminal responsibility to "much of the law of war", but I have no doubt that the instant conduct would be caught by what applies, as involving a serious breach of international humanitarian law.

[4] *See* generally *Tadić*, Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), paras. 128 ff and in particular para. 129; *Akayesu,* Case No. ICTR-96-4A, Judgement, paras. 611-617.

1. The competence of the Appeals Chamber to convict and to sentence

7. My views on the general subject of the competence of the Appeals Chamber to convict and to sentence, notwithstanding that there is no right of appeal from the Appeals Chamber, have been given before.[5] It is however useful to consider some aspects of that question.

8. Under the heading "Status of the Acquitted Person", Rule 99(B) of the Rules of Procedure and Evidence of the Tribunal reads:

> If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.

Correspondingly, Rule 118 reads:

> (A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.
>
> (B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces an acquittal, order the arrest or surrender of the accused to the Tribunal.

9. The substantive origin of these provisions lay in the Second Plenary of the Tribunal, held in February 1994 – almost at the commencement of the life of the Tribunal. Ever since then, in their legislative capacity, the judges of the Tribunal have been affirming that, in their understanding of the Statute, the Appeals Chamber has competence to convict and to sentence even though, on the one hand, there is no right of appeal from the Appeals Chamber, and, on the other, the sentencing is not done on remand to a Trial Chamber. Of course, it is open to the judges, in their judicial capacity, to hold that they were wrong in taking that view. However, in my opinion, those Rules are *intra vires*; I do not understand them to be under question.

10. Proponents of a right of appeal make two suggestions. The first is that an appeal from one bench of the Appeals Chamber may be taken to another bench of that Chamber. That was done in one case.[6] But, in relation to the first bench, the second bench will not be a "higher tribunal" within

[5] *Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), Separate Opinion of Judge Shahabuddeen.
[6] *Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt against Prior Counsel Milan Vujin, 27 February 2001 ("*Tadić* Contempt Appeal").

the meaning of article 14(5) of the International Covenant on Civil and Political Rights, which provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The bench appealed to can only become a "higher tribunal" by the exercise of a competence to make structural changes to the Tribunal which the judges lack under the rule-making power which has been entrusted to them by article 15 of the Statute. A decision of the first bench cannot be overridden on appeal (as distinguished from review or reconsideration) by a decision of the second bench; for the purposes of an appeal, there is no supporting *vinculum juris* between the two benches. Since both benches represent the same Appeals Chamber, the appeal would be an appeal from Caesar to Caesar. Thus there could be two possibly divergent decisions of the same authority on the same matter.

11. I respectfully agree with the dissent of Judge Wald in *Vujin*, in which she said that article 25 of the Statute "nowhere states that an appeal may be taken from one duly constituted Appeals Chamber to another duly constituted Appeals Chamber, and I do not think we have the power to create such a two-level process in that Chamber on our own".[7] That Rule 77(K) of the Rules of Evidence and Procedure was later introduced to accommodate the position cannot get over these constitutional hurdles. I do not propose to discuss further the improbability of the procedure of taking an appeal from one bench of the Appeals Chamber to another bench of the Appeals Chamber.[8]

12. The second suggestion says that the Appeals Chamber has to remand the case to a Trial Chamber for the latter to pass on sentencing, thus preserving a right of appeal to the Appeals Chamber from the decision of the Trial Chamber. In my opinion, it is competent for the Appeals Chamber to make a remand, but that course is confined to quantum and does not touch controlling principles; further it is not mandatory.

13. In *Tadić*[9] the Appeals Chamber initially intended to sentence itself. Later, it remitted sentencing to the Trial Chamber. Its order stated:

> NOTING the oral arguments of the parties on 30 August 1999, whereby they indicated that they recognised the competence of the Appeals Chamber itself to pronounce sentences but considered that the Appeals Chamber was also

[7] *Ibid.*, Separate Opinion of Judge Wald, pp. 1-2.
[8] For my views, see *Rutaganda* Appeal Judgement, Separate Opinion of Judge Shahabuddeen.
[9] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 September 1999. *See also Tadić,* IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000, para. 8, last sentence.

> competent to remit sentencing to a Trial Chamber, which latter course they considered preferable in the circumstances of the case.[10]

14. It is a reasonable inference that the Appeals Chamber did not consider that it was required to abstain from sentencing. The Appeals Chamber is competent to remit but is not obliged to do so; its competence is discretionary. Even more interesting is the fact that the Appeals Chamber made convictions on certain counts of the indictment in lieu of acquittals by the Trial Chamber;[11] there was of course no question of an appeal from the convictions by the Appeals Chamber.

15. The discretion of the Appeals Chamber to remit is exercised by reference to the need of the Appeals Chamber for the assistance of the Trial Chamber. This was the approach taken by the Appeals Chamber in *Čelebići.*[12] Thus, for example, in paragraph 3 of its disposition it said:

> [T]he Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that [Mucić] had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić.

16. The remand was not made in order to preserve the right of appeal. When the Trial Chamber decided, there would of course be a right of appeal to the Appeals Chamber. But what is clear is that sentencing could be done by the Appeals Chamber itself. In fact, in paragraph 4 of its disposition in *Čelebići,* the Appeals Chamber remitted sentencing to the Trial Chamber "with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of [certain matters] …, it would have imposed a sentence of around ten years".[13] Had the Appeals Chamber determined the sentence itself, it is clear that there would have been no right of appeal from its decision. The Appeals Chamber did not take the position that in all cases it had to remand the fixing of sentence to a Trial Chamber.

17. Where there are no circumstances to be investigated and evaluated by a Trial Chamber, there is no need for a remand. In this case, all the circumstances have been investigated and evaluated by the Trial Chamber; they are now before the Appeals Chamber. The Appeals Chamber may act self-sufficiently. In *Aleksovski*, the Appeals Chamber itself increased the sentence from two

---

[10] *Ibid.*, p. 3. *See also Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 327(6); *Tadić*, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999, para. 3; *Tadić,* Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, paras. 8 and 9. *See also Rutaganda* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, footnote 30.
[11] *Tadić,* IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000, para. 8.
[12] *Delalić et al.,* IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").
[13] *Ibid.*, part XV, para. 4 of "Disposition", pp. 306-307.

and a half years' imprisonment to seven years' imprisonment; it did not seek the assistance of a Trial Chamber. That case was cited approvingly by the Appeals Chamber in paragraph 12 of its judgement in *Mucić*[14], in which the Appeals Chamber stated, with reference to *Aleksovski*, that "[w]ithout hearing the parties further and without further evidence, the Appeals Chamber was able to revise the sentence imposed [by the Trial Chamber] by increasing it".

18. The view that the Appeals Chamber cannot itself sentence in the absence of a right of appeal would rely on the decisions of the United Nations Human Rights Committee in *Salgar de Montego v. Colombia*,[15] *Jesús Terrón v. Spain*[16] and *Gomariz Valera v. Spain*[17]. Those decisions are interesting, but are not determinative of the present case. They need to be qualified to accommodate the characteristics of an international criminal tribunal as distinguished from the national judicial bodies to which they applied.

19. It is good jurisprudence that particular provisions of internationally recognised human rights instruments do not apply to the Tribunal lock, stock and barrel; it is superfluous to cite authority. What applies is the substance of the standards – or goals – set by the provisions of those instruments, not the provisions themselves. The supreme goal is fairness; that is sought to be ensured, *inter alia*, by provisions requiring a right of appeal. However, in certain circumstances, that goal can be satisfied even in the absence of a right of appeal from a conviction or sentence by the Appeals Chamber.

20. A sentence reflects the court's assessment of the measure of punishment merited. The object of a guarantee of a right of appeal from sentence is to ensure a right to argue that question before a "higher tribunal", namely, what should be the proper measure of the punishment merited. In this case, the question raised by the prosecution on appeal was not a new one. It was the same as the question before the Trial Chamber: what is the proper measure of the punishment merited by the acts of the accused? The appellant had a right to argue that question both at trial and on appeal, and he did argue it in both fora. The substance of his rights has been respected.

21. Even in cases in which it cannot be said that the accused had a right to argue the substance of the question both at trial and on appeal (such as a contempt of the Appeals Chamber which is dealt with by the Appeals Chamber itself), an absence of a right of appeal is not necessarily fatal.

---

[14] *Mucić et al.*, Case No. IT-96-21-A*bis*, Judgement on Sentencing Appeal, 8 April 2003.
[15] Communication No. 64/1979, 24 March 1982, para. 3.2.
[16] Communication No. 1073/3002, 15 November 2004, para. 3.1.
[17] Communication No. 1095/2002, 26 August 2005, para. 3.3.

The governing criterion is fairness. Whether fairness exists has to be determined in the circumstances of the case. Fairness can exist in the absence of a right of appeal where a first conviction is made by the most senior judicial body. Consider the following.

22. As *Čelebići*[18] shows, the Appeals Chamber may attach conditions to the remission; it may, for example, say that the new sentence should be within certain parameters. An appeal from the judgement of the Trial Chamber cannot challenge the applicability of those parameters: they were not decided by the Trial Chamber. The fairness of the Appeals Chamber's adjudication of that important matter will have to be accepted as an adjudication by the most senior judicial body.

23. Even if the Appeals Chamber attaches no parameters to the remission, the remission falls to be understood as saying to the Trial Chamber that the Appeals Chamber is of opinion that there is merit in the appeal against adequacy of sentence. Or else, why remit? After all, the Appeals Chamber could have dismissed the appeal. In effect, the Trial Chamber is being confined to quantum. That important, and indeed fundamental, aspect (as to whether there is merit in the appeal) not having been decided by the Trial Chamber, will remain outside of any future appeal from the decision of the Trial Chamber; it has to be accepted although it is not subject to a right of appeal. I do not consider that this argument is met by a proposal that the Appeals Chamber should quash the sentence and then remit it to the Trial Chamber: quashing the sentence shows that, in the opinion of the Appeals Chamber, there is merit in the prosecution's appeal.

24. In my view, there is an ineradicable limit to the extent to which the Appeals Chamber can be divested of jurisdiction to decide without there being a right appeal from its decision.

25. Further, internationally recognised human rights instruments were made by states for states. The Tribunal is not a state and is not party to those instruments. There is no way, for example, by which the Tribunal can become a party to the Optional Protocol to the International Covenant on Civil and Political Rights. In an important sense, the United Nations Human Rights Committee set up in part IV of the Covenant is part of the judicial structure of states parties to the Covenant.[19] The Committee is not part of the structure of the Tribunal. It is right that the principles of international

[18] *Čelebići* Appeal Judgement.

[19] The United Nations Human Rights Committee may not be a judicial body. *See* Dominic McGoldrick, *The Human Rights Committee* (Oxford: 1994), p. 54, para. 2.21; Sarah Joseph et al., *The International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 2000) p. 14, para. 1.33. Compare *Tavita v. Minister of Immigration*, [1994] 2 NZLR 257, in which however Cooke, P., was right in saying that "an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure …".

human rights instruments are extended to the Tribunal, but the extension has to be interpreted as itself authorising appropriate allowances to be made to reflect the differences between the Tribunal and a state. Therefore, assuming that those instruments always prohibit the making of an increase in sentence by a final appellate court,[20] different provisions could be made in the case of the Tribunal.

26. Alternatively, the Statute of the Tribunal has to be read as equivalent to a reservation to the International Covenant on Civil and Political Rights on the point in question. *Gomariz Valera's* case recognised that a first conviction by a final court of appeal is possible in the absence of a right of appeal if there is "a reservation by a State party".[21] Judge Wald observed, in her dissenting opinion in the *Tadić* contempt case, that "a number of Western European States have submitted reservations to Article 14(5) [of the Covenant] to make it clear that an appellate court may impose an aggravated sentence, without giving rise to a further right of appeal, although there was no consensus that such a reservation was strictly necessary".[22] The number of reservations was indicative of an existing practice of some states. The Tribunal, not being a state, cannot make a reservation, but its Statute may be treated as having the effect of one.

27. The Tribunal has jurisdiction under article 25(2) of its Statute to "revise the decisions taken by the Trial Chambers". Under that provision, the Appeals Chamber is competent to substitute a conviction for an acquittal. Sentencing, though a separate and distinct process, is a logical and necessary consequence of conviction. The Appeals Chamber is therefore competent to increase a sentence even though there is no right of appeal from its decision. It has done so in the past, both in the case of the ICTY Appeals Chamber[23] and in the case of the ICTR Appeals Chamber.[24]

28. I pause to observe that, although Mr Galić has also appealed, there is no question of an increase being ordered pursuant to his appeal. There is no need therefore to consider the legality of a sentence being increased on appeal by the convicted person alone – the usual subject of the doctrine of *reformatio in pejus*.

---

[20] As to the correctness of the assumption, see *Rutaganda* Appeal Judgement, Separate Opinion of Judge Shahabuddeen.
[21] Communication No. 1095/2002, 26 August 2005, para. 7.1.
[22] *Tadić* Contempt Appeal, Separate Opinion of Judge Wald, p. 3.
[23] *See, e.g.*, *Krnojelac*, IT-97-25A, Judgement, 17 September 2003; *Aleksovski*, IT-95-14/1, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").
[24] *See, e.g., Gacumbitsi*, ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 206.

29. Thus, I do not accept that there is any human right which prevents the Appeals Chamber from increasing sentence, or that the decisions of the United Nations Human Rights Committee or of other similar bodies are controlling – though of course they are entitled to respect.

2. Appellate evaluation of the gravity of a crime

30. All members of this bench of the Appeals Chamber consider that, if they had to determine sentence as a trial judge, they would or might have awarded a higher sentence than that imposed by the Trial Chamber. One colleague, who dissents on the ground that the case should be remitted to a Trial Chamber, says "that the sentence imposed is unreasonable and plainly unjust in light of the Trial Chamber's finding, which we affirm on appeal …".[25] Another dissenting colleague, while he could not say that all reasonable triers of fact were obligated to take the same view, states: "[H]ad I sat as a Trial Judge, I might have called for a sentence of a longer term than 20 years".[26]

31. However, it is trite that sentencing is a matter of discretion to be exercised by the trial court in accordance with certain legal principles. An appellate court, like the Appeals Chamber, does not "conduct a sentencing exercise of its own from the beginning".[27] The test of appellate intervention is not mere disagreement with the result reached by the trial court in the exercise of its discretion, but whether the trial court committed an error in exercising its discretion in that it violated an applicable legal principle. Consequently, the mere fact that the Appeals Chamber considers that the sentence was lenient does not warrant intervention; a "discernible error" would have to be shown.

32. Nevertheless, the Appeals Chamber would be entitled to take the position that, if a very substantial increase were judged to be merited, what this proves is that the Trial Chamber committed a "discernible error" in assessing sentence; in particular, it could have misjudged the gravity of the crimes, which is the ground of the prosecution's appeal.

33. Though the substance of sentencing is a matter for the Trial Chamber, in considering whether the Trial Chamber has committed a discernible error in sentencing, the Appeals Chamber has to bear in mind that, as it was said in a court of appeal, "[o]ur function essentially is to consider whether or not the punishment does fit these crimes. … It is the function of this Court to have regard to the victims and the consequences on the victims. It is the function of this Court to reflect

[25] Partially Dissenting Opinion of Judge Pocar, para. 1.
[26] Separate and Partially Dissenting Opinion of Judge Meron, para. 12.
[27] *R. v. A and B*, [1999] 1 Cr. App. R. (S.) 52, 56.

the public condemnation for offences of this kind".[28] If the sentence imposed by the trial court does not meet those criteria, there could be appellate intervention. As to the bases on which there could be such intervention, on the one hand a court of appeal "will conclude that if the sentence is manifestly excessive there must have been an error in principle".[29] On the other hand, the opposite approach seems correct in a case in which there is power to increase sentence; the test as to whether the sentence was manifestly inadequate is an admissible one.

34. The foregoing was the approach taken by the prosecution. In paragraph 2.3 of its Appeal Brief, it stated (footnote omitted):

> In this appeal, the Prosecution does not challenge any of the Trial Chamber's factual findings; rather, it submits that the sentence handed down by the Trial Chamber, when considered against this factual background of the case, falls outside the discretionary range which was available to Trial Chamber. It is the Prosecution's submission that the Respondent's crimes are among the worst that come before the Tribunal. That being the case, the Trial Chamber committed a discernible error by not imposing the Tribunal's highest sentence.

35. Although the prosecution did "not challenge any of the Trial Chamber's factual findings", it submitted that the Trial Chamber "committed a discernible error by not imposing the Tribunal's highest sentence".[30] In other words, accepting the facts as found by the Trial Chamber, the prosecution contended that the sentence was not correct. It argued that the sentence fell "outside the discretionary range which was available to the Trial Chamber". In paragraph 2.9 of its Appeal Brief, it contended that the Trial Chamber's sentence "clearly does not reflect the extreme gravity of the crimes and the high ranking position of the Respondent". The prosecution's approach was in keeping with the foregoing description of the functions of an appeals court in the matter of sentencing. The facts may themselves suffice to prove that the gravity of the crimes was misapprehended.

36. More particularly, the prosecution's approach was consistent with that taken by the Appeals Chamber in *Aleksovski*[31]. There, in finding that there was "discernible error", the Appeals Chamber said that the "error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute".[32] The Appeals Chamber examined his actual conduct as found by the Trial Chamber and was "satisfied that the Trial Chamber was in error in

[28] *R. v. Waddingham*, 5 Cr. App. R. (S.) 66, 69.
[29] Archbold, *Criminal Pleading, Evidence and Practice 2003* (London: Sweet & Maxwell, 2003), paras. 7-141.
[30] Footnote omitted.
[31] *Aleksovski* Appeal Judgement.

sentencing the Appellant to two and a half years' imprisonment";[33] it observed that the "sentence imposed by the Trial Chamber was manifestly inadequate".[34] In its view, the question which arose was "whether the Appeals Chamber should review the sentence".[35] It proceeded to increase the sentence to seven years' imprisonment. It did not undertake any exercise other than weighing the conduct of the appellant in order to determine whether the Trial Chamber had committed a "discernible error" in estimating the gravity of the crime. The manifest discrepancy between the sentence passed by the Trial Chamber and the sentence merited in the opinion of the Appeals Chamber spoke for itself on the question of gravity – the sentence merited was about thrice the length of the sentence passed. A parsing of this or other cases to demonstrate specific error would be useful but would not negate this conclusion as applying generally: an admissible test is manifest inadequacy.

37. Thus, while it is recognised, as it has been above, that not every leniency betokens error, error is present where the court of appeal considers that the leniency calls into question the soundness of the conviction; where no reasonable Trial Chamber would have imposed a sentence as lenient as that passed, the Appeals Chamber must intervene in keeping with its mission. The question is not how the sentence imposed appears in absolute terms; thus viewed, a sentence of twenty years' imprisonment may appear to be substantial. The question is how the sentence imposed appears in relation to the sentence which is reasonably judged to be merited by the gravity of the appellant's crimes. Looking at the gravity of the appellant's crimes, no reasonable Trial Chamber would have imposed a sentence as low as twenty years' imprisonment. It seems to me that that must be the foundation of a proposal to remand the case to a Trial Chamber for sentencing: the gravity of the crimes was misapprehended.

38. The foregoing being the reasoning which I adopt, it follows that I am not ready to accept that the increase ordered by the Appeals Chamber "disserves the principles of procedural fairness on which our legitimacy rests" or that it is based on "conclusory statements" offered by the majority.[36] No more so than in *Gacumbitsi*,[37] in which the ICTR Appeals Chamber – unanimously on this point – ordered that the sentence be increased from imprisonment for thirty years to imprisonment for life.

[32] *Ibid.*, para. 187.
[33] *Ibid.*, para. 186.
[34] *Ibid.*, para. 187.
[35] *Ibid.*, para. 186.
[36] Separate and Partially Dissenting Opinion of Judge Meron, para. 14.
[37] *Gacumbitsi* Appeal Judgement.

39. In judging what is the sentence merited by the gravity of the crimes in this case, regard has to be had to what the appellant did. For 23 months, as the senior officer in actual command, he directed fire on a daily basis at civilians in Sarajevo. They cowered in mortal fear before a constant barrage of artillery and other guns aimed at them from surrounding mountains and hills with the deliberate design of drilling "terror and mental suffering" in them – apart from causing much carnage, killing and maiming. The entire population of 300,000 persons was terrorised. Hundreds were killed; thousands were wounded. Paragraph 584 of the Trial Judgement stated that the "Majority heard reliable evidence that civilians were targeted during funerals, in ambulances, in hospitals, on trams, on buses, when driving or cycling, at home, while tending gardens or fires or clearing rubbish in the city, … while using public transport vehicles running during cease-fires, … [while] fetching water … Even children were targeted in schools, or while playing outside, riding a bicycle … ".

40. The Appeals Chamber is unanimous in upholding the factual findings of the majority of the Trial Chamber. One member of the bench of the Appeals Chamber might have had reasonable doubts about one incident if he sat as a trial judge, but he "cannot say that all reasonable triers of fact had to reach this conclusion";[38] therefore, even in respect of that incident the Appeals Chamber unanimously upholds the factual finding of the majority of the Trial Chamber. The convictions upheld were not only for terror, but for murder and inhumane acts as crimes against humanity. The sentence of 20 years' imprisonment was a global one, that is to say, it was a single sentence which applied to all the convictions. In my opinion, what is called for by the gravity of the crimes is the maximum sentence.

41. True, the appellant did not personally do all the acts alleged. It is therefore apposite to bear in mind the remark of the District Court of Jerusalem in *Eichmann* that "the degree of responsibility generally increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher levels of command".[39] Thus, the appellant engaged increased responsibility. "War", said a distinguished writer, "is not a condition of anarchy or lawlessness".[40] That has to be remembered where chaos at one end is deliberately organized at the other. Here that was so: the organizer was the appellant.

---

[38] Separate and Partially Dissenting Opinion of Judge Meron, para. 12.

[39] *Attorney-General of the Government of Israel v. Adolph Eichmann*, District Court of Jerusalem, Judgement, 36 ILR (1968), p. 237, para. 197.

[40] Lauterpacht, ed., *Oppenheim's International Law*, 7th Edition, Vol. 2 (London: Longmans, Green, 1952), section 241, cited in *ICJ Pleadings, Aerial Incident of 27 July 1955,* p. 215, para. 7, of the Memorial of the United States of America.

42. Mitigating circumstances in this case are meagre: the only circumstance noted by the majority in the Trial Chamber was that the appellant showed "exemplary behaviour … throughout the proceedings before the International Tribunal".[41] While that consideration is admissible, in the circumstances of this case it is not sufficient to warrant a decrease in sentence: the major question concerns his behaviour during the events, not his behaviour before the International Tribunal.

43. On the question of comparison with sentences imposed in other cases, it has been correctly observed that there is no "ICTY case where a defendant has ended up with a life sentence after appeal".[42] I recognise that result as a cautionary matter; but it is not dispositive. Whether it is satisfactory that a defendant at the ICTY has never until now ended up after appeal with a life sentence will be for others to judge when the historical record of the Tribunal is read in due course.

44. In *Gacumbitsi,*[43] as mentioned above, the ICTR Appeals Chamber increased the sentence from thirty years to life imprisonment. I am not persuaded that the case can be distinguished on the basis of argument that it was "in keeping with a line of life sentences given in ICTR genocide cases in which there were 'no especially mitigating circumstances'", and that by contrast, the "ICTY … lacks a comparable line of genocide cases …".[44] The argument seems to be saying that, in such cases, life sentences have been handed down by the ICTR but not by the ICTY. Like Mr Gacumbitsi, Mr Galić was "convicted of extremely serious offences".[45] It cannot be said that there were any "*especially* mitigating circumstances" in this case. In view of the gravity of Mr Galić's crimes and barring any such "especially mitigating circumstances", I have difficulty in seeing why *Gacumbitsi* should be inapplicable to this case. A jurisprudence with any fair pretension to universality will not accept so marked a discrepancy; parochialism has to be avoided.

45. As remarked above, the prosecution is accepting all the factual findings of the Trial Chamber; what it is questioning is the correctness of the sentence passed on those factual findings. The prosecution is doing so on the basis that the Trial Chamber committed an error of law by misjudging the gravity of the crimes. On that view (which I share), it seems to me that the concept of appellate deference to the factual findings of a Trial Chamber provides limited assistance, if any.

---

[41] Trial Judgement, para. 766.
[42] Separate and Partially Dissenting Opinion of Judge Meron, para. 10.
[43] *Gacumbitsi* Appeal Judgement, para. 206.
[44] Separate and Partially Dissenting Opinion of Judge Meron, para. 9 (quoting *Gacumbitsi* Appeal Judgement, para. 204).
[45] *Gacumbitsi* Appeal Judgement, para. 204.

46. My learned brother Judge Meron has put forward certain propositions in paragraphs 12 and 14 of his valuable opinion. I would rally to the substance of the propositions if the majority of the Appeals Chamber were simply disagreeing with the result of the exercise by the Trial Chamber of its undoubted sentencing discretion. But the majority is doing more than that: it considers that the facts show that the Trial Chamber has committed an error in the exercise of its discretion in that it has underestimated the gravity of the crimes committed by the appellant. In the language of German jurisprudence, the Trial Chamber has taken the sentence "from the wrong shelf".[46]

47. The facts are stubborn; they will not go away. To repeat, they show that the appellant, as the senior officer in actual command, terrorised 300,000 civilians; he killed hundreds of them; he wounded thousands. He did that with artillery and other guns safely perched upon mountains and hills surrounding his hapless victims below – men, women, children and the elderly; he did that on a daily basis over a sustained period of 23 months. As stated in paragraph 455 of the judgement of the Appeals Chamber, his crimes were "characterized by exceptional brutality and cruelty". I do not know of any member of the bench who disagrees with that assessment.

48. In my judgement, the facts show that the Trial Chamber underestimated the gravity of the appellant's crimes in imposing a sentence of 20 years' imprisonment. Underestimation of the gravity of a crime is a reversible error. All the facts were laid before the Trial Chamber and have already been evaluated by it. There are no new matters to be investigated; the Appeals Chamber requires no further help. It is correct for the Appeals Chamber to allow the appeal by the prosecution against sentence.

Done in English and in French, the English text being authoritative.

____

Mohamed Shahabuddeen

30 November 2006
The Hague
The Netherlands

[Seal of the International Tribunal]

[46] Judgement of the Appeal Chamber, para. 455.

XXI. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE MERON

1. I agree with the reasoning of the Appeals Chamber with regard to Galić's Appeal. I write separately for two reasons: first, to add a brief thought on why acts or threats of violence the primary purpose of which is to spread terror among the civilian population are criminal violations of customary international law; and second, to dissent from the decision to grant the Prosecution's Appeal as to the sentence.

I

2. The Appeals Chamber explains why criminal responsibility attaches to acts or threats of violence the primary purpose of which is to spread terror among the civilian population. I believe this conclusion also follows logically from the ban, present at least since the Fourth Hague Convention on the Laws and Customs of War, on "declar[ing] that no quarter will be given."[1] It is a crime to violate principles of customary international law identified in the Fourth Hague Convention.[2] And if threats that no quarter will be given are crimes, then surely threats that a party will not respect other foundational principles of international law – such as the prohibition against targeting civilians – are also crimes. The terrorization at issue here is exactly such a threat.

II

3. I respectfully dissent from the Appeals Chamber's decision to increase Galić's sentence from 20 years to life imprisonment. In my view, this increase is incompatible with the standard of review that we have applied in the past.

4. "Sentencing is essentially a discretionary process on the part of a Trial Chamber."[3] Our jurisprudence makes this very clear. We have recognized in numerous cases that "Trial Chambers are vested with broad discretion in determining an appropriate sentence".[4] We have similarly emphasized that "[a]ppeals against sentence, as appeals from a trial judgement, are appeals *stricto*

[1] Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV, art. 23.
[2] *See, e.g.,* 1 Trial of the Major War Criminals Before the International Military Tribunal 220 (1947) (Nuremberg Judgement) ("The Hague Convention of 1907 prohibited resort to certain methods of waging war.… [S]ince 1907, [these prohibitions] have certainly been crimes, punishable as offenses against the laws of war.").
[3] *Kvočka et al.* Appeal Judgement, para. 669.
[4] *Babić* Judgement on Sentencing Appeal, para. 7; *see also, e.g., Naletilić and Martinović* Appeal Judgement, para. 593; *Deronjić* Sentencing Appeal Judgement, para. 8; *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Krstić* Appeal Judgement, para. 242.

sensu; they are of a corrective nature and are not trials *de novo*."[5] Our obligation to give broad deference to the Trial Chamber stems from the standard set forth in Article 25 of the Statute.[6] As the court most familiar with the particulars related to the defendant and his crime, the Trial Chamber is best positioned to identify the proper sentence.[7] Accordingly, our precedents make clear that we can reverse a sentence imposed by the Trial Chamber only where we identify a "discernible error".[8]

5. As the Prosecution concedes, there is no discernible error in the Trial Chamber's factual findings.[9] The Trial Chamber fully acknowledged the gravity of Galić's crimes in its discussion of the sentence.[10] It also noted his "very senior position" in aggravation,[11] and his "exemplary behaviour … throughout the proceedings before the International Tribunal" in mitigation.[12] Taking into account all these factors, the Trial Chamber imposed a single sentence of 20 years imprisonment.[13] The Appeals Chamber now overturns this sentence and imposes a life sentence on the grounds that a "sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct."[14]

6. I must dissent from the Appeals Chamber's decision to treat the Trial Chamber's chosen sentence as outside its broad discretion. For where a Trial Chamber properly identifies the relevant factors that should govern its decision and where no new convictions are entered on appeal, I would increase its chosen sentence only if one of two conditions is met: either the sentence is clearly out of proportion with sentences we have given in similar situations, or the sentence is otherwise so low

---

[5] *Momir Nikolić* Judgement on Sentencing Appeal, para. 7 (footnotes and accompanying citations omitted); *see also, e.g., Babić* Judgement on Sentencing Appeal, para. 6.
[6] *Momir Nikolić* Judgement on Sentencing Appeal, para. 7.
[7] *Cf. Attorney-General's Reference No. 4 of 1989,* 11 Cr. App. R. (S.) 517, 521 (Lane, C.J.) ("[I]t must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice").
[8] *Krstić* Appeal Judgement, para. 242; *see also Naletilić and Martinović* Appeal Judgement, para. 593; *Momir Nikolić* Judgement on Sentencing Appeal, para. 8; *Prosecutor v. Miodrag Jokić,* Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, para. 8; *Deronjić* Sentencing Appeal Judgement, para. 8; *Babić* Judgement on Sentencing Appeal, para. 7; *Kvočka et al.* Appeal Judgement, para. 669; *Kordić and Čerkez* Appeal Judgement, para. 1047; *Blaškić* Appeal Judgement, para. 680; *Vasiljević* Appeal Judgement, para. 9; *Dragan Nikolić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 253*; Kunarac et al.* Appeal Judgement, para. 33; *Kupreškić et al.* Appeal Judgement, para. 408; *Jelisić* Appeal Judgement, para. 99; *Čelebići* Appeal Judgement, para. 725; *Furundžija* Appeal Judgement, para. 239; *Aleksovski* Appeal Judgement, para. 187; *Tadić* Sentencing Appeal Judgement, para. 22.
[9] *See* Prosecution Appeal Brief, para. 2.3.
[10] Trial Judgement, para. 764 (recognizing the "scale, pattern and virtually continuous repetition, almost daily, over many months" of Galić's offenses, and stating that "[i]nhabitants of Sarajevo – men, women, children, and elderly persons – were terrorized and hundreds of civilians were killed and thousands wounded during daily activities such as attending funerals, tending vegetable plots, fetching water, shopping, going to the hospital, commuting within the city, or while at home"); *see also ibid.,* para. 584.
[11] Trial Judgement, para. 765.
[12] Trial Judgement, para. 766.
[13] Trial Judgement, para. 769.
[14] *See* Appeal Judgment, *supra,* para. 455.

that it demonstrably shocks the conscience. Any more stringent review denies the Trial Chamber the broad discretion vested in it.

7. Neither of these two conditions is satisfied here. As to the first condition, our case law indicates that "in principle, [a sentence] may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences."[15] This principle is of limited use, given the "multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual," and "[o]ften too many variables exist to be able to transpose the sentence in one case *mutatis mutandis* to another."[16] Nonetheless, an "overview of the International Tribunal's cases" can be helpful in assessing whether the sentence was disproportionate.[17]

8. The ICTR Appeals Chamber has applied a comparative analysis in one case: in *Gacumbitsi* it increased a sentence from thirty years to life in keeping with a line of life sentences given in ICTR genocide cases in which there were "no especially mitigating circumstances."[18] The ICTY, however, lacks a comparable line of genocide cases and so *Gacumbitsi* is not applicable here.[19] Indeed, the ICTY Appeals Chamber has been reluctant to apply a comparative analysis.[20]

9. Perhaps partly in consequence of the ICTY's emphasis on individualized sentencing, the final sentences imposed upon convicted individuals have ranged widely. Of the convictions which have become final,[21] 15 individuals have received sentences of less than 10 years;[22] 19 have

---

[15] *Jelisić* Appeal Judgement, para. 96.
[16] *Kvočka et al.* Appeal Judgement, para. 227.
[17] *Kordić and Čerkez* Appeal Judgement, para. 1064.
[18] *See Gacumbitsi* Appeal Judgement, para. 204. The ICTR Trial Chambers had previously issued life sentences, affirmed on appeal, in genocide cases to Jean-Paul Akayesu *(Akeyesu* Appeal Judgement, para. 421), Jean Kambanda *(Kambanda* Appeal Judgement, para 126), Jean De Dieu Kamuhanda *(Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005, para. 364), Clément Kayishema *(Kayishema and Ruzindana* Appeal Judgement, para. 371), Alfred Musema *(Musema* Appeal Judgement, para. 399), and Eliézer Niyitegeka *(Niyitegeka* Appeal Judgement, paras 266-269). Georges Anderson Nderubumwe Rutaganda also received a life sentence, which the Appeals Chamber did not reconsider. *See Rutaganda* Appeal Judgement, para. 592. The Appeals Chamber in *Gacumbitsi* distinguished those ICTR genocide convictions in which a life sentence was not given. *Gacumbitsi* Appeal Judgement, fn. 446.
[19] Contrary to the suggestion of my learned colleague, *see* Separate Opinion of Judge Shahabuddeen, para. 44, I do not distinguish *Gacumbitsi* on the ground that "life sentences have been handed down by the ICTR but not by the ICTY." Instead, I show that *Gacumbitsi* rests on a comparative analysis of genocide sentences that is entirely inapplicable here – as demonstrated by the majority's opinion's failure to provide *any* discussion of *any* prior cases in its analysis, *see supra* paras 454-455.
[20] *See, e.g., Kvočka et al.* Appeal Judgement, paras 682, 690; *Naletilić and Martinović* Appeal Judgement, para. 616. While the Prosecution urges that convictions for crimes involving murder should generally lead to "sentences at the high end of the sentencing spectrum", *see* Prosecution Appeal Brief, para. 2.19(1), this principle cannot be deduced from our case law. To the contrary, we have found "the view that crimes resulting in loss of life are to be punished more severely than those not leading to loss of life" to be "too rigid and mechanistic." *Furundžija* Appeal Judgement, para. 246. *See also infra* fns 22-24 (demonstrating that murder-related convictions are not strongly correlated with high-end sentences in ICTY jurisprudence).
[21] In identifying the length of sentences given, I mention only the longest single sentence where concurrent sentences are given.

received sentences of 10-19 years;[23] and only 12 have received sentences of 20 years or more.[24] In

[22] Dragan Kolundžija received 3 years for persecution of detainees at the Keraterm camp (*Prosecutor v. Sikirica et al.,* Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001, paras 1, 241-243); Damir Došen received 5 years for persecution of detainees at the Keraterm camp (*Prosecutor v. Sikirica et al.,* Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001, paras 1, 237-239); Dražen Erdemović received 5 years for murdering Bosnian Muslim civilian men from Srebrenica (*Prosecutor v. Erdemović,* Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, paras 13, 23); Dragoljub Prcać received 5 years as a co-perpetrator of murder, persecution, and torture at the Omarska camp (*Kvočka et al.* Appeal Judgement, para. 5 & p. 243); Milan Simić received 5 years for two counts of torture which he personally participated in while holding a high-ranking civilian position (*Prosecutor v. Simić*, Case No. IT-95-9/2-S, Sentencing Judgement, 17 November 2002, paras 10, 11, 64, 122); Milojica Kos received 6 years for his role as a co-perpetrator of murder, torture, and persecution, all encompassing large numbers of victims, at the Omarska camp (*Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, paras 504, 729, 735); Mario Čerkez received 6 years for persecution, imprisonment, and unlawful confinement of civilians (*Kordić and Čerkez* Appeal Judgement, para 1070 & p. 302); Simo Zarić received 6 years for persecution of non-Serb civilians (*Prosecutor v. Simić et al.,* Case No. IT-96-9-T, Judgement, 17 October 2003, paras 1123-1126); Miroslav Kvoćka received 7 years as a co-perpetrator of persecution, murder, and torture at the Omarska camp (*Kvoćka et al.* Appeal Judgement, para. 3 & p. 242); Miodrag Jokić received 7 years as a co-perpetrator for unlawful shelling, murder of civilians, and destruction of buildings of significance (*Prosecutor v. Jokić,* Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, paras 2, 31); Zlatko Aleksovski received 7 years for, among other things, violent mistreatment of detainees (*Aleksovski* Appeal Judgement, paras 36, 37, 191); Miroslav Tadić received 8 years for aiding and abetting persecution based on his direct participation in preparation for the deportation and forcible transfers of civilians (*Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgement, 17 October 2003, paras 1119-1122); Pavle Strugar received a sentence of 8 years for attacks on civilians and the destruction of buildings of significance (*Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, paras 481, 478); Pedrag Banović received 8 years for persecution based on excessive violence to detainees at the Keraterm camp, such as the beating to death of 5 detainees (*Prosecutor v. Banović*, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003, paras 90, 91, 93, 95); Zdravko Mucić received 9 years for, among other things, superior responsibility for murder, torture, and sexual assault (*Prosecutor v. Mucić et al.* ("*Čelebići"),* Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, paras 1, 5). A sixteenth individual, Timohir Blaškić, received 9 years for various crimes (*Blaškić* Appeal Judgement, p. 258), but a motion for reconsideration in his case is pending.

[23] Miroslav Deronjić received 10 years for persecutions based on his ordering an attack on a Bosnian Muslim village that led to the deaths of 64 civilians, destroyed much of the town, and caused the forcible displacement of residents (*Deronjić* Sentencing Appeal Judgement, paras 2, 4 & p. 56); Anto Furundžija received 10 years for torture (*Furundžija* Appeal Judgement, para. 216 & p. 79); Stevan Todorović received 10 years for persecution involving murder, beatings, and sexual coercion of various non-Serbs (*Prosecutor v. Todorović,* Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001, paras 5, 9, 117); Biljana Plavšić received 11 years for persecution of non-Serbs in 37 municipalities including killings, forced deportations, and plunder (*Prosecutor v. Plavšić,* Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras 8, 15, 132); Drago Josipović received 12 years for persecution, murder, and inhumane acts related to attacks on certain Bosnian Muslim homes and the murder of their inhabitants (*Kupreškić et al.* Appeal Judgement, paras 15-17 & p. 170); Zoran Vuković received 12 years for the torture and rape of a fifteen-year-old (*Kunarac et al.* Appeal Judgement, paras 21, 395, 414); Ivica Rajić received 12 years for, among other things, wilful killing (*Prosecutor v. Rajić,* Case No. IT-95-12-S, Sentencing Judgement, 8 May 2006, paras 5, 9, 184); Milan Babić received 13 years as a co-perpetrator of persecutions that included the extermination or murder of hundreds of non-Serb civilians, deportation of thousands of non-Serb civilians, and deliberate destruction of non-Serb homes and other establishments (*Babić* Judgement on Sentencing Appeal, para. 3 & p. 47); Esad Landžo received 15 years for various crimes related to killing, torture, sexual assault, and beating of detainees in the Čelebići camp (*Prosecutor v. Mucić et al.* ("*Čelebići"),* Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, paras 1, 61); Blagoje Simić received 15 years for aiding and abetting persecutions of non-Serb civilians through, among other things, confinement under inhumane conditions and forcible displacements (*Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 301); Mitar Vasiljević received 15 years as an aider and abettor to persecution and murder related to the shooting of seven Muslim men (*Vasiljević* Appeal Judgement, paras 148, 182); Duško Sikirica received 15 years for persecution of detainees at the Keraterm camp, at which he had a position of responsibility, and for personally murdering one detainee (*Prosecutor v. Sikirica et al.,* Case No. IT-95-8-S, Sentencing Judgement, 13 November 2001, paras 1, 233-235); Milorad Krnojelac received 15 years for multiple counts of murder, torture, persecution, and cruel treatment committed over an extended stint as a camp warden (*Krnojelac* Appeal Judgement, para. 255 & pp. 113-114); Darko Mrđa received 17 years for crimes related to the massacre of two busloads of non-Serb civilians (*Prosecutor v. Mrđa,* Case No. IT-02-59-S, Sentencing Judgement, 31 March 2004, paras 1, 5, 10, 129); Dragan Obrenović received 17 years for persecutions related to the murder of thousands of Bosnian Muslims at Srebrenica (*Prosecutor v. Obrenović,* Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003, paras 11, 29, 156); Ranko Češić received 18 years for ten murders and for forcing two brothers to commit a sex act upon each other (*Prosecutor v. Cešić,* Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004, paras 3-4, 17, 111); Hazim Delić

no case has an ICTY defendant ended up with a life sentence. This is not to say such a sentence cannot be given. To the contrary, the Appeals Chamber in *Stakić* acknowledged that a life sentence for a "co-perpetrator of extremely serious crimes, including an extermination campaign that the Trial Chamber estimated killed approximately 1,500 people in the Prijedor municipality" fell "within the Trial Chamber's discretion," though the Appeals Chamber did not suggest that such a life sentence was compelled.[25] But in the absence of any ICTY case where a defendant has ended up with a life sentence after appeal, a comparative analysis gives us no basis for finding that the Trial Chamber was obligated to impose a life sentence on Galić. This is true even if, as the Prosecution claims, Galić's "crimes are among the worst that come before the Tribunal."[26]

---

received 18 years for wilfully killing one detainee, wilfully causing great suffering to another, raping two victims, and committing several other crimes (*Prosecutor v. Mucić et al.* ("*Čelebići*"), Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, paras 40-47); Vladimir Šantić received 18 years for persecution, murder, and inhumane acts related to attacks on certain Bosnian Muslim homes and the murder of their inhabitants (*Kupreškić et al.* Appeal Judgement, paras 19-20 & p. 171); Vinko Martinović received 18 years for various crimes related to events at Mostar, including persecution, murder, wilful killing, and plunder (*Naletilić and Martinović* Appeal Judgement, para. 6 & p. 280).

[24] Momir Nikolić received 20 years for persecution related to his role in Srebrenica, including the murder of thousands of Bosnian Muslim civilians and the cruel treatment of many others (*Momir Nikolić* Judgement on Sentencing Appeal, paras 2-3 & p. 48); Dragan Nikolić received 20 years for persecutions, including murder, rape, and torture, from which he derived enjoyment (*Dragan Nikolić* Appeal Judgement, paras 4, 30 & p. 44); Radomir Kovač received 20 years for outrages on personal dignity, rape, and enslavement (*Kunarac et al.* Appeal Judgement, paras 11, 367, 394); Duško Tadić received 20 years for nine counts, (*Tadić* Sentencing Appeal Judgement, para. 76); Mladen Naletilić received 20 years for persecution, torture, and multiple other offenses based upon his role as a Croat commander at Mostar (*Naletilić and Martinović* Appeal Judgement, paras 3-4 & p. 207); Mlađo Radić received 20 years for persecution, murder, and torture at the Omarska camp, where he personally raped or committed sexual violence on 4 victims (*Kvočka et al.* Appeal Judgement, paras 6, 393 & p. 243); Dario Kordić received 25 years for a multitude of horrific crimes committed in many locales over many months (*Kordić and Čerkez* Appeal Judgement, para. 1070 & p. 302); Zoran Žigić received 25 years for persecution, murder, and torture at three camps, one of which he entered for the sole purpose of abusing detainees (*Kvočka et al.* Appeal Judgement, paras 7, 716 & p. 243); Dragoljub Kunarac received 28 years for various counts of torture, rape, and enslavement (*Kunarac et al.* Appeal Judgement, paras 5, 336, 366); Radislav Krstić received 35 years for his role in aiding and abetting genocide, extermination, and persecution with regard to the massacres of Bosnian Muslims at Srebrenica (*Krstić* Appeal Judgement, paras 237, 275); Goran Jelisić received 40 years for 31 counts, among them murder, which he had undertaken enthusiastically (*Jelesić* Appeal Judgement, paras 86, 93 & p. 41); Milomir Stakić received 40 years for extermination, murder, and persecution committed in the Prijedor Municipality, where he was a Serbian leader (*Stakić* Appeal Judgement, para. 3 & p. 141-142).

[25] *Stakić* Appeal Judgement, para. 375. The Appeals Chamber reduced this life sentence to 40 years for other reasons. *See ibid.,* paras 393, 428.

[26] Prosecution Appeal Brief, para. 2.3. The Prosecution does not suggest that this is *the* worst case to come before the Tribunal. Nor does the Prosecution explain why a life sentence is warranted here when it has not been given in other cases. Even in the case involving an authority figure in arguably the most horrific incident in the entire conflict – the massacre of 7000-8000 Bosnian Muslim civilians at Srebrenica – the Trial Chamber did not impose a life sentence on Radislav Krstić. Like the Prosecution, the Appeals Chamber does not even attempt to show that Galić's crimes can be considered graver than Krstić's.

I also note another illogical aspect of the Prosecution's submission. The Prosecution both suggests that there was "a discretionary range which was available to the Trial Chamber" and that the only sentence the Trial Chamber could have imposed was a life sentence. Prosecution Appeal, para. 2.3; *see also* Separate Opinion of Judge Shahabuddeen, *supra,* para. 35 (apparently endorsing this reasoning). This cannot be. If the Trial Chamber was indeed compelled to impose a life sentence, then it had no discretion at all.

10. Turning to the second condition I identified, I cannot conclude that a 20-year sentence is so low that it demonstrably shocks the conscience.[27] The war crimes and crimes against humanity committed by Galić are grave indeed. He commanded a lengthy campaign that led to deaths and serious injuries of civilians of all ages and that sought to terrorize countless more. Yet his sentence is hardly insubstantial. It is not a two-and-a-half-year slap-on-the-wrist,[28] but rather a term of 20 years – a sentence that is as long as or longer than the vast majority of sentences imposed by the ICTY to date.[29] And as noted by the Trial Chamber, this sentence is as long as was the longest prison sentence that could be imposed in the former Yugoslavia.[30] The Trial Chamber fully considered the awful nature of Galić's crimes and the individual considerations pertinent to him in meting it out.

11. Reasonable minds can disagree about this sentence, just as they can disagree about whether there was enough evidence to support all the convictions in the first place. Just as we review the convictions on the merits to see whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt rather than considering whether we ourselves would have entered such a conviction, so we review the sentence to see whether a Trial Chamber could reasonably impose it – rather than whether we ourselves would have done so. Had I sat as a Trial Judge, I might not have found Galić guilty beyond a reasonable doubt of the shelling of Markale market, but I cannot say that all reasonable triers of fact had to reach this conclusion. Similarly, had I sat as a Trial Judge, I might have called for a sentence of a longer term than 20 years, but I cannot say that all reasonable triers of fact were obligated to do the same. The need for a consistent standard of review is particularly high in cases like this one, where the scope of the defendant's guilt presents a close question. Judge Nieto-Navia, for example, would have found Galić responsible for fewer incidents than did the majority of the Trial Chamber; would have found him guilty only of failing to restrain his subordinates from unlawful conduct that he had reason to know was occurring; and

[27] Only once has the ICTY Appeals Chamber arguably revised a sentence upward for such reasons. In *Aleksovski*, the Appeals Chamber concluded that the sentence of two-and-a-half years was too low and raised it to 7 years instead. Aleksovski had been the commander of the Kaonik prison, and in that capacity he had, among other crimes, "aid[ed] and abett[ed] the mistreatment of detainees during body searches"; "order[ed], instigat[ed] and aid[ed] and abett[ed] violence on Witnesses L and M, who were beaten regularly during their detention (sometimes four to six times a day) …[and] order[ed] the guards to continue beating them when they stopped"; and "aid[ed] and abett[ed] the use of detainees as human shields". *Aleksovski* Appeal Judgement, para. 175. In rejecting the two-and-a-half year sentence as unduly low, the Appeals Chamber provided extensive reasoning. *See ibid.,* paras 183-188. Although the Appeals Chamber's decision emphasized the disparity between the crimes and the sentence, it also identified at least one discernible error made by the Trial Chamber. Specifically, the Trial Chamber erred in failing to treat Aleksovski's superior role as an aggravating factor. *See ibid.,* para. 183. The Appeals Chamber also noted that under the law of the former Yugoslavia, Aleksovski could not have received a sentence of less than five years. *See ibid.*

[28] *Compare Aleksovksi*, discussed in the preceding footnote.

[29] *See supra* fns 22-24. Of the 46 sentences that have become final, 40 have been for 20 years or less.

[30] Trial Judgement, para. 761. The law of the former Yugoslavia permitted a death sentence, but did not permit a prison term of more than 20 years.

would have sentenced him to ten years.[31] It is most unfair to affirm Galić's convictions by genuinely deferring to the findings of the Trial Chamber majority, and yet to increase Galić's sentence by not deferring (or only nominally deferring) to the Trial Chamber's choice of sentence.

12. Finally, I see no meaningful difference between the Prosecution's appeal in this case and its appeal in *Kordić and Čerkez*.[32] There, the Prosecution called for us to increase the 25-year sentence imposed by the Trial Chamber on Dario Kordić, who was held responsible for, among other crimes, the persecution of Bosnian Muslims, the murder or wilful killing of hundreds of civilians, inhumane acts, wanton destruction, and plunder committed in and around at least 17 towns and villages in three municipalities of Bosnia-Herzegovina.[33] As in this case, the Prosecutor did "not argue that the Trial Chamber erred in failing to take into account factors that would have called for a longer sentence."[34] Rather, and again parallel to this case, the Prosecution claimed that "the sentence of 25 years' imprisonment is manifestly inadequate in relation to (i) the magnitude, scope – geographic and temporal – and extremely grave nature of the offences, the attacks being committed against defenceless civilians; [and] (ii) Kordić's position, powers, responsibilities as the highest Bosnian Croat political leader in Central Bosnia at the time."[35] We readily held that "The Prosecution has not shown that the Trial Chamber handed down a sentence which did not reflect the gravity of Kordić's conduct."[36] For the same reasons, we should reach the same conclusion in this case.

13. The majority's decision to increase Galić's sentence to life imprisonment may satisfy our sense of condemnation. But this increase disserves the principles of procedural fairness on which our legitimacy rests. As the highest body in our court system, we are not readily accountable to any other authority and thus have a particular obligation to use our power sparingly. We should not substitute our own preferences for the reasoned judgement of a Trial Chamber. A sound method for assuring that we have not fallen prey to such preferences is to measure our choices fully and comprehensively against those made in prior cases. Although precise comparisons may be of limited value, the radically different approach adopted by the majority in this case requires at least some explanation. Rather than undertaking such an analysis, however, the majority simply offers conclusory statements. I cannot accept the majority's approach. No matter what he has done, Galić

[31] Separate and Partially Dissenting Opinion, paras 17-102; 120, 123. Judge Nieto-Navia was influenced in part by the fact that Galić "personally instructed his troops in writing to respect the Geneva Convention and other instruments of international humanitarian law." *Ibid.,* para. 116; *see also* Trial Judgement, para. 708.

[32] Regrettably, I have no guidance on this matter from the majority opinion or the separate opinions of my distinguished colleagues. None of these opinions even acknowledges the Appeals Chamber's decision in *Kordić and Čerkez*, let alone attempts to show that Galić's crimes are graver than Kordić's.

[33] *See generally Kordić and Čerkez* Appeal Judgement; *see also ibid.* paras 1057-1065.

[34] *Kordić and Čerkez* Appeal Judgement, para. 1063.

[35] *Kordić and Čerkez* Appeal Judgement, para. 1058.

[36] *Kordić and Čerkez* Appeal Judgement, para. 1065.

is entitled to due process of law – including a fair application of our standard of review. I respectfully dissent.

Done in English and French, the English text being authoritative.

Done this 30th day of November 2006,	___________________
At The Hague,	Theodor Meron
The Netherlands	Judge

[Seal of the International Tribunal]

XXII. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

1. I am in full agreement with the verdict and the sentence as adjusted by majority, reflecting the extraordinarily serious individual criminal responsibility of Galić for his heinous crimes that spanned a time period of twenty-three months.

2. However, I cannot agree with the majority of the bench which affirmed Galić's conviction under Count 1 for the crime of "acts and threats of violence the primary purpose of which is to spread terror among the civilian population" ("terrorization against a civilian population"). In my view, there is no basis to find that this prohibited conduct as such was penalized beyond any doubt under customary international criminal law at the time relevant to the Indictment.[1] Rather, I would have overturned Galić's conviction under Count 1 and convicted him under Counts 4 and 7 for the same underlying criminal conduct, taking into account the acts of terrorization against a civilian population as an aggravating factor in sentencing, thus arriving at the same adjusted sentence.

B. The Increase of Galić's Sentence

3. I respectfully disagree with the minority's view that the Appeals Chamber was not in a position to increase the sentence of Galić to life imprisonment.[2] There is no provision in the Statute or in the Rules of Procedure and Evidence that would bar the Appeals Chamber from augmenting a sentence handed down by a Trial Chamber. On the contrary, both Statute and Rules allow for an appeal of the sentence brought by the Prosecution. As already explained in the Judgement, the Appeals Chamber will, whenever possible, defer to the discretion vested in the Trial Chamber. However, in a case like this,[3] where the sentence is in gross disproportion to the crimes committed by Galić, the Appeals Chamber must infer that the Trial Chamber's decision exceeded the limits of its discretion because the decision was not reasonable and was plainly unjust.[4] Deliberately I refrain from any comments on paragraph 14 of Judge Meron's Dissenting Opinion, having had the benefit of reading paragraph 38 of Judge Shahabuddeen's Separate Opinion. I am in full agreement with

---

[1] Report of the Secretary-General, U.N. Doc. S/25704 (3 May 1993), para 34.
[2] *See* Partially Dissenting Opinion of Judge Pocar; Separate and Partially Dissenting Opinion of Judge Meron.
[3] I fully subscribe to the reasoning in paras 391-456 of the Judgement. Additionally, the aspect of general deterrence, often referred to as "deterrence for peace", should not be forgotten as one of the main sentencing purposes if only the individual guilt limits the range of the sentence (*see Stakić* Trial Judgement, paras 899, 901).
[4] *See* Judgement, para. 444.

the latter.[5] Moreover, as the majority holds that there is only one adequate sentence, there is no reason to remand this case to the Trial Chamber for sentencing, thus allowing for an appeal that could not be successful.

C. The Applicability of the "Crime of Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population" to the Present Case

4. The Indictment in this case charged the Appellant under Count 1 (violations of the laws or customs of war: unlawfully inflicting terror upon civilians) with having "conducted a protracted campaign of sniping and shelling upon the civilian population."[6] This same criminal conduct also served as a basis for Counts 4 and 7 of the Indictment (violations of the laws or customs of war: attack on civilians). The Trial Chamber found that the "series of military attacks on civilians in ABiH-held areas of Sarajevo and during the Indictment period were carried out from SRK-controlled territories with the aim to spread terror among the civilian population"[7] and "constituted a campaign of sniping and shelling against civilians."[8] It established Galić's individual criminal responsibility for these acts and convicted him under Count 1 for what it called "the crime of terror".[9] The majority of the Appeals Chamber affirms this conviction, subject to two changes: first, it renames the crime; second, it holds without sufficient reasoning that the crime was founded in customary international law during the Indictment period. While I agree to correct the name of the crime, I respectfully submit that it is not possible to assert beyond any doubt that the crime was indeed part of customary international law at the time of Galić's criminal conduct.

[5] Respectfully, however, I disagree with the conclusion drawn by Judge Meron in para. 11 of his Separate Opinion from the fact that the law of the former Yugoslavia only permitted prison sentences of not more than twenty years. First, this Tribunal – although mandated by Article 24 of the Statute to "have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" – is not obliged to unconditionally adhere to this practice, which in any case can be considered only as *one* ingredient in the determination of the sentence. The cases before this Tribunal differ in their magnitude and gravity from those ordinarily prosecuted under domestic criminal law in peacetime. Second, as Judge Meron mentions in footnote 30 of his Separate Opinion, the law of the former Yugoslavia did in fact allow even imposition of the death penalty, *i.e.* a much harsher sentence. Considering that this Tribunal is rightfully barred from imposing capital punishment, it is thus possible to hand out a more lenient sentence in a range of longer than twenty years imprisonment. Third, as correctly pointed out by Judge Meron in giving several examples, this is exactly what the Tribunal has done in the past, in particular, in the settled sentencing practice of the Appeals Chamber. This happened most recently, as regards the ICTY, in the *Stakić* case, where the Appeals Chamber *de facto* increased the sentence (from life imprisonment with mandatory review after twenty years, where early release can be granted, to forty years of imprisonment, taking into account the Tribunal's practice to grant early release – if at all – not prior to date when two thirds of the sentence have been served).

[6] Indictment of 26 March 1999.

[7] Trial Judgement, para. 594.

[8] *Ibid.*

[9] It then correctly concluded that a conviction under Counts 4 and 7 for the same conduct would be impermissible. Trial Judgement, para. 162.

1. The Prerequisites for Jurisdiction under Article 3 of the Statute

5. It is the settled jurisprudence of the Appeals Chamber since *Tadić* that the International Tribunal has jurisdiction for a violation of international humanitarian law under Article 3 of the Statute only when four conditions are met:

> i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];
>
> iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. [...];
>
> iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[10]

6. Furthermore, when taking recourse to customary international law, the International Tribunal must be very careful in assessing what undeniably belongs to this body of law. Indeed, it was the Secretary-General's view that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law [...]."[11]

2. Article 3 of the Statute and "Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population"

7. It is generally accepted that the existence of customary law has primarily to be deducted from the practice and *opinio juris* of states.[12] There can be no doubt – as explained in the Judgement[13]– that the prohibition[14] of acts and threats of violence the primary purpose of which is to spread terror among the civilian population, as set out in Article 51(2), 2nd Sentence of Additional Protocol I and Article 13(2), 2nd Sentence of Additional Protocol II, was part of customary international law. The violation of this prohibition by Galić clearly fulfilled the first three *Tadić* conditions. However, the core question of this case is whether the fourth *Tadić*

---

[10] *Tadić* Jurisdiction Decision, para. 94.
[11] Report of the Secretary-General, *supra* note 1, para 34. The Report continues: "This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law."
[12] International Court of Justice, *Case Concerning the Continental Shelf* (Libya/Malta), Judgement of 3 June 1985, para. 27: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States […]."; see also *M. N. Shaw*, International Law, 5th edition, 2003, p. 68 et seq.
[13] Judgement, paras 91-98.
[14] Emphasis added.

condition was met as well, that is, whether the aforementioned prohibition was penalized,[15] thus attaching individual criminal responsibility to Galić.

8. The Judgement comes to the conclusion that the fourth *Tadić* condition was satisfied, stating "that *numerous* states criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction"[16] and "that *numerous* States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols."[17] Upon further analysis, it is questionable whether these claims are accurate. Indeed, the temporal point of departure when determining whether there was state practice must be the time period relevant to the Indictment, which charged Galić for acts committed between 1992 and 1994.[18]

9. **Ireland**, mentioned in paragraph 94 of the Judgement, only penalized violations of the Additional Protocols in 1998. The reference to Ireland's Geneva Convention Act of 1962 is thus misguided. Equally, **Bangladesh's** International Crimes (Tribunal) Act of 1973, as cited in footnote 296, does not mention the Additional Protocols.[19]

10. The Appeals Chamber was thus only able to establish with certainty that just an extraordinarily limited number of states at the time relevant to the Indictment had penalized terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols, these being **Côte D'Ivoire**,[20] the then **Czechoslovakia**,[21] **Ethiopia**,[22] the **Netherlands**,[23] **Norway** and **Switzerland**. It is doubtful whether this can be viewed as evidence of

---

[15] As opposed to imposing mere disciplinary measures.
[16] Judgement, para. 94 (emphasis added).
[17] *ibid*, para. 95 (emphasis added).
[18] *Ojdanić* Appeal Decision on Joint Criminal Enterprise, para. 9: "The fact that an offense is listed in the Statute does not therefore create new law and the Tribunal has jurisdiction over a listed crime if that crime was recognized as such under customary international law at the time it was allegedly committed." *See also Kordić and Čerkez*, Appeal Judgement, para. 66. Report of the Secretary-General, *supra* note 1, para 34.
[19] Article 33 of Geneva Convention IV is clearly different in scope from the relevant prohibition as set out in Article 51(2), 2nd Sentence of Additional Protocol I and Article 13(2), 2nd Sentence of Additional Protocol II.
[20] Note that Art. 138(5) of Côte D'Ivoire's Penal Code refers only to "mesures de terreur."
[21] The Czech and Slovak Criminal Codes did not differ from the old Czechoslovak Criminal Code of 1961, the relevant provision of which was amended in 1990 (Art. 263a(1)). Czechoslovakia ceased to exist on 31 December 1992 and was succeeded by the Czech Republic and the Slovak Republic. Note that the Criminal Code speaks of "terroriz[ing] defenceless civilians with violence or the threat of violence."
[22] Note that Art. 282(g) of Ethiopia's Penal Code only speaks of "measures of intimidation and terror."
[23] Note that the Art. 8 (1) and (3) (5) of the Wartime Offences Act of the Netherlands of 1952, as amended 1990, only spoke of imposing an aggravating sentence if "the act [constituting a violation of the laws and customs of war] is the expression of a policy of systematic terror." Note furthermore that the relevant provision was repealed in 2003 when the Netherlands implemented the Statute of the International Criminal Court, which penalizes grave breaches of the Geneva Conventions and the Additional Protocols only.

"extensive and virtually uniform"[24] state practice on this matter. Moreover, one must consider that **Norway's** Penal Code[25] only generally refers to breaches of the Additional Protocols, thus raising the question of *nullum crimen sine lege certa*. The same concern applies to **Switzerland's** Military Penal Code.[26] The **Netherlands** later even repealed the relevant provision when implementing the ICC Statute in national law, *i.e.* after the relevant time period (*lex mitior*).

11. Furthermore, it must be considered that many states did *not* choose to pass legislation in this respect, even though they had legislation penalizing attacks on civilians. Examples are the **United States**,[27] the **United Kingdom**,[28] **Australia**,[29] **Germany**,[30] **Italy**[31] and **Belgium**.[32]

12. In any event, it is not sufficient to simply refer to a "continuing trend of nations criminalising terror as a method of warfare"[33] when this trend, if it can be identified as such, is of no relevance to the time period in which Galić's criminal conduct falls.

13. The Judgement's references to the Yugoslav laws before 1992 must also be viewed in context. Significantly, it must be kept in mind that the Criminal Codes of 1960, 1964 and 1976 penalized the "application of intimidating measures and terror", with no change in the 1990 Code, and that there was no change specifically addressing Yugoslavia's ratification of Additional

---

[24] International Court of Justice, *North Sea Continental Shelf Cases* (Germany/Denmark, Germany/Netherlands), Judgement of 20 February 1969, para. 74. Note that in the same paragraph the ICJ also stated that State practice "should moreover have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved."

[25] Section 108 (b) of the Military Penal Code of 1902, as amended in 1981, reads: "Anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in (b) the two Additional Protocols to [the Geneva] Conventions of 10 June 1977, is liable to imprisonment for up to four years."

[26] Article 109 of the Military Penal Code of 1927, as amended in 1968, reads: "Whoever acts contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property, who violates recognised laws and customs of war, will be […] punished."

[27] U.S. Code, Title 18, Chapter 118, Section 2441 (c) (1) defines as a war crime "a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party". The United States has not even ratified either Additional Protocol I or Additional Protocol II.

[28] Section 1 of the Geneva Conventions Act of 1957, as amended in 1995, punishes grave breaches of the Additional Protocol I, referring specifically to Art. 85 of the Additional Protocol. There is no mention of "terrorization against a civilian population."

[29] The War Crimes Act of 1945, referred to in para. 93 of the Judgement, was substantially modified in 1989 and did not contain the phrase "murder and massacres – systematic terrorism" thereafter.

[30] It has to be noted that one of the most recent documents implementing the Rome Statute of an International Criminal Court, the 2002 German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) does not encompass this crime or a similar criminal conduct as a crime *sui generis*. Moreover, in the course of the legislative proceedings leading to the passing of an act by Parliament ratifying the Additional Protocols in 1990, the government attached an aide mémoire (Denkschrift) to the draft bill. Relating to Article 85 of Additional Protocol I, the document states that grave breaches of the Protocol are already covered under the general provisions of German law. It makes no mention of other breaches. (BT-Drucksache 11/6770, p. 116) Moreover, there was and there is no provision in the German Penal Code penalizing terrorization against the civilian population.

[31] Book III, Title IV, Section 2, Art. 185 of the Criminal Military Code of War penalizes to "utilise la violence contre des personnes privées ennemies qui ne prennent pas part aux opérations militaires". There is no mention of "terror".

[32] The Law of 16 June 1993 penalized in its Art. 1*ter* (11) "le fait de soumettre à une attaque délibérée la population civile ou des personnes civiles qui ne prennent pas directement part aux hostilities". There is no mention of terror. (The law was repealed in 2003; the new provision in Art. 136*quater* (1) (20) of the Belgian Penal Code reads the same.)

[33] Footnote 297 of the Judgement.

Protocols I and II in 1979. Contrary to the references in footnote 304 of the Judgement, the 1988 Regulations on the Application of International Laws of War in the Armed Forces of the SFRY do not add anything new as the part on "Criminal Responsibility for War Crimes and Other Serious Violations of the Law of War" merely refers back to the Criminal Code.[34]

14. Furthermore, it is doubtful whether the arguments relating to the 1919 Report of the Commission on Responsibilities presented in paragraph 93 of the Judgement withstand careful scrutiny. The citations (which were also employed in the Trial Judgement[35]) are taken out of context: When reading the original text in the 1948 work by the U.N. War Crimes Commission, one could ask whether the 1919 Commission was not just making a broader statement without actually coining legal definitions:

> In particular, the Commission established the fact that multiple violations of the rights of combatants, of the rights of civilians, and of the rights of both had been committed, which were the outcome of the "most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end. Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance."[36]

It is true that the Commission mentioned "systematic terrorism" on its list of recommended war crimes. However, it is uncertain what the Commission actually meant by "systematic terrorism" and whether their idea of the concept corresponds to Art. 51(2), 2nd Sentence of Additional Protocol I and Article 13(2), 2nd Sentence of Additional Protocol II. Moreover, the Judgement correctly states that "the few trials [...] in Leipzig did not elaborate on the concept of 'systematic terrorism.'"[37] In this context, it has to be recalled that there was no penalization of terrorization against a civilian population in either Nuremberg or the Tokyo Charters.[38] The same applies to Control Council Law No. 10.[39]

---

[34] Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, exhibit P5.1, para. 34 (p. 20): "In conformity with its international obligations, the SFRY has prescribed in the Criminal Code of the SFRY (Chapter XI – Criminal Offences Against Humanity and International Law) that violations of the laws of war referred to in item 33 of these instructions [referring *inter alia* to "the application of measures of intimidation and terror"] constitute criminal offences and are punishable. […]"

[35] Trial Judgement, para. 116.

[36] *UN War Crimes Commission*, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: HMSO, 1948), p. 33 et seq.

[37] *See* Judgement, para. 93.

[38] Nuremberg Charter: Charter of the International Military Tribunal Annexed to the London Agreement (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis), Aug. 8, 1945, 82 U.N.T.S. 280; Tokyo Charter: Special Proclamation by the Supreme Commander for the Allied Powers, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

[39] Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, Official Gazette Control Council for Germany, No. 3, 31 January 1946.

15. The Judgement refers in paragraph 97 to a judgement rendered in 1997 by the County Court of Split, Croatia. It is questionable whether a single judgement can be considered an example of state practice. On the contrary, one could argue that the existence of just *one* judgement rendered in a region where there was much comparable criminal conduct actually militates against the proposition that there was relevant state practice.

16. Finally, it must be considered that the Trial Chamber made no finding as to the nature of the conflict being international or non-international at that time.[40] However, an additional finding would have been required by the Appeals Chamber even though the relevant provisions of Additional Protocol I (applying to international armed conflicts) and Additional Protocol II (applying to non-international armed conflicts) are identical. At least, pursuant to the view of the majority which is based primarily on an interpretation of the Additional Protocols, the Appeals Chamber should have made a much more detailed determination of why according to the opinion of the majority *both* the relevant provisions of Additional Protocol I and Additional Protocol II would amount to international customary law.[41]

17. Moreover, with all due respect, I cannot agree with Judge Meron's proposition that "the conclusion [that criminal responsibility attaches to the prohibition of terrorization against a civilian population] also follows logically from the ban […] on 'declaring that no quarter will be given.'"[42] For me, the argument that "if threats that no quarter will be given are crimes, then surely threats that a party will not respect other foundational principles of international law – such as the prohibition against targeting civilians – are also crimes" appears to be incorrect since it could be made in any context in relation to any and every violation of international humanitarian law.[43] While the act of declaring that no quarter will be given is undoubtedly penalized under international customary law[44] (and was so during the Indictment period) it is nevertheless distinct from terrorization against a civilian population. In particular, the placement of Article 40 of Additional Protocol I in the part on methods and means of warfare, combatant and prisoner-of-war status, under the subsection dealing with methods and means of warfare, as well as its origin in Article 23(d) of the Hague Regulations,[45] makes clear that the prohibition of declaring that no quarter will be given refers to enemy combatants. Having said this, I agree with Judge Meron that the prohibitions are *similar* in

---

[40] Trial Judgement, para. 22.
[41] The Judgement at the end of its discussion (para. 98) on the subject merely states "that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II […]."
[42] Separate and Partially Dissenting Opinion of Judge Meron, para. 2.
[43] *Simma/Alston* in this context refer to a quote by *John Humphrey* who observed that "human rights lawyers are notoriously wishful thinkers." *Simma/Alston*, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Aust. YBIL 82 (84) (1988-1989).
[44] *See inter alia G. Werle*, Principles of International Criminal Law (2005), margin number 1074.

nature in that they both aim at protecting those who are either hors-de-combat or civilians. However, as an international criminal court, we are under the obligation to define what is a crime under our Statute *with precision* in order to avoid any violation of the fundamental principle of *nullum crimen sine lege certa*.[46]

18. What then is supposed to be the foundation of state practice, apart from the few states mentioned above? Moreover, while noting that *de jure* all member States of the United Nations are on an equal footing, I nevertheless observe that none of the permanent members of the Security Council or any other prominent state have penalized terrorization against a civilian population.[47]

19. With regard to *opinio juris*, it is undisputed, as mentioned above, that there were many statements by states concerning the *prohibition* of acts and threats of violence the primary purpose of which is to spread terror among the civilian population but not referring to its penalization. In any case, as the recent Study on Customary International Humanitarian Law carried out by the International Committee of the Red Cross recognizes:

> [I]n the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation.[48]

20. In addition, and even though I am fully aware of Article 10[49] of the Statute of the International Criminal Court, it must be pointed out that the Rome Statute does not have a provision referring to terrorization against a civilian population. If indeed this crime was beyond doubt part of customary international law, in 1998 (!) states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.[50]

21. To be abundantly clear: The conduct prohibited by Article 51(2), 2nd sentence of Additional Protocol I and Article 13(2), 2nd sentence of Additional Protocol II, namely, acts and threats of violence the primary purpose of which is to spread terror among the civilian population, should be

---

[45] *See also Sandoz/Swinarski/Zimmermann* (eds), Commentary on the Additional Protocols, margin number 1591.
[46] Indeed, I am aware of – as *Simma* and *Alston* put it in a different context – "the temptation to adapt or re-interpret the concept of customary international law in such a way as to ensure that it provides the 'right' answers." *See Simma/Alston*, *supra* note 43, p. 83. As a criminal court we shall, however, never yield to this temptation.
[47] Indeed, Judge Nieto-Navia in his Dissenting Opinion strictly and rigidly observed that "these limited references [to State practice given by the Trial Judgement] do not suffice to establish that this offence existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law." Trial Judgement, Dissenting Opinion of Judge Nieto-Navia, para. 113.
[48] *Henckaerts/Doswald-Beck* (eds), Customary International Law Humanitarian Law (2005), Vol. I: Rules, p. xli.
[49] Article 10 of the Statute of the International Criminal Court reads as follows: "Nothing in this Part [Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."
[50] For example, the German Code of Crimes Against International Law does not have a provision penalizing the terrorization against a civilian population, *see also supra* note 30.

penalized as a crime *sui generis*. However, this Tribunal is not acting as a legislator; it is under the obligation to apply only customary international law applicable at the time of the criminal conduct, in this case the time between 1992 and 1994. It is not necessary to dwell on the question of whether *today* the crime of terrorization against a civilian population is part of customary international law. In fact, there might be some indicators that this is indeed the case. However, one cannot conscientiously base a conviction in criminal matters on a "continuing trend of nations criminalising terror as a method of warfare" [51] or on a "trend in prohibiting terror […] continued after 1992"[52] The use of the term "trend" clearly indicates that at the time of the commission of the crimes in question, this development had not yet amounted to undisputed state practice. The case in question is about a conduct that happened fourteen years ago, which must be assessed accordingly. The International Tribunal is required to adhere strictly to the principle of *nullum crimen sine lege praevia* and must ascertain that a crime was "beyond any doubt part of customary law."[53] It would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place.

22. It is even less understandable in the present case why the majority chose this wrong approach when it would have been possible to arrive at the same result in an undisputable way: *i.e.* overturn Galić's conviction under Count 1 and convict him under Counts 4 and 7 for the *same* underlying criminal conduct, namely the campaign of shelling and sniping, constituting the crime of attacks on civilians, this offence being without any doubt part of customary international law. In light of the finding of the Trial Chamber, which held that Galić "intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo", it would have been furthermore possible to consider this an aggravating circumstance in sentencing, which would also necessitate the adjusted sentence as handed down by the Appeals Chamber.

D. Conclusion

23. Considering Galić's individual criminal responsibility, as affirmed on appeal, it was the Appeals Chamber's right and obligation to substantially increase the sentence handed down by the Trial Chamber.

24. However, the Appeals Chamber erroneously upheld Galić's conviction under Count 1 of the Indictment for the crime of acts and threats of violence the primary purpose of which is to spread

[51] *See* already *supra*, para. 13.
[52] Judgement, footnotes 286 and 287.

terror among the civilian population. While the *prohibition* of such acts and threats was part of international customary law at the time Galić's criminal conduct took place, in my view the same cannot be conscientiously said about its *penalization.* Galić has to be convicted of the crime of attacks on civilians under Counts 4 and 7 for the same underlying criminal conduct. His primary purpose to spread terror among the civilian population has to be taken into account as one aggravating factor in sentencing, thereby *inter alia* necessitating the adjusted sentence.

Done in English and French, the English text being authoritative.

Dated this 30th day of November 2006,
At the Hague,
The Netherlands.

Wolfgang Schomburg
Judge

[Seal of the International Tribunal]

[53] Report of the Secretary-General, *supra* note 1, para. 34.

XXIII. ANNEX A: PROCEDURAL BACKGROUND

A. History of Trial Proceedings

1. An initial indictment against Stanislav Galić and Dragomir Milošević was confirmed by Judge Antonio Cassese on 24 April 1998.[1] On 15 March 1999, Judge Cassese granted leave to the Prosecution to file a separate indictment naming only Galić for transmission to the Registry and to SFOR.[2] The Indictment was filed on 26 March 1999 and charged Galić pursuant to Article 7(1) and 7(3) of the Statute with seven counts under Articles 3 and 5 of the Statute.[3]

2. Galić was arrested by SFOR on 20 December 1999. His initial appearance before the Trial Chamber was held on 29 December 1999 and he entered a plea of not guilty to all of the charges against him. The trial commenced on 3 December 2001 and lasted 223 days. In the course of the proceedings, 171 witnesses gave evidence, and five Rule 92*bis* witness statements and 15 expert reports were admitted. All expert witnesses gave oral evidence in court. A total of 603 Prosecution exhibits, 651 Defence exhibits and 14 Chamber exhibits were admitted into evidence; 32 documents were marked for identification.[4]

3. The Trial Judgement was rendered on 5 December 2003. Trial Chamber I, by majority, found Galić guilty of acts of violence the primary purpose of which was to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949, a violation of the laws or customs of war (Count 1); murder as a crime against humanity (Count 2); inhumane acts other than murder as a crime against humanity (Count 3); murder as a crime against humanity (Count 5); and inhumane acts other than murder as a crime against humanity (Count 6). As a consequence of the finding of guilt it entered on Count 1, the Trial Chamber dismissed Counts 4 and 7 (attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 as a violations of the laws or customs of war) because they were impermissibly cumulative.[5] Galić was sentenced to a single sentence of 20 (twenty) years of imprisonment.[6]

---

[1] *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-I, Review of the Indictment, 24 April 1998.
[2] *Prosecutor v. Stanislav Galić and Dragomir Milošević*, Case No. IT-98-29-I, *Ex parte* and Confidential Order on Prosecution Motion, 15 March 1999.
[3] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29-I, Indictment, 26 March 1999.
[4] Trial Judgement, para. 784.
[5] Trial Judgement, paras 159-162, 751-752.
[6] Trial Judgement, para. 769 (Disposition).

B. The Appeal

1. Notices of Appeal

4. The Prosecution filed its Notice of Appeal on 18 December 2003.[7] It appealed the sentence against Galić, considering it "manifestly inadequate" in light of the gravity of the crimes and his degree of criminal responsibility. On 22 December 2003, the Pre-appeal Judge granted Galić an extension of time by which he had to file the Notice of Appeal until 30 days from the day he received the French version of the Trial Judgement, following his request for an extension of time, filed on 18 December.[8] Galić filed his Notice of Appeal on 4 May 2004, containing 19 grounds of appeals alleging various errors of law and of facts.[9]

2. Composition of the Appeals Chamber

5. By order of 18 December 2003, the then-President of the Tribunal, Judge Theodor Meron, designated the following Judges to form the Appeals Chamber in these proceedings: Judge Theodor Meron, Presiding; Judge Fausto Pocar; Judge Mohamed Shahabuddeen; Judge Florence Ndepele Mwachande Mumba; and Judge Wolfgang Schomburg.[10] Pursuant to Rule 65*ter* and Rule 107 of the Rules, Judge Mumba was designated Pre-Appeal Judge.[11]

6. On 18 November 2005, Judge Mehmet Güney was assigned to replace Judge Florence Ndepele Mwachande Mumba as Pre-Appeal Judge following the expiration of her term, effective 16 November 2005, as a member of the Appeals Chamber.[12] Following the appointment of Judge Fausto Pocar as President of the Tribunal on 17 November 2005, Judge Fausto Pocar replaced Judge Theodor Meron as the Presiding Judge in this appeal, pursuant to Article 14(2) of the Statute.[13] On 22 November 2005, the President of the Tribunal assigned Judge Theodor Meron as Pre-Appeal Judge in replacement of Judge Mehmet Güney, and ordered the recomposition of the Appeals Chamber hearing the case accordingly.[14]

---

[7] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Notice of Appeal, 18 December 2003.
[8] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Request for Extension of Time to File Notice of Appeal, 22 December 2003.
[9] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Notice of Appeal, 4 May 2004, filed in French 5 May 2004.
[10] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Order Assigning Judges to a Case Before the Appeals Chamber and Designating a Pre-Appeal Judge, 18 December 2003.
[11] *Ibid*.
[12] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Order Replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005.
[13] *Ibid.*
[14] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Order Reassigning a Pre-Appeal Judge, 22 November 2005.

3. Filing of the Appeal Briefs

7. The Prosecution filed its Appeal Brief on 2 March 2004.[15] Galić responded on 2 April 2004,[16] and the Prosecution filed its Reply Brief on 13 April 2004.[17]

8. After first being denied[18] and then partly granted his motion for a leave to exceed the page limit,[19] Galić filed his Appeal Brief on 19 July 2004.[20] The Prosecution filed its Response Brief on 6 September 2004,[21] after being granted an extension of the time limit.[22] Galić filed his Reply Brief on 27 September 2004,[23] after being granted leave to exceed the page and time limits.[24]

4. Motions to Strike

9. On 20 August 2004, the Prosecution filed a motion asking the Appeals Chamber to strike the Defence Appeal Brief, and to order Galić to re-file it.[25] Galić responded on 26 August 2004[26] and the Prosecution replied on 27 August 2004.[27] The motion of the Prosecution was denied on 2 September 2004.[28]

10. On 29 October 2004, the Prosecution filed a motion requesting the Appeals Chamber to strike passages from the Defence Appeal Brief, Book of Authorities and Defence Reply Brief insofar as they related to a letter from the ICRC, which the Prosecution claimed constituted new

[15] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Appeal Brief, 2 March 2004. The related Book of Authorities was filed the same day. A Supplementary Book of Authority was filed on 28 August 2006.
[16] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Response Brief, 2 April 2004. The related Book of Authorities was filed the same day.
[17] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Reply Brief, 13 April 2004. The related Book of Authorities was filed on 16 April 2004.
[18] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Leave to Exceed Page Limit in Defence's Appellant's Brief, 19 May 2004.
[19] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004.
[20] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Appeal Brief, 19 July 2004. A corrigendum was filed on 29 July 2004. The related Book of Authorities was filed on 19 July 2004.
[21] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Response Brief, 6 September 2004.
[22] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Request for Extension of Time to file Respondent's Brief, 28 July 2004. On 1 September 2004, a corrigendum to the decision was filed.
[23] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Brief in Reply, 27 September 2004.
[24] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Motion to Increase Page Limit and Extend the Time Limit, 17 September 2004.
[25] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Urgent Prosecution Motion for an Order Requiring the Appellant to Re-file his Appeal Brief and Requests for Leave to Exceed Word-limit for Motion, 20 August 2004, corrected 24 August 2004 in a corrigendum.
[26] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Response to Prosecution Motion Dated 20 August 2004, 26 August 2004.
[27] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Reply to "Defence Response to Prosecution Motion Dated 20 August 2004", 27 August 2004.
[28] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on "Urgent Prosecution Motion for an Order Requiring the Appellant to Re-file his Appeal Brief and Request for Leave to Exceed Word-limit for Motion", 2 September 2004.

factual material.[29] The Prosecution asked in the alternative that the Appeals Chamber require Galić to file a motion addressing the admissibility criteria for Rule 115. Galić responded on 3 November 2004,[30] and the Prosecution filed its reply on 8 November 2004.[31] On 3 December 2004, the Appeals Chamber directed Galić to file a motion pursuant to Rule 115, if he wished to retain the grounds of appeal to which the letter was directed.[32]

11. On 30 November 2004, the Prosecution filed a further motion requesting the Appeals Chamber to strike an argument in the Defence Reply Brief, on the basis that it raised an allegation not contained in the Defence Notice of Appeal or Defence Appeal Brief.[33] Galić responded on 3 December 2004,[34] and the Prosecution filed its reply on 7 December 2004.[35] On 28 January 2005, the Appeals Chamber granted the Prosecution's motion, and ordered that the passage be struck from the Defence Reply Brief.[36]

5. Rule 115 Motions

12. On 18 June 2004, Galić filed a confidential motion requesting the Appeals Chamber to allow the admission of additional evidence.[37] After being granted[38] a request for extension of time to file its response,[39] the Prosecution responded on 12 July 2004.[40] Galić requested leave to reply under Rule 126*bis*,[41] to which the Prosecution responded on 20 July 2004.[42] The Defence filed its

---

[29] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Motion to Strike Portions of Appellant's Appeal Brief, Book of Authorities and Reply Brief, 29 October 2004.
[30] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Response on Prosecution's Motion Dated 29 October 2004, 3 November 2004.
[31] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Reply to "Defence Response on Prosecution's Motion dated 29 October 2004", 8 November, 2004.
[32] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike Portions of Appellant's Appeal Brief, Book of Authorities and Reply Brief, 3 December 2004.
[33] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 30 November 2004.
[34] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Response to Prosecution's Motion to Strike New Argument Alleging Error by Trial Chamber Raised for the First Time in Appellant's Reply Brief, 3 December 2004.
[35] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Reply to Defence Response to Prosecution's Motion to Strike New Argument Alleging Error, 7 December 2004.
[36] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecutions Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005.
[37] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Confidential Defence Motion to Present Before the Appeals Chamber Additional Evidence, 18 June 2004.
[38] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Request for Extension of Time to file Response to Defence Additional Evidence Motion of 18 June 2004, 28 June 2004.
[39] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Request for Extension of Time to File Response to Defence Additional Evidence Motion of 18 June 2004, 23 June 2004.
[40] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Response to Defence Motion to Present Additional Evidence dated 18 June 2004, 12 July 2004.
[41] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defense's Request for the Approval for Replay [*sic*] Under rule 126*bis*, 19 July 2004.
[42] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Response to Defence Request for Leave to Reply Dated 19 July 2004, 20 July 2004.

reply on 20 July 2004.[43] On 21 July 2004, the Appeals Chamber granted the Prosecution an extension of the page limit, and recognised its motion as validly filed.[44] The Appeals Chamber also granted in part Galić's motion as to leave to reply, and recognised the Rule 115 reply as validly filed.[45]

13. On 2 February 2005, however, the Appeals Chamber found that Galić's motion did not comply with the requirements set out in Practice Direction IT/201, and invited him to re-file his motion.[46] It was re-filed on 11 February 2005.[47] The Prosecution, after being granted an extension of the time and page limits,[48] filed its response on 28 February 2005.[49] Galić replied on 4 March 2005.[50] The Appeals Chamber dismissed the motion on 30 June 2005.[51]

14. After being invited to do so in the Appeals Chamber's Decision on the Prosecution's Motion to Strike Portions of the Appellant's Appeal Brief, Book of Authorities and Reply Brief,[52] Galić filed a motion pursuant to Rule 115 to have the letter from the ICRC permitted as additional evidence on 7 December 2004.[53] The Prosecution responded on 17 December 2004, to which Galić replied on 23 December 2004.[54] The Rule 115 motion was dismissed by the Appeals Chamber on 22 March 2005.[55]

15. On 20 January 2005, Galić requested that further additional evidence be admitted on his appeal.[56] After being granted[57] its request for an extension of time, and for an order requiring

---

[43] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Reply to the Prosecution's Response Under Rule 126*bis,* 20 July 2004, re-filed 28 July 2004, owing to two missing lines in paragraph 1 of the document, and corrected in a corrigendum 29 July 2004.

[44] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Request for an Extension of Pages, 21 July 2004.

[45] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request "Pursuant to Rule 126*bis*", 21 July 2004.

[46] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Order on Appellant's Confidential Motion to Present Additional Evidence Before the Appeals Chamber Under Rule 115, 2 February 2005.

[47] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Confidential Defence Motion to Present Before the Appeals Chamber Additional Evidence, 11 February 2005.

[48] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Requests for Extensions of Time and of Page Limit for the Response, 21 February 2005.

[49] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Response to Defence Re-filed First Rule 115 Motion, 28 February 2005.

[50] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Reply to Prosecution's Response, 4 March 2005.

[51] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005.

[52] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike Portions of the Appellant's Appeal Brief, Book of Authorities and Appeal Brief, 3 December 2004.

[53] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Request for Admission of Further Additional Evidence on Appeal, 7 December 2004.

[54] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Reply to Prosecution's Response Dated 17 December 2004, 23 December 2004.

[55] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 22 March 2005.

[56] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Motion to Present Before the Appeals Chamber Additional Evidence, 20 January 2005.

official translations of documents attached to Galić's motion,[58] the Prosecution filed its confidential response on 21 March 2005.[59] Galić filed his reply on 29 March 2005.[60] The Rule 115 motion was dismissed by the Appeals Chamber on 30 June 2005.[61]

16. On 18 March 2005, Galić confidentially filed a fourth Rule 115 motion.[62] The Prosecution filed a confidential response on 8 April 2005,[63] and Galić subsequently filed his confidential reply on 12 April 2005.[64] The Appeals Chamber dismissed the Rule 115 motion on 29 August 2005.[65]

17. On 26 April 2005 the Prosecution filed, partly confidentially, a request seeking leave to file a further response to the replies filed by Galić supporting the third Rule 115 motion and a subsequent motion.[66] On 28 April 2005, Galić filed a response opposing the Prosecution's request for leave.[67] Given the merits of its decision delivered on 30 June 2005, the Appeals Chamber did not find it necessary to address the matters raised in the Prosecution's request for leave and in the attached consolidated response insofar as they related to the third Rule 115 motion.[68]

18. On 29 June 2006, the Prosecution filed a status report "to notify the Chamber that the Ministry of Defence of Bosnia and Herzegovina recently informed the Office of the Prosecutor that it has been compiling an archive of military documents from both the Republika Srpska and the Federation of Bosnia and Herzegovina which includes, *inter alia*, material from the Sarajevo Romanija Corps […] during the time period relevant to this case."[69] A day later, Galić filed a

---

[57] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Request for Extension of Time and for an Order Requiring Official Translations of Documents Attached to the Defence Third Motion for Additional Evidence, 7 February 2005.

[58] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Request for Extension of Time and for Order Requiring Official Translations of Documents attached to Defence Additional Evidence Motion, 26 January 2005.

[59] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Response to Galić Third Rule 115 Motion, 21 March 2005. The Prosecution had however been denied an extension of page limit, in the Appeals Chamber's Decision on Request for Extension of Page Limit for the Prosecution's Response to Galić's Third Rule 115 Motion, 16 March 2005.

[60] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Reply to Prosecution's Response Dated 21 March 2005, 29 March 2005.

[61] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005.

[62] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Confidential Defence Motion to Present Before the Appeals Chamber Additional Evidence, 18 March 2005.

[63] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Response to Galić's Fourth Rule 115 Motion (Confidential), 8 April 2005.

[64] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Confidential Defence Reply to Prosecution's Response to Galić's Fourth Rule 115 Motion, 12 April 2005.

[65] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Fourth Defence Motion to Present Additional Evidence Before the Appeals Chamber, 29 August 2005.

[66] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Request for Leave to File a Consolidated Further Response to Defence Replies Concerning Third and Fourth Rule 115 Motions, 26 April 2005.

[67] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Reply to Prosecution's Request for Leave to File Consolidated Further Response to Defence Replies Concerning Third and Fourth Rule 115 Motions, 28 April 2005.

[68] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on the First and Third Rule 115 Defence Motions to Present Additional Evidence Before the Appeals Chamber, 30 June 2005, para. 9.

[69] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution Status Report, 29 June 2006.

motion requesting: (1) "an extension before deciding if they will file a new motion under the Rule 115"; (2) the Appeals Chamber to "allow the counsel to examine the mentioned documents [in the archives of the ABiH 1st Corps] in the presence of its military expert"; (3) "that the Appeals Chamber orders the Defence to seek the translations in English from the Registry and, that being done, files a motion under Rule 115 in the next 10 days"; and (4) the Appeals Chamber to decide about the hearing planned for 29 August 2006.[70] The Appeals Chamber denied the Defence Motion on 14 July 2006.[71]

19. On 22 August 2006, Galić filed his fifth Rule 115 motion.[72] The Prosecution filed a response on 23 August 2006,[73] and Galić filed his reply on 24 August 2006.[74] The Appeals Chamber denied the Defence Motion and dismissed the Motion to Dismiss on 28 August 2006.[75]

20. On 8 September 2006, Galić filed his sixth Rule 115 Motion ("Defence Motion").[76] The Prosecution filed its response on 29 September 2006.[77] On 4 October 2006, the Defence filed "Additional Observations on the Defence Motion to Present Before the Appeals Chamber Additional Evidence Dated 7 September 2006, Rule 115 of the Rules of Procedure and Evidence" ("Additional Observations").[78] On 29 September 2006, the Prosecution filed the "Prosecution Motion to Strike Defence Additional Observations to the 6th Defence Motion to Present Additional Evidence" ("Motion to Strike").[79] On 15 November 2006, the Appeals Chamber granted the Motion to Strike and denied the Defence Motion.[80]

---

[70] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Motion Regarding New Evidence, 11 July 2006.
[71] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Motion Regarding New Evidence, 14 July 2006
[72] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Motion to Present Before the Appeals Chamber Additional Evidence, 22 August 2006.
[73] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Motion to Dismiss Defence's 5th Motion for Additional Evidence, 23 August 2006.
[74] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appelant's Response to Prosecution's Motion to Dismiss Defence's 5th Motion for Additional Evidence, 24 August 2006.
[75] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Motion to Present Additional Evidence, 24 August 2006.
[76] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Motion to Present Before the Appeals Chamber Additional Evidence, 8 September 2006.
[77] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Response to 6th Defence Motion to Present Additional Evidence, 29 September 2006.
[78] The signature page of the Additional Observations is dated 28 September 2006.
[79] The Prosecution received a copy of the Additional Observations on 29 September 2006 and believed that the Additional Observations were filed on 28 September 2006. Motion to Strike, para. 1. and fn. 1.
[80] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Motion to Present Additional Evidence, 15 November 2006.

6. Requests for Provisional Release

21. On 4 March 2005, Galić filed a request for provisional release to attend the memorial service of his late sister pursuant to Rule 65(I) of the Rules.[81] The Prosecution filed its response on 9 March 2005.[82] After receiving guarantees from the government of Republika Srpska,[83] the Appeals Chamber granted the request in part, and ordered the provisional release of Galić for the fixed period from 31 March 2005 to 3 April 2005.[84]

22. On 6 September 2005, Galić filed a second request for provisional release, seeking provisional release pending his appeal hearing, to Banja Luka, Republika Srpska, pursuant to Rule 65(I) of the Rules.[85] The Prosecution filed its response on 15 September 2005 opposing the request.[86] Galić filed his reply on 19 September 2005.[87] On 31 October 2005, not satisfied with regard to the first requirement of Rule 65 (I), the Appeals Chamber dismissed the request.[88]

7. Status Conferences

23. Status Conferences in accordance with Rule 65*bis* of the Rules were held on 31 March 2004, 28 July 2004, 22 November 2004, 11 March 2005, 7 July 2005, 2 November 2005, 2 March 2006 and 29 June 2006.

8. Appeal Hearing

24. Pursuant to the Scheduling Orders of 21 June 2006 and of 14 August 2006,[89] the hearing on the merits of the appeal took place on 29 August 2006.

[81] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Defence Request for Provisional Release of General Galić, 4 March 2005.
[82] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Response to Defence Request for Provisional Release of General Stanislav Galić, 9 March 2005.
[83] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, RS Government Guarantees for Provisional Release of General Stanislav Galić, 21 March 2005.
[84] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005.
[85] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appellant's Request for Provisional Release, filed on 6 September 2005.
[86] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Prosecution's Response to Galić's Request for Provisional Release on Appeal, 15 September 2005.
[87] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appellant's Reply to Prosecution's Response to Appellant's Request for Provisional Release on Appeal, 19 September 2005.
[88] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005.
[89] The additional Scheduling Order informed the parties about the timetable for the Appeal Hearing.

XXIV. ANNEX B: GLOSSARY OF TERMS

A. <u>List of Tribunal and Other Decisions</u>

1. International Tribunal

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ
Prosecutor v. Blagojević, IT-02-60-T, Decision on Blagojević's Motion for Clarification, 27 March 2003.

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN AND TALIĆ
Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talić* Decision on Disqualification and Withdrawal of a Judge").

ČELEBIĆI
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Between Zejnil Delalić and Zdravko Mucić, 11 November 1996 ("*Delalić et al.* Decision on Production of Notes").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Order on the Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-Examination by the Prosecution and Counsel for the Co-accused, 3 April 1998 ("*Delalić et al* Order on Witness Appearances").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

ČERMAK AND MARKAC
Prosecutor v. Ivan Čermak and Mladen Markac, Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markač's Motion on Form of Indictment, 8 March 2005.

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004 ("*Deronjić* Sentencing Judgement").

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Sentencing Appeal Judgement").

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GALIĆ
Prosecutor v. Galić, Case No. IT-98-29-PT, Prosecutor's Further Response to Defence Reply and Documents on Motion for Provisional Release, 29 June 2000 (filed 30 June 2000).

Prosecutor v. Stanislav Galić, Case No. IT-98-29-PT, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considered as the Amended Indictment, 19 October 2001 ("Trial Decision on Indictment Schedules").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("Appeal Decision on Indictment Schedules").

Prosecutor v. Stanislav Galić, IT-98-29-AR73, Decision On Application By Prosecution For Leave To Appeal, 14 December 2001.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused Stanislav Galić, 3 October 2002.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Defence Submission Regarding the Possible and Hypothetical Hearing of General Stanislav Galić as a Witness, 21 January 2003.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Confidential Decision on Certification Pursuant to Rule 73(B) Regarding the Possible Testimony of the Accused as a Witness, 4 February 2003 ("Certification Decision").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Confidential Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo, 4 February 2003 ("On-site Visit Decision").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003 ("Appeal Decision on Disqualification").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), Bureau, 28 March 2003 ("Galić Bureau Decision on Disqualification").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 ("Trial Judgement").

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, 5 December 2003 ("Separate and Partially Dissenting Opinion").

Prosecutor v. Galić, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004.

Prosecutor v. Galić, Case No. IT-98-29-A, Decision on "Urgent Prosecution Motion for an Order Requiring the Appellant to Re-File His Appeal Brief and Request for Leave to Exceed Word-Limit for Motion", 2 September 2004.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike Portions of Appellant's Brief, Book of Authority and Reply Brief, 3 December 2004.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Scheduling Order for Appeal Hearing, 14 August 2006.

HADŽIHASANOVIĆ, ALAGIĆ AND KUBURA

Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Appeal Decision on Jurisdiction in Relation to Command Responsibility").

Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005.

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ

Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal").

KORDIĆ AND ČERKEZ

Prosecutor v. Kordić et al., Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-PT, Decision on Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 & 3, 2 March 1999 ("*Kordić and Čerkez* Jurisdiction Decision").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999 ("*Kordić and Čerkez* Trial Procedure Decision").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* Trial Judgement").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Order to File Amended Grounds of Appeal, 18 February 2002.

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement") *as corrected by Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, 26 January 2005.

KRAJIŠNIK
Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-AR73.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005 ("*Krajišnik* Appeal Decision on Adjournment").

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement").

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement").

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, PAPIĆ AND ŠANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement").

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać., Case No. IT-98-30/1-T, Decision on the Admission of the Record of the Interview of the Accused Kvočka, 16 March 2001.

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

MARTIĆ
Prosecutor v. Milan Martić, Case No. IT-95-11-R61, Decision, 8 March 1996 ("*Martić* Rule 61 Decision").

MILOŠEVIĆ
Prosecutor v. Slobodan Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002 ("*Milošević* Appeal Decision on Refusal to Order Joinder").

Prosecutor v. Slobodan Milošević, Case Nos IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002.

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Appeal Decision on Defence Counsel Assignment").

MILUTINOVIĆ, ŠAINOVIĆ AND OJDANIĆ

Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Appeal Decision on Joint Criminal Enterprise").

MILUTINOVIĆ, ŠAINOVIĆ, OJDANIĆ, PAVKOVIĆ, LAZAREVIĆ, DJORDEVIĆ AND LUKIĆ

Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Djordjević and Lukić, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005.

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003 ("*Dragan Nikolić* Sentencing Judgement").

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal").

M. NIKOLIĆ

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Appeal Sentencing Judgement, 8 March 2006 ("*Momir Nikolić* Judgement on Sentencing Appeal")

OBRENOVIĆ

Prosecutor v. Dragan Obrenović, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 ("*Obrenović* Sentencing Judgement").

PRLIĆ, STOJIĆ, PRALJAK, PETKOVIĆ, CORIĆ AND PUŠIĆ

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić, Case No. It-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić et al.* Decision on Interlocutory Appeal").

SIMIĆ

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

STANIŠIĆ

Prosecutor v. Mićo Stanišić, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Rule 65 Decision").

STRUGAR, JOKIĆ AND KOVAČEVIĆ

Prosecutor v. Pavle Strugar, Miodrag Jokić and others, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002 ("*Strugar et al.* Jurisdiction Decision").

TADIĆ
Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, dated 15 October 1998, filed 16 October 1998.

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement").

TOLIMIR, MILETIĆ AND GVERO
Prosecutor v. Zdravko Tolimir, Radivoje Miletić and Milan Gvero, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005.

Prosecutor v. Zdravko Tolimir, Radivoje Miletić and Milan Gvero, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006.

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement").

GACUMBITSI
Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

KAJELIJELI
Prosecutor v. Juvénil Kajelijeli, Case No. ICTR-98-44A-A, Judgement and Sentence, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KAMBANDA
Jean Kambanda v Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement").

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUSEMA
Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

NIYITEGEKA
Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement").

NTAGERURA, BAGAMBIKI AND IMANISHIMWE
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

RUTAGANDA
Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA
Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SERUSHAGO
Prosecutor v. Omar Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

3. Decisions Related to Crimes Committed During World War II

International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, Vol. 22: Proceedings, 27 August 1946 – 1 October 1946 (Nuremberg: International Military Tribunal, 1948).

Trial of Shigeki Motomura and 15 Others, in *Law R. Trials War Crim.*, Vol. 13, p. 138.

4. Other Decisions

(a) ICJ

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, 1996 ICJ 66 ("*Nuclear Weapons* Case").

(b) ECHR

De Cubber v. Belgium, judgment of 26 October 1984, 86 Eur. Ct. H.R. (ser. A).

Findlay v. United Kingdom, judgment of 25 February 1997, 263 Eur. Ct. H.R.

Hauschildt v. Denmark, judgment of 24 May 1989, 154 Eur. Ct. H.R. (ser. A).

Padovani v. Italy; judgment of 26 February 1993, 257 Eur. Ct. H.R. (ser. A).

Piersack v Belgium, judgment of 1 October 1982, 53 Eur. Ct. H.R. (ser. A) at 14-15.

Şahiner v. Turkey, judgment of 25 September 2001, 155 Eur.. Ct. H.R. (2001-IX).

Sainte-Marie v. France, judgment of 16 December 1992, 235-A Eur. Ct. H.R. (ser. A).

Sramek v. Austria, judgment of 22 October 1984, 84 Eur. Ct. H.R. (ser. A).

(c) Domestic cases

Berger v. United States, 255 U.S. 22 (1921).

Brooks v. Tennessee, 406 U.S. 605 (1972).

Carter v. United States, 530 U.S. 255 (2000).

Collins v. Dixie Transport, Inc., 543 So. 2d 160 (Sup. Ct. Miss. 1989).

Prosecutor v. R. Radulović et al., Split Country Court, Republic of Croatia, Case No. K-15/95, Verdict of 26 May 1997.

R. v. Angelantoni (1975) 31 C.R. n.s. 342 (Ont. CA).

B. List of Other Legal Authorities

1. Books, Edited Volumes and Collections, and Journals

Jean-Marie Henckaerts and Louise Doswald-Beck, eds., International Committee of the Red Cross: Customary International Humanitarian Law, Vol. I (Rules) and Vol. II (Practice) (Cambridge: Cambridge University Press, 2005) ("Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, Volumes I and II (Cambridge 2005)").

Jean S. Pictet, ed., *Commentary: Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* ICRC (Geneva: ICRC, 1958) ("ICRC Commentary (GC IV)").

Hugo Grotius, *De Jure Belli Ac Pacis* (Delft, 1625).

Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th Edition, Vol. 2 (London: Longmans, Green, 1952).

Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2 (1987), p. 426.

UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948).

Yves Sandoz, Christoph Swinarski and Bruno Zimmernmann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (Dordrecht: Martin Nijhoff Publishers, 1987) ("ICRC Commentary (Additional Protocols)").

2. <u>Other Legal Authorities</u>

Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).

Draft Convention for the Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938

Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, 1956.

International Criminal Court, Rules of Procedure and Evidence.

Letter from the Department of the Army to the Legal Adviser of the US Army Forces Deployed in the Gulf Region, 11 January 1991, §8(F), Report on US Practice, 1997, ch. 1.4, cited in Jean-Marie Henckaerts and Louise Doswald-Beck, eds., International Committee of the Red Cross: Customary International Humanitarian Law, Vol. II: Practice (Cambridge: Cambridge University Press, 2005).

Lieber Code of 24 April 1863.

Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Appeals Requirements")

Practice Direction on the Lengths of Briefs and Motions, IT/184/Rev.1, 5 March 2002.

Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993 ("Report of the Secretary-General (ICTY)").

Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), S/1995/134, 13 February 1995 ("Report of the Secretary-General (ICTR)").

Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Drafted by a Commission of Jurists at the Hague, December 1922-February 1923.

C. List of Abbreviations, Acronyms and Short References

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

ABiH	Army of Bosnia and Herzegovina
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609
a.k.a.	Also known as
AT	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
BiH	Bosnia and Herzegovina
D	Designates "Defence" for the purpose of identifying exhibits
Defence	Counsel for Stanislav Galić
Defence Appeal Brief	Defence Appellant's Brief, filed 19 July 2004
Defence Final Trial Brief	Defence's Final Trial Brief, filed 22 April 2003
Defence Notice of Appeal	Defence Notice of Appeal, filed 4 May 2004
Defence Pre-Trial Brief	Pre-Trial Brief of the Defence Pursuant to Rule 65*ter*(F), filed 29 October 2001

Defence Reply Brief	Brief in Reply, filed 27 September 2004
Defence Response Brief	Respondent's Brief, filed 2 April 2004
ex.	Exhibit
Fourth Geneva Convention	Geneva Convention IV Relative to the Protection of Civilian Person in Time of War of 12 August 1949, 75 U.N.T.S. 287
Hague Convention IV	The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907, 187 C.T.S. 227, 1 Bevans 631
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994
Indictment	*Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Indictment, 26 March 1999
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Law R. Trials War Crim.	United Nations War Crimes Commissions, selector and preparer, *Law Reports of Trials of War Criminals* (London: HMSO, 1949)
P	Designates "Prosecution" for the purpose of identifying exhibits
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	Prosecution Appeal Brief, filed 2 March 2004

Prosecution Pre-Trial Brief	Prosecutor's Pre-Trial Brief Pursuant to Rule 65*ter*(E)(i) (Provisional), filed on 20 February 2001.
Prosecution Response Brief	Prosecution Response Brief, filed 6 September 2004
Prosecution Reply Brief	Prosecution Reply Brief, filed 13 April 2004
RS	Republika Srpska, one of the entities of BiH
Rules	Rules of Procedure and Evidence of the International Tribunal
Security Council Resolution 935	S.C. Res. 935, UN SCOR, 49th Session, U.N. Doc. S/Res/1935 (1994).
SFOR	Multinational Stabilisation Force
SFRY	Former Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Criminal Code of the Socialist Republic of Yugoslavia, adopted 28 September 1976 and entered into force on 1 July 1977
SRK	Sarajevo Romanija Corps
Statute	Statute of the International Tribunal for the former Yugoslavia, established by Security Council Resolution 827 (1993)
T	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
Third Geneva Convention	Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
Travaux préparatoires	Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)

22 May Agreement	Agreement concluded under the auspices of the ICRC by the representatives of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action, and the Croatian Democratic Community, signed in Geneva on 22 May 1992.
UN	United Nations
UN Commission of Experts Report	Final Report of the United Nations Commission of Experts, U.N. Doc. S/1994/674
UNDU	UN Detention Unit
UNPROFOR	United Nations Protection Forces
Vienna Convention	Vienna Convention on the Law of Treaties, 27 January 1980, 115 U.N.T.S. 331
VRS	Army of the Serbian Republic